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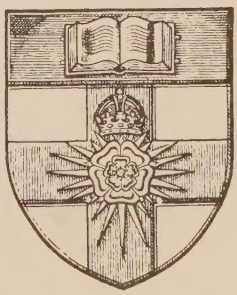

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OF

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OF

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1914.

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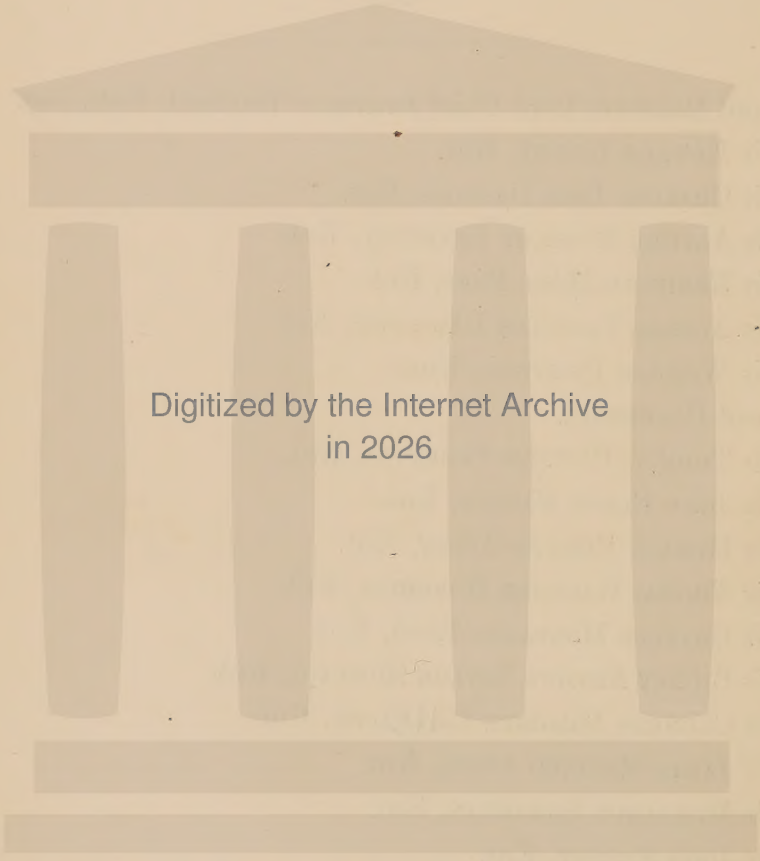

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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Jan. 23, 26, 27, 28.

THE ATTORNEY-GENERAL (AT THE RELATION OF THE WORCESTER CORPORATION) *v.* SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY.

Bridge—Canal made across Highway—Highway carried by Bridge over Canal—Statutory Duty to keep Bridge "in sufficient repair"—Standard of Repair—Worcester and Birmingham Canal Act, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

By an Act passed in 1791 a canal company were empowered to make a canal, and it was provided that the company should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal, and of such dimensions and in such manner as the commissioners appointed under the Act should adjudge proper; "and all such . . . . bridges . . . . shall from time to time be supported, maintained, and kept in sufficient repair" by the company.

The canal was made in 1812, and was made across several highways

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within a certain district; and the company constructed bridges over the canal to carry each of such highways.

In an action against the company for a declaration that they were liable under the provisions of the Act of 1791 to keep the bridges in repair so as to be sufficient to bear the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character and needs of the district served by the said highways:—

Held, that the standard of repair which the company were bound to observe was not the standard existing at the time of the passing of the Act or the construction of the bridges, but was the standard existing at the present time, that is, the standard of the present traffic.

Decision of Phillimore J. [1913] 1 K. B. 422 reversed.

APPEAL from a decision of Phillimore J. in an action tried without a jury; reported [1913] 1 K. B. 422.

By 31 Geo. 3, c. 59, s. 1, entitled an Act for making and maintaining a navigable canal from or from near to the town of Birmingham, in the county of Warwick, to communicate with the river Severn near to the city of Worcester, certain persons were incorporated by the name of "the Company of Proprietors of the Worcester and Birmingham Canal Navigation," and were authorized and empowered to make and complete the canal above mentioned.

By s. 61 of the Act the said company of proprietors were required at their own charges to make, erect, and set up and from time to time maintain and support such bridges over the canal of such dimensions and in such manner as the commissioners (appointed by s. 20 of the Act) should from time to time judge necessary and appoint; "and the said company of proprietors shall not make the said canal, or any trench, in or across any common highway, public bridleway, or footpath until they shall at their own proper charges have made and perfected such bridges, passages, or arches across such highway, bridleway, or path, and of such dimensions and in such manner as the said commissioners shall adjudge proper; and all such gates, stiles, bridges, arches and other works and conveniences to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors."

The canal was made in or about the year 1812. It passed through the city of Worcester and was made across several common

highways within the city and also several common highways then outside but now within the city. The company of proprietors erected certain bridges over the canal to carry each of the said several common highways which were crossed by the canal as aforesaid.

By the Gloucester and Berkeley Canal Act, 1874 (37 & 38 Vict. c. clxxxi.), s. 4, the undertaking of the Company of Proprietors of the Worcester and Birmingham Canal Navigation, including the canal, bridges, and other works, was, as from January 1, 1874, vested in the defendants, the Sharpness New Docks and Gloucester and Birmingham Navigation Company, subject to the obligations and liabilities of the said company of proprietors.

The plaintiff alleged that each of the bridges over the canal within the city of Worcester was out of repair and was insufficient to bear the ordinary traffic which might reasonably be expected to pass along the highways carried over the canal by the said several bridges, having regard to the present character and needs of the district served by the said highways; and that the defendants refused and neglected to keep them in repair.

The plaintiff claimed a declaration that the defendants were liable to support, maintain, and keep in repair each of the said bridges sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the highways carried over the said canal by the said several bridges, having regard to the present character and needs of the district served by the said highways. The plaintiff also claimed an injunction restraining the defendants from allowing the bridges to remain in such a condition as to hinder and endanger His Majesty's subjects from passing and repassing over and along them, and requiring them forthwith to repair them.

The defence, in substance, was that the defendants had kept the bridges in repair in accordance with their statutory obligations as hereinafter mentioned, and that they were not under any further or other liability, whether at common law or otherwise, to repair them; that they were not bound to keep the bridges in a state of repair sufficient to bear the ordinary traffic which might reasonably be expected to pass along the highways carried over the canal by the bridges having regard to the present

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character and needs of the district served by the said highways, but only so as to carry such traffic as was ordinary on such highways when the bridges were originally constructed; and they did not deny their liability to keep the bridges in repair so as to be sufficient for that purpose.

At the hearing the defendants admitted that some of the bridges in question required repairs so as to make them sufficient to bear the traffic which was ordinary on the said highways at the time when the bridges were constructed, but they said that they had not carried out those repairs because the corporation of Worcester claimed that a much higher standard of repair, based upon the present character and needs of the district, was necessary, and it was considered advisable, before expending money in repairs, that the dispute as to the standard of repair should be determined.

Phillimore J. held that the company were only liable to keep the bridges in repair so as to be sufficient having regard to their original construction to bear such traffic as was then ordinary on such highways.

The plaintiff appealed. (1)

The notice of appeal asked that "so much of the declaration of Phillimore J. which declared that the defendants are liable to support, maintain, and keep in repair all the bridges named in paragraph 3 of the statement of claim (other than Lowesmoor Bridge, as to which no decision was given but further consideration was reserved) within the boundaries of the city of Worcester sufficient to bear such traffic as was ordinary and might reasonably have been expected to pass upon the highways serving the said bridges at the time of the making of the said bridges should be rescinded or varied and that it should be declared that

(1) A second action, *The Sharpness New Docks and Gloucester and Birmingham Navigation Company* v. *Corporation of Worcester*, was tried at the same time as, and is reported together with, the present action. In it the learned judge held that, if the persons liable to repair a bridge have placed thereon a notice under s. 6 of the Locomotive Act, 1861, the fact that the weight of a particular locomotive does not exceed the weight of the ordinary traffic of the district does not entitle the owner of the locomotive to cause it to pass over the bridge without having previously obtained the consent of the persons liable to repair the bridge. There was no appeal against this decision.

the defendants are liable to support, maintain and keep in repair each of the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic of the district and the traffic which may reasonably be expected to pass along the highways carried over the defendants' canal in the statement of claim mentioned by the said several bridges having regard to the present character and needs of the district served by the said highways."

John Sankey, K.C., and *W. W. Mackenzie*, for the plaintiff. By s. 61 of the Worcester and Birmingham Canal Act, 1791, the defendants are bound to maintain the bridges over the canal so as to make them sufficient to carry the traffic of the present day. The section requires that all such bridges "shall be supported, maintained, and kept in sufficient repair"; and "sufficient repair" means sufficient repair according to the requirements from time to time of the traffic which may reasonably be expected to pass over them. The liability of canal owners to maintain the bridges over their canals in a condition fit to accommodate the traffic of the day is apparent from the language of Martin B. in *Manley* v. *St. Helen's Canal and Ry. Co.* (1) In *Hertfordshire County Council* v. *Great Eastern Railway* (2) Fletcher Moulton L.J. said: "In my opinion the law as settled by the cases of *Rex* v. *Inhabitants of Kent* (3), *Rex* v. *Inhabitants of the Parts of Lindsey* (4), *Rex* v. *Kerrison* (5), and *Reg.* v. *Inhabitants of Isle of Ely* (6) practically amounts to this: that, where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance." By saying that the obligation was "of a continuing nature" the learned Lord Justice

(1) (1858) 2 H. & N. 840, at pp. 850, 851.
(2) [1909] 2 K. B. 403.
(3) (1811) 13 East, 220.
(4) (1811) 14 East, 317.
(5) (1815) 3 M. & S. 526.
(6) (1850) 15 Q. B. 827.

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meant that the works must be maintained up to the standard of the requirements of the day. A highway authority must repair a highway with reference to its existing user: *Reg.* v. *Inhabitants of Henley* (1); and the same principle must apply to that part of a highway which is carried over a canal by a bridge, for otherwise the traffic of the district might be obstructed. It may be true that the defendants would not be liable to widen the bridges: see *Rex* v. *Inhabitants of Devon* (2); but the authorities shew that it is the duty of the defendants to maintain them in accordance with an up-to-date standard. [They also cited *Attorney-General* v. *Scott* (3); *Reg.* v. *High Halden* (4); *Wallington* v. *Hoskins* (5); *Hemsworth Rural Council* v. *Micklethwaite* (6); *Chichester Corporation* v. *Foster* (7); *Macclesfield Corporation* v. *Great Central Railway* (8); *North Staffordshire Railway* v. *Hanley Corporation* (9); *Rhymney Ry. Co.* v. *Glamorganshire Canal Navigation Co.* (10); *Reg.* v. *East India Dock Co.* (11); *Caledonian Railway* v. *Glasgow Corporation.* (12)]

Macmorran, K.C., and *E. W. Cave* (*C. K. Tatham* with them), for the defendants. The question is solely one as to the statutory liability of the defendants to repair these bridges. By s. 61 of the Act the canal company had to build such bridges over the canal, of such dimensions and in such manner, as the commissioners appointed under s. 20 for the settlement of differences should think proper, and "all such bridges shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors." It is submitted that the standard of repair should be in accordance with what the commissioners deemed sufficient for the public requirements when the bridge was erected. A person who is authorized by statute to cut a canal across a highway must no doubt construct a bridge to carry the highway over the canal and must keep the bridge in repair, but no authority shews that he

(1) (1847) 10 L. T. (O.S.) 110.
(2) (1825) 4 B. & C. 670.
(3) [1905] 2 K. B. 160.
(4) (1859) 1 F. & F. 678.
(5) (1880) 6 Q. B. D. 206.
(6) (1904) 68 J. P. 345.
(7) [1906] 1 K. B. 167.
(8) [1911] 2 K. B. 528.
(9) (1909) 73 J. P. 477.
(10) (1904) 91 L. T. 113.
(11) (1888) 53 J. P. 277.
(12) [1909] A. C. 138.

is compelled to construct a new bridge whenever, owing to an alteration in the nature of the district, the traffic along the highway becomes of an altered character. The obligation to repair a bridge is different from the obligation to repair a highway; in the latter case it is no doubt to keep it in a state of repair sufficient for the traffic which may be reasonably expected to come along it. The judgment of Bayley J. in *Rex* v. *Inhabitants of Devon* (1) shews that the obligation on the inhabitants of a county, who at common law are bound to repair a bridge, is to keep the bridge in the state in which it was at the time of its dedication to the public. *Manley* v. *St. Helen's Canal and Ry. Co.* (2) was an action of negligence and affords no help towards the decision of the present case. It is admitted that the duty of a highway authority is to maintain the roads in a state of repair fit for the traffic which may reasonably be expected to pass over them. But it does not follow that all roads must be maintained in a condition fit to allow of the passage of traction engines. A parish which had always repaired a wooden bridge by a ford was held not liable to repair a new brick bridge which had been constructed in its place by the trustees of the turnpike road: *Rex* v. *Inhabitants of Surrey.* (3) In *Reg.* v. *East and West India Dock Co.* (4) it was held that a dock company, having statutory authority to build bridges over their docks and having built bridges sufficient to carry the traffic of the day when they were built, were not compellable to build new bridges to carry the heavy traffic of a later date. The expression "such bridges" at the end of s. 61 refers to the bridges specified in the earlier part of the section, that is to say, the bridges which the commissioners adjudged to be proper.

John Sankey, K.C., in reply.

VAUGHAN WILLIAMS L.J. I think there has been a very unfortunate muddle in this case. In the first action, that brought by the canal company for an injunction, there is no appeal. The learned judge did not grant an injunction, but he came to a conclusion in fact which would have justified an

(1) 4 B. & C. 670.
(2) 2 H. & N. 840.
(3) (1810) 2 Camp. 455.
(4) (1888) 60 L. T. 232.

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injunction, had he thought fit to grant one. I suppose he may have come to the conclusion that in a case where the corporation of Worcester were the defendants it was sufficient for him to make the declaration which he actually did make in that action, which was to the effect that these heavy motor vehicles ought not to cross this bridge. It is said (and I do not say that it is wrong) that his decision depended entirely on the provisions of s. 6 of the Locomotive Act, 1861, and all that he decided in the action by the canal company was that, this notice being put up that the bridge was insufficient to carry weights beyond the ordinary traffic of the district, the canal company were wrong in allowing their steam rollers to pass over the bridge. I am not prepared to say that that may not be the case, although the learned judge in his judgment refers to questions outside the Act of 1861, and I think he bases his decision not only on the provisions of s. 6 of the Act of 1861, but also on the fact that he came to the conclusion that these steam rollers were not part of the ordinary traffic. As to one part of the learned judge's decision, namely, as to the action against the company, I think the appellant succeeds, because I think that the statement of the standard which is made by the learned judge in his judgment, with all respect to him, is wrong. The standard that he has taken is the standard of the condition of the roads and traffic at the time of the passing of the Canal Act, 1791, or some such state as that; I agree that the appellant is right in his contention that we must take the standard of traffic at the present moment.

On the pleadings as they stood originally in the second action, the second paragraph of the defence says this: "None of the said bridges are out of repair or are insufficient to bear the ordinary traffic of the district, whether such ordinary traffic as may reasonably be expected to pass along the highways carried over the said canal by the said several bridges having regard to the present character and needs of the district served by the said highways, or whether such ordinary traffic as was ordinary and might reasonably have been expected to pass along the said highways at the time of the making of the said bridges." That is the efence which is pleaded here, but when you look at the

pleadings, whether in the first action or in the second action, to see whether the question as to whether these locomotives were part of the ordinary traffic was on the pleadings intended to be raised, Mr. Sankey says, "Oh! but when the trial took place I offered no evidence upon that point at all, the question whether it was ordinary traffic or was not ordinary traffic was not really gone into." If this very question whether it was ordinary traffic or not was raised in the first action, I should have felt myself bound, but I do not decide the question. Prima facie I am not at all sure that if you raise a question by way of defence, which is what the Worcester Corporation were really doing in the first action, and you offer no evidence upon that point, that does not become res judicata against the party who offered no evidence in support of his plea. That does not affect the first action; it might affect the second action as being res judicata, but I have not to decide that point. I am only expressing a prima facie opinion, because what is said is this, that it was agreed between the parties that the questions of fact, one of which would have been what was at the moment when this question arose the ordinary traffic, should not be gone into because it was agreed that the only questions that were left to be dealt with in that case were questions of law and not questions of fact, and the question of what the ordinary traffic was might at all events be a mere question of fact. In those circumstances I think I must come to the conclusion that Phillimore J. had no intention of dealing with the matter which it was agreed between the parties, however much the question was raised on the pleadings in the first action, should not be gone into. The result of that is that, when we come to look at the declaration of the learned judge in the first action, it is stated to be based entirely on s. 6 of the Act of 1861. Under those circumstances let us see what there is in the notice of appeal. The notice of appeal reads in this way; it is the appeal of the plaintiff, the Attorney-General, at the relation of the Worcester Corporation, "for an order that so much of the declaration in the judgment herein of the Honourable Mr. Justice Phillimore made at the date of this action before his Lordship without a jury and dated the 28th day of November 1912 as declared that the defendants were liable to support, maintain and

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keep in repair all the bridges named in paragraph 3 of the statement of claim (other than Lowesmoor Bridge, as to which no decision was given but further consideration was reserved) within the boundaries of the city of Worcester sufficient to bear such traffic as was ordinary and might reasonably have been expected to pass upon the highways serving the said bridges at the time of the making of the said bridges should be rescinded or varied" —that was the order made on the judgment—"and that it should be declared that the defendants are liable to support, maintain and keep in repair each of the said bridges (reserving Lowesmoor Bridge) sufficiently to bear the ordinary traffic of the district which may reasonably be expected to pass along the highways carried over the defendants' canal in the statement of claim mentioned." The declaration of the learned judge does not seem to me right there, and it seems to me that in effect the Attorney-General is entitled to have the wider declaration asked for. I have spoken on the matter to my brethren, and they agree that what the Attorney-General is entitled to should be declared in wider terms than those framed by the learned judge. We have made some alterations in the order asked for in order to carry out that view, and I will read it. It now runs thus: "and that it should be declared that the defendants are liable to support, maintain and keep in repair each of the said bridges sufficiently to bear the ordinary traffic of the district which may reasonably be expected to pass along the highways carried over the defendants' canal in the statement of claim mentioned." It will be varied in that way, that is to say, it will not include the latter words which by the notice of appeal it is desired to eliminate.

I cannot help saying that I think this action has been a very unfortunate one; the whole matter might really have been tried in one action and in one proceeding. Now we have tried some questions of law which might just as well have been decided in the same action as decided the questions of fact, but now another action is necessary in order to determine the question of fact.

I am of opinion that, for the purpose of maintaining the bridges, the standard which the company are bound to observe is not the standard existing at the time of the passing of the

Act, but the standard existing at the present time, that is, the standard of the present traffic.

KENNEDY L.J. In 1791 an Act was passed, entitled the Worcester and Birmingham Canal Act, 31 Geo. 3, c. 59. By that Act the predecessors in title of the defendants were enabled to carry out an undertaking which involved the cutting for the purposes of the canal of a large number of highways. By one of the sections (to which I shall have to refer for its exact terms) it was enacted that the undertakers should, where they so cut the highways, make amongst other things certain bridges which would enable passengers travelling along the highway to pass from one side of the canal to the other in the same way as they would have passed along the highway if the canal had not been made. The action with which we have to deal is entitled the Attorney-General, at the relation of the Worcester Corporation, against the Sharpness New Docks and Gloucester and Birmingham Navigation Company, who are the successors in title of those who obtained the Act in 1791. The claim of the Attorney-General, put broadly, is in effect that the duty created by that Act is a duty that involves the support and maintenance of these bridges not merely, as the defendants contended, according to the standard requisite for the traffic of those days across that part of the country, but up to the standard which from time to time was requisite to permit the safe passing of the traffic along the highway over the bridge in each case as the conditions of traffic from time to time required; or, to put it shortly, that the defendants were wrong in saying "We have sufficiently performed our duty in keeping the bridges up to the standard at which they were made up to with the approval of the commissioners" (to whom I will refer in a moment) "at the time of the passing of the Act." That is, to my mind, not a sound contention. The standard is unstable, varying from time to time with the requirements of the traffic of the district, in so far as in the case of each individual bridge it can be shewn that the ordinary traffic passing over or along the highway to and over that bridge must require a stronger bridge.

Another action was tried at the same time as the present one,

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which raised a different question. It was an action which could not technically be consolidated with the present action, for the defendants in the earlier action were the Worcester Corporation, who were sued by the Sharpness New Docks and Gloucester and Birmingham Navigation Company, the present defendants, whereas in the present action the plaintiff is the Attorney-General, at the relation of the Worcester Corporation. Therefore, technically, they could not be consolidated, and the actions, though relating largely to the same subject-matter, could not be made the subject of a single claim and counter-claim. Phillimore J. gave judgment in both actions at the same time, and they were, as I understand, tried together at the same assizes. The first action (not the present one) was one in which the present defendants sued the Worcester Corporation in respect of a question that had arisen as to driving locomotives over one or more of these bridges, and, as appears by the head-note of the report of the case in the *Law Reports* (1), the contention of the plaintiffs in that action was this: "You have no right to drive these locomotives over bridges where a notice has been properly placed under the Locomotive Act." The contention on the other side was: "We have a right; we are not prevented, according to the true interpretation of s. 6, from doing that; all that happens is that if the owner of a locomotive believes that it is not heavier than the ordinary traffic he may use the bridge at his own risk and with only a liability under s. 7 to make good the damage which may result from that user." That question was decided by Phillimore J. in favour of the plaintiffs in that action. He said he could construe the Act to mean—and there is no appeal against that decision—that there had been in effect by the Locomotive Act, 1861, a right conferred on the owner of the bridge to prevent such traffic passing over as the defendants in that action asserted they had a right to pass over. The right asserted by the then defendants was negatived by Phillimore J.

Then came the question upon which the present appeal arises, which is one neither requiring any decision nor calling for any argument about locomotives as such. The Attorney-General

(1) [1913] 1 K. B. 422.

says that the duty of the defendants is to maintain these bridges according to the standard of the time, that is, according to a standard which would make them sufficient to carry the ordinary traffic of the district so far as it may reasonably be expected to pass along the highway in the case of each of these bridges; and they say, "You, the defendants, are wrong in limiting your liability as to maintenance and support to the standard which was sufficient for the ordinary traffic of the district which might reasonably be expected to pass along the highway at the time when the bridges were constructed." In form, perhaps, to be perfectly accurate, I ought to say that the actual contention, if I follow it, of the present defendants is that, according to the terms of the Act of Parliament regulating the making of these bridges, all that the defendants—as the successors of the company of proprietors who existed at the time of the passing of the Act in 1791—were by s. 61 of the statute directed to do was that they should not make the said canal or any trench in or across any common highway, public bridleway or footpath, until they should at their own proper charges have made and perfected such bridges, passages, or arches across such highway, bridleway, or footpath, and of such dimensions and in such manner as the said commissioners, being the commissioners mentioned in the Act, should adjudge proper; and all such gates, stiles, bridges, arches, and other works and conveniences to be made should from time to time be supported, maintained, and kept in repair by the said company of proprietors. The defendants contend that the bridge was to be a bridge, the propriety and sufficiency of which, according to s. 61 of the Act of 1791, should be to the satisfaction of the commissioners—a body, I may say in passing, created by the Act in reference to what may be termed the supervision of its fulfilment—they say that they must be presumed to have built in accordance with what the commissioners deemed to be sufficient and proper; and that all that they are bound to do is to support and maintain the bridges and keep them in sufficient repair as they were when they were passed as satisfactory in the opinion of those commissioners. Phillimore J. has held that that is the true view. With profound respect for the learned judge, I have come, as my colleagues have

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come, to a different conclusion, namely, that the true duty of the defendants is as expressed in the judgment of Vaughan Williams L.J., that is, that these bridges must be maintained and kept in repair sufficient to bear the ordinary traffic of the district which may be reasonably expected to pass along the highways carried over the said canal by the said several bridges mentioned in the statement of claim. Some of those bridges, when you come to the question of fact with which we are not dealing, may be bridges across which the ordinary traffic of the district that may reasonably be expected to pass over any particular bridge may not be more than it was at the time of the building of these bridges under the Act of 1791. In others again, in the urban parts of Worcester and possibly elsewhere, much heavier traffic may be now the ordinary traffic of the district. Certainly we give no decision whatever dealing with locomotives. The standard must be the ordinary traffic.

We have had very valuable and helpful arguments as to what is the true view of the duty of the defendants. Is it a duty merely to maintain in the same state, or does it change in reference to one bridge or another, or is it at all events a duty which may change and vary considerably because of the change of the ordinary traffic of the district passing over that highway or of the traffic which may reasonably be expected to pass over the highway in that part? I think myself that, when one comes to look at the decisions, it is clear that—to take first of all the duty of those who have entrusted to them the maintenance of the highways—it is a duty which necessitates, according to law, the fulfilment of the requirements as asked by the plaintiff here in regard to the bridges, namely, that the roads, the highways, must be kept up to date. "Up to date," I quite agree, is a modern and a not very accurate expression, but it has been used judicially, and I think that no one can be under any mistake as to what its meaning is, because it has the advantage of being briefer than the statement "in such a condition as enables the highway to carry the ordinary traffic of the district which may reasonably be expected to pass along it."

I need only refer to two modern decisions, arising, no doubt, on a different question to this. So far as I know, the question

which we have to decide has never before come up for decision exactly in this form; but I will refer to a judgment which not only received the approval of the Court of Appeal at the time, but has certainly been referred to more than once since, and that is the full and elaborate judgment of Jelf J. in *Attorney-General* v. *Scott* (1), in which he discussed the facts and also the authorities. He speaks (2) of the duty of the road authority as a duty to maintain a road according to an up-to-date standard.

The only other case to which I will refer is a somewhat more recent decision, *Chichester Corporation* v. *Foster* (3), in which Lord Alverstone says (4): "In the present case no question arises upon the provisions of the Locomotives Acts, and therefore the decision in *Attorney-General* v. *Scott* (1) is not a direct authority; but when that decision is looked at its fair result is that a road authority must keep its roads up to date, that is, in a reasonably fit state to bear the traffic (including the traction traffic) which may reasonably be expected to come upon them." And Wills J. says (5): "If it could be shewn that the damage was due to any failure of duty on the part of the plaintiffs in their capacity of road authority, there would no doubt be an answer to the action, and the question seems to be whether the plaintiffs, as the road authority, were guilty of any failure of duty in keeping the road in a proper state for the reception of the traffic which might reasonably be expected to pass over it." And Darling J. (6), referring to the rights of persons, including the defendants, "to use the highway in a natural manner, having reasonable regard to the kind of traffic which would usually pass along it," proceeds to say: "This must involve a duty on the plaintiffs to vary the construction of the road from time to time, so as to adapt it to conditions of traffic which should at any given time become ordinary, although these were formerly unknown, afterwards rare, and at last not exceptional but usual." That is, I need not say, in accordance with my view of the drift of other authorities of an earlier date cited by Mr. Sankey and Mr. Mackenzie in the present case. I approach the matter, therefore,

(1) [1905] 2 K. B. 160.
(2) [1905] 2 K. B. 168.
(3) [1906] 1 K. B. 167.
(4) [1906] 1 K. B. 173.
(5) [1906] 1 K. B. 175.
(6) [1906] 1 K. B. 177.

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if there be a question of construction, as I think there is, at any rate in great part with regard to the local Act of Parliament of 1791, from this point of view. If these bridges had not been erected for the convenience of the canal company, the highways in these places where the bridges now are would have been repairable according to the standard of the requirements of traffic from time to time. The law as to highways not having altered or being different now from what it was then, so far as that is concerned, is it reasonable to suppose that the Legislature could have meant in passing this last series of sections that the public generally in the district who had the right to use those highways should be in a worse position as regards having a space of the highway over which they could safely travel with their vehicles than they would have been in if the Act had not been passed? I do not think that such an attitude in dealing with the construction of the Act is reasonable or right, and I think that that is the view which I was not the only one to express in the case of *Macclesfield Corporation* v. *Great Central Railway*. (1) I take the view that what the section prescribes is that the commissioners appointed by the Act were to pass judgment as to the propriety of the bridges, and upon the bridge being so made, and therefore presumably at the time properly made, that the bridge—I omit the other matters, such as arches and stiles—shall from time to time be supported, maintained, and kept in repair by the said company of proprietors. In those words I do not see myself any reason for deviating from that which I think would be the natural construction, namely, that the Legislature there has imposed upon the undertakers in this concern, the canal, a duty which would be equivalent, so far as it gave rights and advantages to the public traversing the highways, to that which the public would have enjoyed if the Act had not been passed. Otherwise traffic would have to stop at one end of the bridge, because it could not go safely over it. I say that the natural inference is, having regard to the subject-matter, which is a section of a highway, that it is to be sufficient for giving the traffic of the district the same advantage in regard to safety as it would have had with regard to a highway. Incidentally, in the course

(1) [1911] 2 K. B. 528.

of the case, the question of widening has been mentioned, and upon a review of the authorities I think that it must now be taken to be the law, at any rate I take it as at present advised to be the law, that you could not require a highway authority by reason of its duties as they stand without a special Act to widen the highway; they cannot acquire land for that purpose; but so far as regards support, maintenance, and repair, I treat the liability of the proprietors of the bridges to be under this Act equivalent, according as I have construed it properly, to that which would have been the duty of the highway authority.

Now it has been pointed out in the case which I think was first cited to us, *Hertfordshire County Council* v. *Great Eastern Railway* (1), that it is the opinion—it is not more than an opinion—expressed by Fletcher Moulton L.J., that, in order to rebut a presumption which he has described there, which is the presumption of an obligation prima facie imposed upon them to construct certain works as may be necessary to restore to the public the use of the highway so interrupted, it must be shewn "that the statute under the authority of which they were acting contains some provision amounting to an exemption from such obligation. It is not enough, in my opinion, that the statute is silent on the point." It is, of course, merely a dictum, but it is a dictum of great weight, and in that dictum I respectfully concur, and it confirms me in the propriety of my view that, in looking at this section, I must look at it to see whether the prima facie presumption is sufficiently rebutted so as to impose the lesser liability for which the defendants in this case contend. I do not find anything in the terms of the statute which should restrict the obligation which, in Fletcher Moulton L.J.'s words, prima facie lies on the defendants. I therefore think that the judgment ought to run in the way which my Lord has stated. We are deciding nothing as to the question of fact as to what the ordinary traffic of the district which may reasonably be expected to pass over any particular bridge is; we have in the form of the judgment united, and I think rightly united, as qualifying each other, that which Phillimore J. treated as two different standards specified in the declaration claimed. I agree with that criticism of the

(1) [1909] 2 K. B. 403.

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declaration claimed, and the judgment of this Court corrects that fault by making the qualification that not only is it to bear the ordinary traffic of the district, which might impose too heavy a burden, but the ordinary traffic of the district which may reasonably be expected to pass along the highway. Clearly to my mind the case of one bridge may, in the circumstances of the ordinary traffic of the district, differ from another. Therefore we are not deciding anything on the facts as to locomotives, nor are we deciding anything as to what may be the actual standard in the case of one bridge or another, but we are laying down a general standard which will be flexible and therefore adaptable to the requirements of each bridge.

For these reasons I concur in the judgment which has already been pronounced by the president of this Court.

SWINFEN EADY L.J. In 1791 a statute was passed to enable a canal to be made from Birmingham to communicate with the river Severn near the city of Worcester, and the undertakers in constructing the canal were empowered amongst other things to cut through certain highways, and there was imposed upon them the obligation of making communications between the portions of the highways so severed, and they were bound to make gates, stiles, bridges, arches and other works and conveniences, and from time to time to support, maintain, and keep them in sufficient repair. It is not disputed in the present case that the burden lies upon the canal proprietors, whose successors in title are the present defendants, to maintain and support the bridges including the roadways over the bridges, but the parties are in dispute with regard to the standard of repair. At one time it was disputed by the defendants that any of the bridges were out of repair. During the course of the hearing it was conceded that some of the bridges at all events required repair in the view of the defendants, but they abstained from proceeding with the repairs because there was a contention between the parties as to the proper standard of repair, and so the parties agreed not to go into evidence in detail with regard to the particular bridges until the question of law on which they were in dispute had been decided between them. It was thought to be a more expedient

and less expensive method of getting the question decided. The way in which the question was formulated is put by the learned judge below in this way: "It was therefore agreed between counsel that the real matter to be determined is whether the standard at the date of construction or the standard of the present day is to apply to the efficiency, suitability and strength of these bridges." That was the question, and the learned judge determined it by the declaration that the defendants were liable to maintain, support, and keep in repair the bridges and so on, "sufficient to bear such traffic as was ordinary and might reasonably be expected to pass upon the highways serving bridges at the time of the making of the bridges . . . ."—that is, in the year 1791 or thereabouts.

Now the Attorney-General at the relation of the corporation of Worcester appeals from that declaration and contends that the defendants are liable to repair the bridges sufficient to bear—I will put it shortly for the moment—the ordinary traffic of to-day as distinguished from the ordinary traffic in the year when the bridges were built, that is to say, in the year 1791. That is the issue between the parties. At the trial the defendants were prepared to concede that the duty at common law of the highway authority was to maintain the highways under their control in a state of sufficient repair for the traffic which might reasonably from time to time be expected to pass along them at the present day. The defendants intimated that they were prepared to concede that, but the learned judge said that he could not quite accept it. He said, "I am not quite certain that I agree." What is the duty of a highway authority with regard to the maintaining of a public highway? It has been expressed from time to time in varying language, but I cannot find that in substance there is any difference in the way in which the liability has been described. In *Burgess* v. *Northwich Local Board* (1) Lindley J. expressed it thus: "The duty of the highway surveyors is to repair and keep in repair, which means, I apprehend, to keep the road as dedicated to the public in such a state as to be safe and fit for ordinary traffic." That was not by any means new. In an earlier case which has been referred

(1) (1880) 6 Q. B. D. 264.

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to of *Reg.* v. *Inhabitants of Henley* (1), where it was a question of the non-repair of a highway, it was determined that the question for the jury was not whether the road was in good repair as it ever or usually had been, but whether it was in a state of sufficient repair in reference to the present day. Here the defendants contended that if the bridges were in as good a state of repair as ever they were, that is to say, as on the day they were built, that was sufficient. There are many other highway authority cases. They were summed up by Lord Alverstone C. J. in a passage which Kennedy L.J. has just read from the case of *Chichester Corporation* v. *Foster* (2), where he says this: "The fair result is that a road authority must keep its roads up to date, that is, in a reasonably fit state to bear the traffic (including the traction traffic) which may reasonably be expected to come upon them." So that the duty of a highway authority is to keep up the roads to such a state. Of course that does not at all involve that every road is to be kept in the same condition, because regard must be had to the nature of the traffic expected to pass along it. Some are large main roads intended to carry a great volume of traffic, other roads are of a quite different character; but the standard is not the standard of any previous age or date, it is the standard of the requirements of the present day. Therefore, but for the construction of the canal and but for the intersection of the highways the public would have been entitled to pass over the whole of the highway, including the portion removed for the construction of the bridge, and over a highway kept in such a state of repair.

Now what is the obligation of the canal company who have removed a portion of the highway, substituted a bridge, and connected the two parts? It would be strange if there were to be two parties liable to repair the highway with different standards, that is to say, it would be strange if the canal company were the party liable to repair the highway and the bridges supporting it to the standard of 1791, and the road authority for any additional difference to bring the standard of 1791 up to the present day requirements. The law with regard to this was stated thus by

(1) (1847) 2 Cox, C. C. 334; 10 L. T. (O. S.) 110.
(2) [1906] 1 K. B. 167, at p. 173.

Lord Alverstone C.J. in the case of *Hertfordshire County Council* v. *Great Eastern Railway* (1): "The learned judge in the Court below has accepted as applicable to this case the principle which has been acted on in a number of cases, namely, that where under a statutory authority a body of persons have interrupted a public highway, and there is a duty imposed on them to make some means of communication for the purpose of restoring the continuity of the highway, there is also involved a duty on the part of that body to keep the substituted means of communication in repair. That principle has been approved of in such a long series of cases that it would be quite impossible for us now to overrule it." Then he says: "Assuming, as I think I may, that the common law doctrine on this subject, which has been acted on and recognized for many years, may now be taken to be well settled, I do not propose to go through the series of cases cited, such as *Rex* v. *Inhabitants of Kent* (2), *Rex* v. *Inhabitants of the Parts of Lindsey* (3), and *Rex* v. *Kerrison.* (4) In those and many other cases the broad principle has been adopted that, where persons, acting under statutory authority, for their own benefit interfere with some existing public convenience, such as a highway or a ford, and are by the statutes bound to provide some substitute for the convenience so interfered with, such persons, although there is no express provision in the statute to that effect, are nevertheless under the further obligation of keeping the substituted convenience in repair, as for instance in the case of the structure of a bridge erected in substitution for a public ford." He says that it is their obligation at common law unless under the provisions of the statute under which the work is done there is something which excludes the common law rule. Then he examined the cases and came to the conclusion that there was nothing to exclude the common law rule. Fletcher Moulton L.J. in the passage which Kennedy L.J. has already read, and which I will therefore not read again, comes to the same conclusion. The case of *Macclesfield Corporation* v. *Great Central Railway* (5) is quite consistent with that case. Farwell L.J.

(1) [1909] 2 K. B. 403.
(2) 13 East, 220.
(3) 14 East, 317.
(4) 3 M. & S. 526.
(5) [1911] 2 K. B. 528.

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there said (1): "Where a new thing like a bridge is substituted for the former highway a new liability is created." In my opinion the measure of that liability is the same measure as the liability of the road authority in respect of the rest of the road.

That practically disposes of this appeal. The result is that there will be a declaration that the defendants are liable to support and repair the bridge sufficient to bear the ordinary traffic of the district which may reasonably be expected to pass along the highways carried over the canal according to the standard of the present day. It is to be observed that there is no decision at all with regard to any particular class of traffic. The case is decided upon the general principle of law, and one can quite appreciate that with regard to roads over different bridges—it is said that there are about ten bridges in question in the present case—it may well be that one standard of repair has to be applied to one bridge and another to another in the varying circumstances of each case. There is no decision on the details with regard to the bridges. It is merely that the general question of law is decided in favour of the appellants.

Appeal allowed.

Solicitors for plaintiff: *Church, Rendell, Bird & Co., for S. Southall, Worcester.*

Solicitors for defendants: *Burton, Yeates & Hart, for Johnson & Co., Birmingham.*

(1) [1911] 2 K. B. at p. 537.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1914
March 5.

EVANS *v.* GWENDRAETH ANTHRACITE COLLIERY COMPANY, LIMITED.

Coal Mine—Supply of Explosives—"Actual net cost to the owner"—Cost of Distribution—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 61, *sub-s.* 2.

Sect. 61, sub-s. 2, of the Coal Mines Act, 1911, provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner :—

Held, that the "actual net cost to the owner" includes not only the cost of carriage to the owner's magazine, but also the cost of distribution from the magazine to the workman.

Decision of a Divisional Court (Channell J. and Lord Coleridge J.) [1913] 3 K. B. 100 reversed.

Appeal of the defendants from the decision of a Divisional Court (Channell J. and Lord Coleridge J.); reported [1913] 3 K. B. 100.

The plaintiff was a collier in the employment of the defendants, who were colliery owners. The defendants had supplied explosives to the plaintiff at a price which, over and above the amount attributable to the invoice price and the cost of carriage of the explosives to the defendants' magazine, included a proportion

(1.) of the cost of delivery from the magazine to the workmen,

(2.) of the cost of attending to the magazine and of office expenses, and

(3.) of interest on the cost of erecting the magazine and of the licence in respect thereof.

Sect. 61, sub-s. 2, of the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner.

The plaintiff sued the defendants in the Llanelly County Court, in substance alleging that he had been overcharged in so far as

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the price of the explosives supplied to him included the proportion of the three items of cost mentioned above.

The action took the form of a claim to recover 3*s.* 1½*d.*, the balance of wages alleged to be due from the defendants to the plaintiff. The defendants paid a sum of 1*s.* 4*d.* into Court. The balance of 1*s.* 9½*d.* they claimed to retain as being the proportion of the three items of cost above mentioned, which they contended were properly included in the net cost price to the owners of the explosives supplied to the plaintiff between July 1, 1912, and October 26, 1912. Evidence was given on item No. 1 that a workman was employed and paid 4*s.* 7*d.* a week for attending at the magazine half an hour earlier and distributing the explosives to the miners.

The deputy county court judge gave judgment for the plaintiff for the sum of 1*s.* 4*d.* paid into Court together with a sum to be ascertained as the proportion attributable to items 2 and 3, but held that the actual net cost to the owner included the cost of delivery from the magazine to the workman, and that the defendants were entitled to retain in respect of item 1 the difference between 1*s.* 9½*d.* and the ascertained sum.

The plaintiff appealed, and the Divisional Court held that the "actual net cost to the owner" did not include the cost of distribution from the magazine to the workman.

The defendants appealed to the Court of Appeal.

John Sankey, K.C., and *Albert Parsons*, for the defendants. The "actual net cost to the owner" includes all expenditure necessarily incurred in order to place the explosives in the hands of the miner; it is not confined to the invoice price of the explosive plus the cost of its carriage to the mine; it is the cost at the time of delivery to the miner, and not at the time of delivery to the mine-owner, that must be looked at.

Leslie Scott, K.C., and *Meager*, for the plaintiff. The question resolves itself into one whether the point of delivery to the owner or the point of supply to the miner is the one to be taken. It is most unlikely that the Legislature would include in the cost items of expenditure which the collier would have no possible means of checking. The word "actual" is inserted before "net cost" in

order to eliminate all questions of estimated expenditure, such as cost of clerical staff, depreciation of buildings, &c. The "net cost" is the cost after deduction of trade discounts and rebates, and is used to prevent the owner charging the collier more than he has paid out of pocket. The item in dispute here is in the nature of an item of expense, not of an item of cost. [They cited *Dobbs* v. *Grand Junction Waterworks Co.* (1)]

John Sankey, K.C., was not called upon to reply.

LORD READING C.J. This is an appeal from a Divisional Court reversing a decision of the deputy county court judge of Llanelly. The material facts are very short. The plaintiff is a collier in the employment of the defendants, who are colliery owners; the defendants supplied explosives to the plaintiff under s. 61 of the Coal Mines Act, 1911; and under sub-s. 2 of that section the price, if any, charged to the workman by the owner is not to exceed the actual net cost of the explosives to the owner; the question for our decision is what in the circumstances of the case and on the facts is the meaning of "actual net cost." It must be borne in mind that there were originally three claims made by the owners against the collier; and it is sufficient to say that two out of the three were rejected by the deputy county court judge, who found against the owners in respect of (1.) establishment charges and (2.) storing, deciding against them on the ground that they had not spent a penny on these matters and therefore could not include them in the actual net cost of the explosives. This decision left one charge in dispute, the amount which the defendants, the owners, had to pay a workman for taking the explosives to the collier. The deputy county court judge found as a fact that a man went half an hour earlier to work and was paid 4*s.* 7*d.* a week for this service only. It was said that this was a charge which could properly be added to the cost per lb. of the explosives delivered to the workman, and the deputy county court judge so held. The Divisional Court reversed his judgment on the ground, as I understand their judgments, that Channell J. thought it involved too great a difficulty of calculation and that Lord Coleridge J. thought that if such a standard were adopted the miner

(1) (1883) 9 App. Cas. 49, at p. 55.

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would have no voice in the economic distribution of explosives. I am unable to agree with the Divisional Court, and I entirely agree with Mr. Sankey's argument that "actual net cost" means a sum which will neither give the owner a profit nor subject him to loss.

It is said on behalf of the plaintiff that if the figures are to be worked out on that basis, they must include rates and taxes, establishment charges, &c. But, first, that question is not before us, and, secondly, the expression used seems intended only to cover the amount paid out by the owner, though I must not be understood as deciding that point. The use of the word "net" was intended to enable the owner to recover in respect of an outcharge no more and no less than the actual cost to him.

KENNEDY L.J. I am of the same opinion. As we are reversing the decision of the Divisional Court, I will add a few words of my own. In the Divisional Court Channell J. came to the conclusion he did with some hesitation. On the balance of the arguments, what is the true view of the words in s. 61 which we have to construe? Speaking for myself I should supply after the words "actual net cost" the words "of provision to the workmen of explosives." The price to the workman is not to exceed the "actual net cost" to the owner. In my opinion, when one is considering the supply of explosives, the terminus is not the hand of the owner but the hand of the workman, and the price is not to exceed the actual net cost which the owner has had to pay. The language used does not exclude the actual cost to the owner of getting the article to the hands of the workman, though "actual net cost" excludes estimated charges of every kind, such as establishment charges. Reading the words simpliciter, can it be said that, when the owner has had to pay 4*s.* 7*d.* for distribution to the workmen, that payment is not part of the actual net cost? I am of opinion that while the language used excludes estimated charges, it does not exclude what is shewn to be part of the actual net cost to the owner.

SWINFEN EADY L.J. I am of the same opinion. The question for us is the meaning of sub-s. 2 of s. 61. If the language were

expanded, it would run thus: "shall not exceed the actual net cost of providing the workman with explosives." Channell J. began his judgment with a reference to the obvious intention of the Legislature that the mine-owner should not make a profit out of the sale of his explosives; I quite agree with that; but he is also entitled to make such a charge to the miner as will not leave him, the mine-owner, at a loss. In the present case the matter appears quite simple. It is found that a man was employed and was paid 4*s.* 7*d.* a week for attending half an hour earlier and distributing the explosives to the workmen. That is as much a part of the cost of carrying the explosives to the workmen as are the charges for railway carriage. There is no profit to the owner, who only gets back his out of pocket costs. The cost of delivery to the workman is a part of the actual net cost to the owner of providing the workman with explosives. I think that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *J. T. Lewis, for Randall, Saunders & Randall, Llanelly.*

Solicitors for defendants: *C. & W. Kenshole, Aberdare.*

W. J. B.

C. A.
1914
March 30.

[IN THE COURT OF APPEAL.]

INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED.

[1912 I. 1158.]

Practice—Costs—Separate Issues—Decision by Judge upon Issue of Fact and Point of Law in favour of Plaintiffs—Appeal by Defendants on Point of Law but not on Issue of Fact—Judgment of Court of Appeal for Defendants with Costs—Costs of Issue found in Plaintiffs' Favour—Taxation—Rules of the Supreme Court, Order LXV., *rr.* 1, 2.

In an action for damages for loss of plaintiffs' goods shipped on defendants' ship and destroyed by fire on voyage, Scrutton J. at the trial found on the facts that defendants' ship was unseaworthy at commencement of voyage and that the unseaworthiness caused the loss; and decided as a point of law that s. 502 of the Merchant Shipping Act, which in ordinary circumstances would have protected the defendants from liability, was excluded by certain exceptions in the bill of lading, and gave judgment for the plaintiffs. (1) The defendants appealed on the point of law, but not on the facts. The Court of Appeal reversed Scrutton J.'s decision on the point of law and gave judgment for the defendants with costs without giving any directions as to the plaintiffs' costs of the issue of fact. (2) On the taxation the plaintiffs claimed that the taxing Master should tax their costs of the issue on which they had succeeded, and allow them. The taxing Master refused, and on a summons to vary, Bailhache J. held that the taxing Master was not debarred by the order of the Court of Appeal from taxing these costs. The defendants appealed:—

Held by the Court of Appeal, that the taxing Master had no jurisdiction to go behind the order and divide the costs of separate issues where no direction as to the costs of such issues had been given by the order of the Court.

Decision of Bailhache J. reversed.

Slatford v. *Erlebach* [1912] 3 K. B. 155 distinguished.

This was an action by the plaintiff company for damages for loss of goods shipped upon the defendants' ship.

At the trial without a jury Scrutton J. held that the ship was unseaworthy at the commencement of the voyage, and the plaintiffs' goods were destroyed by fire caused by the unseaworthiness; that the defendants would have been protected from liability by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502,

(1) [1913] 1 K. B. 538. (2) [1914] 1 K. B. 541.

but that Act was excluded by the terms of the bill of lading. The defendants appealed, but gave notice, by letter to the plaintiffs, that they did not propose on the appeal to question any of the findings of fact in the judgment of Scrutton J., and that the appeal was directed only to that part of his judgment which decided that the owners had excluded the operation of s. 502 of the Merchant Shipping Act, 1894, by their contract of affreightment; and that the provisions of that contract did not relieve the owners from liability.

The Court of Appeal reversed the decision of Scrutton J. as to the effect of the provisions of the bill of lading, and directed that judgment should be entered for the defendants, and they should recover against the plaintiffs their costs of the action (1) to be taxed.

On the taxation the plaintiffs claimed to be allowed their costs of the issue as to unseaworthiness, in which they had succeeded below, and as to which there was no appeal. The taxing Master refused to tax separately the costs of this issue. The plaintiffs took out a summons to review taxation, and on this summons Bailhache J. made the following order: "the taxing Master is not debarred by the order of the Court of Appeal from taxing the plaintiffs' costs of the issue of unseaworthiness; otherwise no order except that the plaintiffs do have their costs of to-day."

The defendants appealed.

The question turned upon the construction of Order LXV., rr. 1 and 2. (2)

F. D. Mackinnon, for the appellants. This is an appeal from an order of Bailhache J. declaring that the taxing Master is not

(1) [1914] 1 K. B. 541.

(2) Order LXV., r. 1: "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge . . . . Provided . . . . that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

Rule 2: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

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debarred by the order of the Court of Appeal, which merely directed judgment to be entered for the defendants with costs, from taxing separately and allowing to the plaintiffs the costs of the issue of unseaworthiness on which it is said the plaintiffs succeeded at the original hearing before Scrutton J. There is no direction to give the plaintiffs the costs of that issue either in Scrutton J.'s judgment or in that of the Court of Appeal, and it is submitted that such a direction cannot be supplied by the taxing Master. Bailhache J. relied on *Slatford* v. *Erlebach*. (1) That case purports to have been decided under Order LXV., r. 1, but that rule refers only to cases tried with a jury.

[*W. N. Raeburn*, for the respondents. That is explained by the Arbitration Act, 1889, s. 15, which makes the report of a referee equivalent to the verdict of a jury. (2)]

It may explain the reference to Order LXV., r. 1, but in *Slatford* v. *Erlebach* (1) it appeared from the referee's report, as it might have done from the verdict of a jury, that there were several issues, on one of which the plaintiff succeeded. The Court of Appeal seem to have decided that the judge ought to have given the costs of one issue to the plaintiff, and so directed the taxing Master to do it. They did not decide that the taxing Master could do it on his own authority where there is no direction by the Court.

W. N. Raeburn, for the respondents. There were several issues of fact and law before Scrutton J.; his judgment is reported. (3) He decided in favour of the plaintiffs on the issue of unseaworthiness. The defendants did not appeal on this point, so that the issue never came before the Court of Appeal, but they reversed Scrutton J. on a point of law, and naturally did not refer to his decision on the issue of fact which was not before them. The decision of Scrutton J. was an "event" within the meaning of Order LXV., and the costs ought to follow it under r. 2 of that Order: *Hoyes* v. *Tate*. (4) There is no

(1) [1912] 3 K. B. 155.

(2) 52 & 53 Vict. c. 49, s. 15, sub-s. 2: "The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

(3) [1913] 1 K. B. 538.

(4) [1907] 1 K. B. 656.

possible difference between this case and *Slatford* v. *Erlebach* (1), except that there the finding was in the report of an official referee, in this case it is in the judgment of a judge. It is the practice in the King's Bench Division for the taxing Master to ascertain from the whole proceedings what issues of fact have been raised and decided, without special directions from the Court.

SWINFEN EADY L.J. This is an appeal from an order of Bailhache J. in chambers, dated March 13. It was made upon an application to review taxation. The portion of the order that is complained of on this appeal is this: "It is ordered that the taxing Master is not debarred by the order of the Court of Appeal from taxing the plaintiffs' costs of the issue of unseaworthiness." Upon that the defendants, who succeeded in the action, appeal, and their contention is that, having regard to the form of the order of the Court of Appeal, there are no costs given to the plaintiffs of the issue of unseaworthiness, and therefore there are no costs of the plaintiffs in respect of that matter which the Master can tax.

The action was brought by the shippers of some mineral waters on board the defendants' steamer for loss or damage to the goods. The result of the action in the Court of Appeal (2) was that the plaintiffs failed. It was held that the exceptions in the bill of lading did not exclude the operation of s. 502 of the Merchant Shipping Act,— that the goods were lost by fire without the actual fault or privity of the shipowner—and therefore, as the section was not excluded, the defendants were entitled to rely upon its protection, and were not liable for the loss. The form of the order of the Court of Appeal was this: "It is ordered that the appeal be allowed and that the judgment"—that was the judgment of Scrutton J. at the trial—"in favour of the plaintiffs be wholly set aside, and that judgment be entered for the defendants with costs, including the costs of the appeal." Upon that form of judgment there are no costs given to the plaintiffs, the original judgment is wholly set aside, and the defendants are entitled to judgment with costs; that is, judgment in the action, for the

(1) [1912] 3 K. B. 155. (2) [1914] 1 K. B. 541.

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general costs of the action and of the appeal, not, of course, disturbing the costs directed by any separate interlocutory orders to be otherwise dealt with.

The plaintiffs now claim that an issue was raised of unseaworthiness, that they alleged that the ship was unseaworthy, and that the defendants denied it, and that in the Court below before Scrutton J. it was found that the ship was unseaworthy within the meaning of the authorities, and that they succeeded upon the issue of unseaworthiness, and that, as there is no order to the contrary, their costs of the issue ought now to be taxed, and, I assume, set off against the costs of the defendants.

This claim is based upon the provision of Order LXV., r.2: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." In my opinion the practice which is to be followed, where it is intended to make a provision for the costs of different issues, is that laid down by the Court of Appeal in *Hoyes* v. *Tate*. (1) In that case there were separate issues raised. It was an action of trespass, for damage to the plaintiffs' fence, and cutting down and removing a tree which the plaintiffs alleged was their tree. The defendants by their defence denied the trespass and damage, and said that the tree was upon the first defendant's land and belonged to the first defendant and not to the plaintiffs. The action was tried with a jury, and the jury found, first, that there was damage to the plaintiffs' fence, and that damage was assessed, and then that the tree was upon the first defendant's land; so that upon the issue of damage the plaintiffs succeeded, and upon the issue of the ownership of the tree the plaintiffs failed. Then when the matter came before the Court of Appeal, the Court inquired into the practice in the matter. The case stood over, and, after an interval, Collins M.R. said (2): "We have had the very best advice upon this matter from those who are most competent to give it"—no doubt the officers of the Court familiar with the practice—"and we are told that when the certificate of the associate is taken to the proper office with a request that

(1) [1907] 1 K. B. 656. (2) [1907] 1 K. B. 659.

judgment be entered upon it, inasmuch as the learned judge has made no order interfering with the incidence of the costs as prescribed by Order LXV., r. 1, the judgment will be drawn up in such a form as to give the defendants the costs of the issue as to the ownership of the tree upon which they have succeeded"; that is to say the appeal was before the actual formal order was prepared, and then the Court of Appeal, after inquiry, laid down the form in which the judgment should be drawn up. "The result is that the defendants upon this certificate are entitled to have the judgment drawn up in the form now before us." The form of the judgment is given a little later in the report: "Therefore it is this day adjudged that the plaintiffs recover against the defendants 10*l.* 10*s.* and (except as herein otherwise adjudged) the general costs of the action on the High Court scale . . . . And the jury having found that the tree referred to in the pleadings was in the grounds of the first defendant, and the judge having made no order as to the costs of the issue as to the ownership of the said tree, it is further adjudged that on taxation the defendants do have their costs of the said issue as to the ownership of the said tree"; in other words, that where the costs of issues are to be taxed separately, and where one party succeeds, and obtains the general costs, and the other party obtains the costs of one or more separate issue or issues, there ought to be in the judgment as drawn up a direction stating who is to have the costs of the issues so separately dealt with.

That case settled the practice. In the present case there is no direction at all that the plaintiffs are to have the costs of any separate issue. As they succeeded in the Court below, it would not be for them to apply there. They obtained the general costs. But there was no application by the plaintiffs in the Court of Appeal, where they failed, asking that they should have the costs of any issue. The result was that the order of the Court of Appeal wholly set aside the original judgment and gave judgment for the defendants in the action with costs.

In my opinion, under those circumstances, it is not open now for the taxing Master to look into the reasons given by the learned judge in the Court below and to consider whether any, and what, costs ought to be allowed to the plaintiffs in respect of

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the unseaworthiness. By the judgment they are not given those costs. It is not open to him to tax any costs of the plaintiffs in respect of that matter.

We were referred to the recent case in the Court of Appeal of *Slatford* v. *Erlebach.* (1) That was the case upon which the learned judge at chambers proceeded, and it was the only case that the respondents really relied upon. They had to endeavour to bring themselves within that authority. It will be sufficient to say that that case has really no bearing upon the case before us. The Court of Appeal were not there giving effect to the language of the judgment as drawn up, whether by consent of the parties or otherwise; they were considering the way in which the judgment ought to have been drawn up having regard to the report or certificate of the official referee. Buckley L.J. said (2): "In order to see whether the official referee has 'for good cause shewn otherwise ordered' it is only necessary to read the certificate; it is quite plain that he has done nothing of the kind." They were going behind the judgment and considering what the official referee had done; and it was a Court which had power to rectify the judgment, if not properly drawn up. They allowed such costs as the judgment if properly drawn up ought to have allowed. Here the judgment in itself is clear and the Court cannot depart from it, and under this judgment I am of opinion that the plaintiffs are not entitled to any costs.

PHILLIMORE L.J. I agree. The judgment of the Court of Appeal was that judgment should be entered for the defendants with costs. That is a judgment that we, sitting as a Court of Appeal, cannot touch. We have only to enforce it, and no special order having been made as to any matter at issue (I prefer using that expression for the moment to using the word "issue") or the costs of proving any matters at issue, we cannot now import that into the judgment.

The practice (as Swinfen Eady L.J. has observed) is clearly settled by the case of *Hoyes* v. *Tate.* (3) I am by no means saying that the Court of Appeal could not have made an order

(1) [1912] 3 K. B. 155. (2) [1912] 3 K. B. 161.
(3) [1907] 1 K. B. 656.

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which would have given the present respondents, the plaintiffs in the action, the costs which they are now seeking to get. I am not expressing any opinion as to whether, if an application had been made to the Court of Appeal, they would or would not have made such an order as is sought for. All that I have to do is to say that they have not done it.

The difficulty in the case (and I admit that it is a serious difficulty, and I quite understand the hesitation, at any rate, of Bailhache J. in deciding adversely to the claim) arises from the case of *Slatford* v. *Erlebach*. (1) Even after the explanation which has been given to us, *Slatford* v. *Erlebach* (1) remains a peculiar case. No doubt it was decided by the Court of Appeal upon a different ground from that taken by the taxing Master, on the ground that the case was regulated by Order LXV., r. 1, and not, as the taxing Master thought, by r. 2 of the same Order; and no doubt the second sub-section of s. 15 of the Arbitration Act makes the report of the official referee equivalent to the verdict of a jury. The written report of the official referee is, therefore, rightly taken as equivalent to the certificate of the associate at a trial at nisi prius, upon which judgment ought to be entered strictly according to law following the certificate; so judgment ought to have been entered strictly according to law following the report. I think that the only way in which to look at *Slatford* v. *Erlebach* (1) is this: it was not the Court of Appeal dealing with the decision of the Court of Appeal, but the Court of Appeal dealing with a decision of the Court below (the official referee being, for this purpose, equivalent to the Court below), and having power to alter the judgment of the Court below if it thought it should be altered, and having power to direct formal judgment to be drawn up in accordance with the report of the official referee, as in *Hoyes* v. *Tate* (2) they might, if necessary, have directed formal judgment to be drawn up in accordance with the certificate. Taking that view, and looking at the substance of the thing, which was the report, and having before them the rule which said that the findings of an official referee are equivalent to the findings of a jury, they thought that the justice of the case would be met by giving costs

(1) [1912] 3 K. B. 155. (2) [1907] 1 K. B. 656.

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in accordance with the report, and they either disregarded the formal judgment or they treated it, as they could do, as, for this purpose, overruled. With that explanation, one can follow *Slatford* v. *Erlebach*. (1) It is a decision which rests on very special circumstances, and it does not prevent our applying the general rule, which may, in this case, operate somewhat harshly for the plaintiffs, for whom I am sorry, but which would be very mischievously set aside if we gave any other decision. The expense and the applications which would arise would be endless. Therefore I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *William A. Crump & Sons; Ballantyne, Clifford & Hett.*

J. R. B.

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April 2, 29.

WILD *v.* TUCKER.

[1913 W. 3371.]

Contract — Consideration — Public Policy — Policy of Bankruptcy Acts — Contract for Good Consideration by Undischarged Bankrupt to pay in full Debt Provable in Bankruptcy — Validity of Contract.

A contract by an undischarged bankrupt, in consideration of a small loan, to pay in full a debt of a large amount due from him at the commencement of and provable in his bankruptcy, is not void as being contrary to public policy or the policy of the Bankruptcy Acts, but is a valid and enforceable contract.

ACTION tried before Atkin J. without a jury.

The plaintiff claimed the sum of 913*l.* 11*s.* under an agreement in writing, dated December 8, 1911, which was as follows: "In consideration of the loan of 15*l.* by you to me this day I hereby agree and undertake to pay you the debts and obligations I owed to you prior to the recent receiving order against me and adjudication in bankruptcy just as if such receiving order and adjudication had not been made, i.e., in full after crediting any dividend received."

(1) [1912] 3 K. B. 155.

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On March 13, 1911, the plaintiff recovered judgment by default against the defendant for 913*l.* 11*s.* for debt and costs. On October 13, 1911, a receiving order was made against the defendant, and on November 4, 1911, he was adjudicated bankrupt. On December 8, 1911, the plaintiff lent the defendant 15*l.* upon the terms of the above agreement. No dividend had been or could be paid in the bankruptcy, and the plaintiff had not lodged any proof in the bankruptcy; no part of the judgment debt had been paid to the plaintiff. The defendant had not obtained his discharge in bankruptcy.

Upon an application for summary judgment under Order XIV. it was ordered that the action should be tried as a short cause. At the trial before Atkin J. the defendant contended that the agreement could not be enforced because there was no consideration and because it was contrary to the policy of the Bankruptcy Acts and void as being contrary to public policy.

W. H. Duckworth and *J. H. Harris*, for the plaintiff. There was a new and valuable consideration for this promise to pay the debt provable in the bankruptcy, and it is therefore a valid and enforceable contract: *Kirkpatrick* v. *Tattersall* (1); *Jakeman* v. *Cook* (2); *In re Aylmer* (3); *In re Bonacina.* (4) This very point was so decided by Bailhache J. in *Herbert* v. *Skliros.* (5) The case of *Ex parte Barrow* (6) was decided upon the ground that the contract was contrary to the provisions of s. 126 of the Bankruptcy Act, 1869, and was also a fraud upon the other creditors, and that decision is therefore not applicable to the present case.

S. Lynch, for the defendant. There was no consideration for this promise, because the 15*l.* was a loan only which the defendant would be bound to repay. This contract is void as being contrary to the policy of the Bankruptcy Acts and to public policy. The policy of the Bankruptcy Acts is to free a debtor from all debts provable in bankruptcy, and that policy will be defeated if a bankrupt can for a very small consideration bind

(1) (1845) 13 M. & W. 766.
(2) (1878) 4 Ex. D. 26.
(3) (1893) 70 L. T. 244.
(4) [1912] 2 Ch. 68, 394.
(5) Unreported. Nov. 9, 1912.
(6) (1881) 18 Ch. D. 464.

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himself to pay in full large debts provable in bankruptcy: *Ex parte Milner* (1); *Jones* v. *Phelps* (2); *Mahalm* v. *M'Cullagh*. (3)

Cur. adv. vult.

April 29. (4) ATKIN J. In this case the plaintiff sues the defendant to recover the sum of 913*l.* 11*s.* under a written agreement, dated December 8, 1911, given under the following circumstances. The plaintiff, who is a solicitor, had had money transactions for some years with the defendant, an insurance broker, and on March 13, 1911, the plaintiff recovered judgment by default against the defendant for 906*l.* and 7*l.* 11*s.* costs, making the total sum of 913*l.* 11*s.* On October 13, 1911, a receiving order was made against the defendant and on November 4, 1911, he was adjudicated bankrupt. No part of the 913*l.* 11*s.* had been paid by the defendant; it was a debt provable in his bankruptcy, but in fact the plaintiff had not lodged any proof. On December 8, 1911, the defendant called upon the plaintiff and asked for a further loan which the plaintiff agreed to make to him on the terms contained in the agreement sued on, which is in the following terms. [The learned judge read the agreement.] The plaintiff only advanced the 15*l.* No dividend has been paid by the estate of the defendant; and it was admitted that no dividend would or could be paid. The defendant remains undischarged in the bankruptcy. The plaintiff now brings his action to recover 913*l.* 11*s.*, which is the amount of the "debts and obligations" owed him by the debtor prior to the receiving order, being the amount of the judgment debt.

It was contended before me by the defendant that the agreement of December 8, 1911, was not enforceable—(1.) as being made without consideration; and (2.) as being contrary to the spirit of the Bankruptcy Acts and void as being against public policy. In view of the latter contention I reserved judgment.

On the first point it appears to me that there was consideration

(1) (1885) 15 Q. B. D. 605.
(2) (1871) 20 W. R. 92.
(3) (1891) 27 L. R. Ir. 431.
(4) The judgment was written.

for the promise to pay 913*l.* 11*s.* in the plaintiff's contemporaneous loan of 15*l.* : see *Jakeman* v. *Cook* (1), where a promise to supply meat on credit was held consideration for a promise to repay a debt from which the defendant had been discharged by a liquidation by arrangement pursuant to the Bankruptcy Act, 1869. If there is consideration, the Court has not to consider whether such consideration is adequate.

On the second point I was pressed with the argument that, if before discharge a debtor may for small and apparently inadequate consideration revive his liability for all debts provable in the bankruptcy, one of the objects of the bankruptcy laws, namely, to enable an insolvent debtor to shake off his load of debt and make a fresh start, would be defeated; and, moreover, that such an agreement as was made in the present case would be inconsistent with equality of treatment of all creditors; and on the latter point the case of *Ex parte Barrow* (2) was cited. I have to remember, however, that our present bankruptcy laws impose no limit upon the power of undischarged bankrupts to incur liabilities, and that the present defendant might have bound himself under seal, or by any legal consideration, to pay to the plaintiff any sums he pleased whether in excess of the judgment debt or not. I therefore find it difficult to suppose that public policy requires that his power of incurring liabilities should be limited only in respect of a promise to pay a sum admittedly due at the commencement of the bankruptcy. A promise for good consideration to pay a debt from which the debtor is already discharged in bankruptcy is an enforceable promise: see *Jakeman* v. *Cook*. (1)

The case of *Ex parte Barrow* (2), when examined, is not an authority in favour of the defendant. There proceedings had been taken under s. 126 of the Bankruptcy Act, 1869, for a composition with creditors without proceeding in bankruptcy, and after the composition had been resolved upon one of the creditors bound by the resolution had entered into an agreement with the debtor for payment of his debt in full. It was held that such an agreement, though made for good consideration, was invalid, both as being contrary to the express terms of s. 126, which provided

(1) 4 Ex. D. 26. (2) 18 Ch. D. 464

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that no variation of the composition should be made without a resolution of the creditors, and also as being a fraud upon the creditors. The principles applicable to an agreement for a composition do not appear to me applicable to the proceedings in this case under the Bankruptcy Act, 1883.

I do not think it necessary to consider here the history of the various statutory enactments dealing with promises to revive debts provable in bankruptcy after discharge. I am not prepared, in the absence of express authority, to invoke public policy in a new form to invalidate a contract between two business men of full capacity. There must be judgment for the plaintiff for 913*l.* 11*s.*

Judgment for plaintiff.

Solicitor for plaintiff: *A. F. V. Wild.*
Solicitor for respondent: *A. M. Armstrong.*

J. H. W.

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April 2, 3.

ANT. JURGENS MARGARINEFABRIEKEN *v.* LOUIS DREYFUS & CO.

[1914 A. 81.]

Sale of Goods—Delivery Order—Document of Title—Delivery Order created and issued by Owner of Goods—Whether a "transfer"—Delivery Order not for Specific Goods—Factors Act, 1889 (52 & 53 *Vict.* c. 45), *ss.* 1, 2, 10—*Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *ss.* 25, 47, 62.

A delivery order was given by the defendants to F. for 2640 bags of mowra seed, which formed part of a consignment of 6400 bags. F. gave the defendants a cheque therefor and indorsed the delivery order to the plaintiffs, who took it in good faith and for valuable consideration. F.'s cheque having been dishonoured, the defendants refused to give delivery of the seed to the plaintiffs:—

Held, (1.) that the delivery order was a document of title to the goods which had been "transferred" by the defendants to F. within the meaning of s. 10 of the Factors Act, 1889, and s. 47 of the Sale of Goods Act, 1893, and having been transferred by F. to the plaintiffs, who took it in good faith and for valuable consideration, the defendants' right of lien as unpaid vendors was defeated; and (2.) that the delivery order

was valid notwithstanding that it related to goods which were not specific.

Capital and Counties Bank v. *Warriner* (1896) 1 Com. Cas. 314 followed.

ACTION tried by Pickford J. without a jury.

The plaintiffs, margarine manufacturers carrying on business in Holland, sued the defendants, who were merchants carrying on business in London and Hamburg, claiming damages for the non-delivery of 2640 bags of mowra seed.

The circumstances out of which the action arose were as follows. Henry Finkler & Co., Limited, in July, 1913, entered into contracts with the defendants for the purchase, "for account of principals," of certain mowra seed, "payment to be made in London on vessel's arrival before Hamburg by cash, less 2½ per cent. discount, in exchange for shipping documents and/or delivery order." The shipments were to be made from Bombay and/or Calcutta during September-October and October-November, 1913. Finkler & Co. wrote to the defendants stating that the buyers were the Niger Company, Limited, but for the purposes of this case Pickford J. treated it as immaterial whether Finkler & Co. were acting as principals or whether the Niger Company were the real principals. Finkler & Co. afterwards, namely, on November 25, 1913, entered into a contract for a sale to the plaintiffs of 500 tons of mowra seed at 12*l.* 12*s.* 6*d.* per 1000 kilos, ex ship Hamburg, "payment to be made in London on vessel's arrival before Hamburg by nett cash against documents on presentation in exchange for shipping documents and/or delivery order." Previous transactions had taken place between Finkler & Co. and the defendants, and the latter were content, for the purpose of the delivery of the documents, to accept Finkler & Co.'s cheque as equivalent to cash. In the case of the particular contract, the defendants, who had received a consignment of 6400 bags of mowra seed at Hamburg, accepted Finkler & Co.'s cheque for 2640 bags of the seed, and gave them two delivery orders in the following terms, addressed to their Hamburg house:—"To Messrs. Louis Dreyfus & Co., Hamburg. Please deliver to Messrs. H. Finkler & Co., Limited, or order against payment of

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freight the undermentioned goods ex s.s. *Hohenfels* ex B/L for L. D. M. S. 6400 bags of mowra seed dated Bombay 19.11.13 (L. D. M. S. 960 bags) nine hundred and sixty bags of mowra seed. Any excess or deficiency damaged or sweepings to be shared pro rata by receivers of bulk." The second delivery order, which was in a similar form, was given for the remaining 1680 bags. These two delivery orders were indorsed by Finkler & Co. and handed to the plaintiffs in fulfilment of the contract of November 25, 1913, the plaintiffs paying Finkler & Co. 1927*l.* 4*s.* 8*d.* for the same. Finkler & Co.'s cheque given to the defendants was dishonoured, whereupon the defendants immediately communicated with their Hamburg house, instructing them not to deliver the mowra seed. The plaintiffs being thus unable to obtain delivery brought the present action.

Roche, K.C., and *Robertson Dunlop*, for the plaintiffs. The delivery orders given by the defendants were documents of title—see s. 1, sub-s. 4, of the Factors Act, 1889, and s. 62 of the Sale of Goods Act, 1893—and Finkler & Co., who were either the buyers from the defendants or were the buyers' mercantile agents, could, and lawfully did, transfer the delivery orders to the plaintiffs—see s. 2, sub-s. 1, of the Factors Act, and s. 25, sub-s. 2, of the Sale of Goods Act—and the plaintiffs having taken these documents in good faith and for value, the defendants' rights as unpaid vendors were defeated: see s. 10 of the Factors Act (1) and s. 47 of the Sale of Goods Act, 1893. (2)

(1) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 10: "Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu."

(2) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47: "Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

"Provided that where a document of title to goods has been lawfully

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Leck, K.C., and *W. N. Raeburn*, for the defendants. The defendants were unpaid vendors, and the question is whether they have lost their rights as such. It is not disputed that a delivery order may be a document of title, but the delivery orders in this case did not constitute documents of title. The document of title to the mowra seed was the bill of lading, and that was held by the defendants. Moreover, to satisfy s. 10 of the Factors Act and s. 47 of the Sale of Goods Act, there must be two transfers of a document of title. In this case there were not two transfers. The word "transferred" in the sections cannot be applied to the creation and issue of the delivery orders to Finkler & Co. What the sections refer to are documents of title which have come to the owners from some third person and then have been transferred. Furthermore, a delivery order must attach to specific goods, and the delivery orders in this case did not satisfy this requirement inasmuch as they were given in respect of a number of bags out of a larger consignment. [*Farmeloe* v. *Bain* (1) was cited.]

Roche, K.C., in reply. A bill of lading may be the document of title to the whole cargo, but the cargo may be split up into parcels and delivery orders given in respect of these. When the cargo is split up the bill of lading ceases to be the document of title. In this case the delivery orders were the documents of title to the goods in question; they were transferred by the defendants to Finkler & Co. and by the latter to the plaintiffs. It is unnecessary that the delivery orders should apply to specific goods: *Capital and Counties Bank* v. *Warriner*. (2)

PICKFORD J., after stating the facts, said: The question is whether the defendants were justified in acting as they did. For the plaintiffs it was argued that the defendants were not justified

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transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transitu is defeated, ..."

(1) (1876) 1 C. P. D. 445.

(2) 1 Com. Cas. 314.

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in refusing to give delivery inasmuch as they had given delivery orders as documents of title, which were transferred by Finkler & Co., who were either the buyers from the defendants, or were the mercantile agents of the buyers, assuming the Niger Company were the real buyers, to the plaintiffs, who took them in good faith and for valuable consideration. It is not disputed that the plaintiffs acted in good faith, and as to Finkler & Co. the defendants say in one of their letters that the delivery orders were passed on to the plaintiffs by Finkler & Co. without any wrong intention. In answer to the plaintiffs' contention the defendants say first that the delivery orders are not documents of title at all, as there was a bill of lading in existence which was the document of title. I do not agree with this contention. The bill of lading may have been the defendants' document of title and the document by which they got possession of the cargo, but at this time they were in possession of the cargo by their Hamburg house and were distributing it to the different vendees under the different contracts. Each delivery order was, in my opinion, a document of title for each of those parcels. It was next said that these delivery orders were not documents of title within the meaning of the Factors Act, 1889, and the Sale of Goods Act, 1893, because they were created by the defendants themselves, and that as the documents did not come to them from some one else they could not be "transferred" by the defendants to Finkler & Co. I cannot accept that argument. A delivery order is not the less a document of title because it is created by the owner of the goods. It would be a curious result if the document by which the owner gets a title can, if passed on by him, give a title to some one else, but that a document created by himself cannot give a title when passed on because it is not a "transfer" but is only a delivery or issue. I cannot narrow the meaning of the word "transfer" in the way suggested. It seems to me that the delivery orders in this case were documents created by the defendants, the owners of the goods, for the purpose of transferring the title to the goods, and the handing of these to Finkler & Co. was a "transfer" of the documents just as much as if they had come into existence by the act of some one

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other than the defendants, had been handed to the defendants, and by them been handed on. If that is so, this concludes the case, because I have no doubt that Finkler & Co. were either the buyers or were mercantile agents for the buyers, and they transferred the documents of title to the plaintiffs, who took them in good faith and for valuable consideration. The further argument that a document of title cannot operate because it is not given in respect of specific goods is answered by the case of *Capital and Counties Bank* v. *Warriner*. (1) There will be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *C. J. Parker.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

J. S. H.

EMBIRICOS *v.* SYDNEY REID & CO.

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March 30; *April* 4.

Charterparty—Justification of Charterers' Refusal to perform—Restraint of Princes—Inability of Shipowner to carry Cargo to Destination—Frustration of Adventure.

By a charterparty made between the plaintiffs, the owners of a Greek ship, and the defendants as charterers, the plaintiffs' ship was to proceed to the Sea of Azoff, there load a cargo of grain, and carry it to a port in the United Kingdom. The charterparty contained an exception of restraints of princes. The ship arrived at the loading port on October 1, 1912, just before the war between Greece and Turkey broke out. She commenced to load, and on the following day, after she had loaded a small portion of the cargo, the defendants stopped further loading owing to the fact that the Turkish authorities were then seizing and detaining Greek ships arriving at the Dardanelles. War was declared on October 18. The lay days under the charterparty expired on October 22. On October 21 the defendants purported to cancel the charterparty upon the ground that the war had brought the adventure to an end, but the plaintiffs refused to accept such cancellation. The ship was unable to leave the Black Sea till September, 1913, when the war ended. In an action to recover damages for breach of the charterparty:—

Held, that the probability of the capture of the ship, if she attempted

(1) 1 Com. Cas. 314.

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to pass through the Dardanelles, and the consequent inability of the plaintiffs to perform their duty under the contract of carrying the cargo to its destination, justified the defendants in treating the adventure as frustrated and throwing up the charterparty; and that the defendants were none the less so justified because at the time of the alleged breach the contract was in part executed by reason of a portion of the cargo having been already loaded.

TRIAL of action before Scrutton J. without a jury.

By a charterparty dated September 11, 1912, the *Andriana*, a Greek steamship sailing under the Greek flag and belonging to the plaintiffs, was chartered by the defendants to proceed to a port in the Sea of Azoff and there load a cargo of grain for any direct port in the United Kingdom. Ten running days (Sundays and non-working holidays excepted) were to be allowed the charterers for sending the cargo alongside, and the charterers were to have liberty to detain the ship on demurrage for fifteen running days. By clause 9 "The act of God, perils, dangers, and accidents of the sea or other waters of what nature and kind soever; fire from any cause on land or water, barratry of the master or crew, enemies, pirates and robbers, arrests and restraints of princes, rulers and peoples, explosions, bursting of boilers, breakage of shafts or any latent defects in hull and/or machinery, strandings, collisions, and all accidents of navigation and all losses and damages caused thereby" were excepted. But it was thereby expressly provided that "all the above exceptions are subject to the steamer being seaworthy when she sails on the voyage."

By clause 10 it was provided that "If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamer is endangered, or in case of blockade or prohibition of export of grain and seed from the loading port, this contract shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise previous to cargo being shipped"; and by a clause in the margin "Should the Dardanelles be closed on steamer's arrival with no immediate prospect of opening this contract to be mutually cancelled."

On September 28, 1912, the *Andriana* arrived at Constantinople (the Dardanelles still being open) and there received orders from the defendants to load at Temrieuk. On September 30 the Turkish authorities prevented and prohibited by armed force if

necessary the passage of Greek vessels through the Dardanelles, and on that date arrested a Greek steamship called the *Athos Romanos* at or near Constantinople as that vessel was proceeding in ballast from the Sea of Marmora into the Black Sea. From that date onwards (except as hereinafter mentioned) the Turkish Government seized and detained for varying periods all Greek steamers arriving at the Dardanelles. On the same date, September 30, the Greek Minister for Foreign Affairs communicated by telegram to the respective Greek consuls that Greek steamships were not to undertake the passage of the Bosporus. The *Andriana* proceeded to Temrieuk and arrived there at 4.30 P.M. on October 1. At 8.30 A.M. on October 2 written notice of readiness to load was given, and at 2.30 P.M. on the same day a quantity of grain was sent alongside the steamship in a lighter and loading began. By 4.30 P.M. 110 tons of grain had been loaded under the charterparty, when loading was discontinued and was never again resumed, rumours having by this time reached the shippers that all Greek vessels were being seized and detained at the Dardanelles. The *Andriana* remained at Temrieuk awaiting further cargo, and on October 7 the defendants, through their agents, wrote the following letter to the master :— "Dear Sir,—We beg to notify you that owing to subsequent events having occurred steamer is not in a position to carry out charter, besides being uninsurable. Shippers meantime cannot continue loading and decline responsibility." The "subsequent events" referred to in that letter were that strained relations were prevailing between Turkey and Greece, that actual war was imminent, and that the Turkish Government were detaining all Greek steamships attempting the passage of the Dardanelles as stated above. On October 16 the defendants' agents by a letter of that date to the plaintiffs suggested that the charterparty should be cancelled, to which the plaintiffs refused to agree. On October 21 the defendants by letter to the captain purported to cancel the charterparty under clause 10 on the ground that war had then broken out between Turkey and Greece. War was in fact declared on October 18. The plaintiffs refused to accept the suggested cancellation and retained on board the vessel the 110 tons already loaded, but refused to issue a bill of lading for them.

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The *Andriana's* lay days expired on October 22, and the fifteen running days during which she might be detained on demurrage expired on November 6. On November 13 the 110 tons were unloaded and delivered back to the shippers. On November 19 the *Andriana* left Temrieuk for Theodosia (the former port being unsafe during the winter) and remained at Theodosia till September 3, 1913, when the war ended. On September 8, 1913, she arrived at Odessa Roads, and was ready and able to take up further employment. On October 16, 1912, permission was given by the Turkish authorities, by notice published at Constantinople and communicated to the Greek Minister, for laden Greek vessels to pass the Dardanelles for a period of four days (subsequently extended on October 20 to seven days from October 17), and by reason of this permit all laden Greek vessels with cargoes destined for countries other than Greece which were already under arrest or which arrived during such period of seven days were thereby enabled to pass through and to proceed on their voyages. A full cargo for the *Andriana* would have been about 5000 tons, and had the defendants continued on or after October 2 to provide cargo it was physically possible for her to have been loaded with a full cargo before October 19, and she could have reached Constantinople in three or four days after leaving Temrieuk. A further period of seven days from November 12 to November 19 was subsequently granted by the Turkish officials to laden Greek vessels to pass the Dardanelles. The *Andriana* was not at any time a laden vessel within the terms of these permits. Except during the periods above mentioned no Greek vessels were allowed to pass through the Dardanelles between the beginning of the war on October 18, 1912, and its close on or about September 3, 1913. At no time after October 7, 1912, was it possible for the *Andriana* to procure a cargo in substitution for that which the defendants had agreed to load under the charterparty. It was impossible for her by reason of the fact that she would have been seized and detained by the Turkish authorities if she had attempted to leave the Black Sea, and she was forced to remain at Theodosia until the war ended. The plaintiffs claimed damages for breach of the charterparty.

Leck, K.C., and *Raeburn*, for the plaintiffs. The defendants cannot rely on the exception of restraint of princes, for the exceptions apply to the shipowners only and not to the charterers. By the express terms of the clause containing the exceptions (clause 9) they are conditional on the steamer being seaworthy when she sails on the voyage, and with the seaworthiness of the ship the charterers are not concerned: *Braemount S.S. Co.* v. *Weir*. (1) But even if that exception does apply to the charterers it only does so if they were in fact prevented from carrying out their contract, and here at the port of loading there was no restraint. Mere apprehension of a hostile embargo is not enough: *Atkinson* v. *Ritchie*. (2) If the defendants had continued the loading of the cargo the ship could as events turned out have performed her voyage, for she might being laden have passed through the Dardanelles during one or other of the two periods of grace allowed by the Turks. Further the fact of the restraint where it exists can only justify a party to the contract in putting an end to it so long as the contract remains executory. "Very different considerations arise where the cargo is already on board": per Blackburn J. in *Geipel* v. *Smith* (3); and Lord Blackburn in *Dahl* v. *Nelson & Co.* (4) At the time of the repudiation a part of the cargo was already loaded.

Roche, K.C., and *Mackinnon*, for the defendants. Until the lay days expired on October 22 the defendants would in any view have not been in default by reason of the cargo not being loaded. But before that date war had been declared, and the defendants were excused by the exception from performance: *Reid* v. *Hoskins*. (5) The exception enures for the benefit of the charterers as well as of the shipowners: *Barrie* v. *Peruvian Corporation* (6); *Newman and Dale S.S. Co.* v. *British and South American S.S. Co.* (7) The fact that the passage of a laden Greek ship through the Dardanelles was afterwards temporarily rendered possible is immaterial. The question is whether it was possible at the date when the contract ought to have been

(1) (1910) 15 Com. Cas. 101.
(2) (1809) 10 East, 530.
(3) (1872) L. R. 7 Q. B. 404, at p. 414.
(4) (1881) 6 App. Cas. 38, at p. 53.
(5) (1856) 6 E. & B. 953.
(6) (1896) 2 Com. Cas. 50.
(7) [1903] 1 K. B. 262.

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performed, namely, October 22. The defendants were not bound to anticipate improbable events. But wholly irrespective of the exceptions the defendants were excused from performance because by reason of the restraint involved in the fact of war the adventure was wholly frustrated. The contract of the charterers is not merely to load, but to load with a view to the cargo being carried to its destination, and if the carriage of it to its destination becomes impossible the charterers are excused from loading: *Geipel* v. *Smith*. (1)

Raeburn in reply.

Cur. adv. vult.

April 4. SCRUTTON J. delivered the following written judgment: One Embiricos, the owner of the Greek steamer *Andriana*, sues Sydney Reid & Co., the charterers of that vessel, for 11,500*l.* damages for failing to load a cargo in the steamer whereby she was detained in the Black Sea by the Græco-Turkish war, and a Turkish embargo in the Dardanelles preceding it. The defendants reply in substance that the war and embargo prevented the performance of the charter within any time in contemplation of the parties as reasonable.

The facts were as follows: By charterparty dated September 11, 1912, the *Andriana* was to sail from Leghorn to Kertch and then to a loading place in the Sea of Azoff as ordered and there load grain; ten working days to be allowed the charterers for bringing the cargo alongside with liberty to detain the steamer on demurrage fifteen running days. Arrests and restraints of princes, rulers, and peoples were excepted. The charterparty provided by clause 10 as follows: "If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamer is endangered, or in case of blockade or prohibition of export of grain and seed from the loading port, this contract shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped." It also contained a clause in the margin which was in the following terms:—"Should the Dardanelles be closed on

(1) L. R. 7 Q. B. 404.

steamer's arrival with no immediate prospect of opening this contract to be mutually cancelled." The vessel passed through the Dardanelles into the Black Sea on September 28, 1912, and on September 30 and onwards, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving at the Dardanelles. The *Andriana* arrived at her loading port, Temrieuk, on October 1, and on October 2 received some cargo, 110 tons; on that day the loading stopped; on the same day the plaintiff telegraphed to the captain: "Owing probable war you must not leave Azoff before receiving my orders." On October 7 the charterers wrote a letter to the captain of the steamer: "We beg to notify you that owing to subsequent events having occurred steamer is not in a position to carry out charter, besides being uninsurable; shippers meantime cannot continue loading, and decline responsibility." War was declared between Turkey and Greece on October 18. Meanwhile, on October 16, the Turkish Government allowed Greek vessels laden to pass through the Dardanelles till October 20 and then till October 24. As the *Andriana's* lay days did not expire till October 22, up to which date the charterers could bring cargo alongside, and Temrieuk was three to four days from Constantinople, the *Andriana* could not have availed herself of this permission if the charterers had insisted on their rights under the charter to bring cargo alongside up to and including October 22. On October 21 the charterers purported to cancel the charter and the shipowners refused to accept the cancellation. Somewhat unexpectedly the Turkish Government allowed another seven days from November 12 to November 19 for Greek laden vessels to pass the Dardanelles; and if the *Andriana* had been loaded in her lay days, or in her fifteen demurrage days, which expired on November 6, she could have passed the Dardanelles then. There was, however, no reason to believe up to October 16 that the Turkish Government would let Greek vessels pass through the Dardanelles, or after October 24 up to November 11 that they would let them pass again. In fact, the *Andriana* was detained in the Black Sea till the close of the war. Her proposed cargo of grain was perishable and would have been seriously injured by prolonged detention in a hold.

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It was not really argued before me that either clause 10 or the marginal clause excused the charterers. Clause 10 did not, for cargo had been shipped before the war. The marginal clause did not, for the Dardanelles were not closed on the steamer's arrival on September 28. Arguments were addressed to me on the point whether the exception clause was available to protect the charterers. If this were the only point, I think I should be bound, as a judge of first instance, by the decisions of Mathew J. in *Barrie* v. *Peruvian Corporation* (1) and of Bigham J. in *Newman and Dale S.S. Co.* v. *British and South American S.S. Co.* (2) The clause in the latter charter is, I think, indistinguishable from this charter, while the exception "fire from any cause on land" in this charter seems to point to charterers' obligations rather than shipowners' duties. But I do not think the point is whether the exceptions apply to the charterers. It is probably true that "restraints of princes" did not prevent the doing of anything the charterers had to perform; but did they prevent the shipowners from carrying out their part of the contract for such a time that the charterers need not be called upon to do their part, because, even if they did it, there was no reasonable probability of the adventure proceeding? Were the charterers bound to put a valuable cargo into a ship's hold subject to the shipowners' claim for full freight, if the state of things was such that there was no reasonable probability of the shipowners being able to proceed on the voyage and overcome the restraints of princes then existing? The breach alleged in the statement of claim was the purported cancellation of the charter on October 21. At that time there was war existing between Greece and Turkey, and, in my opinion, there was no reasonable probability that Turkey would allow Greek ships to pass through the Dardanelles again during the war. This view, in my opinion, is supported by the decision and reasons in *Geipel* v. *Smith* (3) and *Nobel's Explosives Co.* v. *Jenkins*. (4) In the former case the blockade of Hamburg in the Franco-German war was held to excuse a shipowner from loading coal at Newcastle in order to proceed to Hamburg if the blockade was raised. Cockburn C.J.

(1) 2 Com. Cas. 50.
) 1903] 1 K. B. 262.
(3) L. R. 7 Q. B. 404.
(4) [1896] 2 Q. B. 326.

said (1): "It is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals, if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: it was an entire contract, and there was an insuperable obstacle to the performance of it in toto; and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless." So in *Nobel's Explosives Co.* v. *Jenkins* (2) the probability of capture of the cargo somewhere on the thousand miles of sea between Hong Kong and Yokohama was held by Mathew J. to justify the shipowner in refusing altogether to proceed beyond Hong Kong.

Mr. Leck, for the shipowners, argued that the well-known doctrine of frustration of the commercial adventure by unreasonable delay laid down in *Jackson* v. *Union Marine Insurance Co.* (3) did not apply if the shipowners had cargo on board, so that the contract was in part executed. This, which was a favourite argument of the late Walton J. and based by him on some expressions of Lord Blackburn in *Dahl* v. *Nelson & Co.* (4), was addressed by him unsuccessfully to Mathew J. in *Nobel's Explosives Co.* v. *Jenkins.* (2) It seems to me to fail to recognize that in *Jackson* v. *Union Marine Insurance Co.* (3) the charter was not executory but part executed, as the ship was proceeding under the charter to her port of loading; and it received its deathblow

(1) L. R. 7 Q. B. at p. 411.
(2) [1896] 2 Q. B. 326.
(3) (1874) L. R. 10 C. P. 125.
(4) 6 App. Cas. at p. 53.

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in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (1), where the vessel had a cargo on board, and yet the charter was held by the House of Lords to be avoided and the freight lost by such delay as frustrated the adventure.

I hold, therefore, that at the time of the breach alleged, October 21, an excepted peril, restraint of princes, prevented the shipowners from carrying out the charter by the vessel's proceeding on her voyage, and was, in the language of Lush J. in *Geipel* v. *Smith* (2), "likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this." If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed. As Lord Gorell said in *The Savona* (3), "I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered," and the whole of his subsequent remarks are valuable on this point. Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.

For these reasons I have come to the conclusion that there was no breach of contract by the charterers in not loading their cargo in this Greek ship; and there must, therefore, be judgment for the defendants on the question of liability, with costs.

Judgment for defendants.

Solicitors for plaintiffs : *Holman, Birdwood & Co.*
Solicitors for defendants : *W. & W. Stocken.*

(1) [1897] A. C. 609. (2) L. R. 7 Q. B. 404, at p. 414.
(3) [1900] P. 252, at p. 259.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1914
April 23.

WESTERN STEAMSHIP COMPANY, LIMITED *v.* AMARAL SUTHERLAND & CO., LIMITED.

Ship—Charterparty—Demurrage—Period of Demurrage not specified—Detention of Ship beyond reasonable Time—Damages.

APPEAL from the judgment of Bray J. (1)

The plaintiffs, shipowners, claimed damages for the detention of two steamships chartered to the defendants by two charterparties stipulating that the ships should be discharged at the rate of 500 tons per day, and containing the clause "if longer detained consignees to pay steamer demurrage at the rate of four pence per net register ton per running day or pro rata part thereof."

The plaintiffs claimed that this clause ceased to apply if the ships were detained for more than a reasonable time, which they estimated at ten days, beyond the lay days. They alleged that one of the ships was detained for thirty-four days, and the other for thirty-two days, in excess of what was reasonable, and claimed damages accordingly at a rate in excess of the rate specified in the above clause.

The defence alleged (paragraph 3) that each of the said charterparties contained a provision for the payment of demurrage at a fixed rate in the event of the said steamships being detained longer than the time allowed by the terms of the charterparties for discharging, and that the plaintiffs had been paid the full amount of the demurrage in each case in accordance with the terms of the charterparties; (paragraph 4) that no provision either express or implied was contained in either of the charterparties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case; and (paragraph 5) that a reasonable time on demurrage would not in the case of either of the said steamships have been limited to ten or any other number of days, and that

(1) [1913] 3 K. B. 366.

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WESTERN STEAMSHIP COMPANY, LIMITED v. AMARAL SUTHERLAND & Co., LIMITED.

the defendants denied that they detained either of the said vessels in excess of the demurrage days.

Pickford J. made an order in chambers that the point of law raised on these pleadings should be set down for hearing. The point was heard and decided by Bray J., who gave judgment for the defendants.

The plaintiffs appealed.

Leck, K.C., and *Raeburn*, for the appellants.

Inskip and *England*, for the respondents.

In the course of the argument the Lord Chief Justice intimated that this case could not be satisfactorily disposed of upon a preliminary point of law in view of the contention of the appellants, raising matter of fact, that the vessels had been deliberately detained by the respondents for their own purposes. The Court therefore heard counsel upon the question whether the order of Pickford J. setting down for argument the point raised on the pleadings should not be set aside. In the result,

LORD READING C.J. We are not deciding whether the judgment of Bray J. was right or wrong. We neither assent to nor dissent from that judgment. We are not reversing it in the sense of disagreeing with it. But the original order of Pickford J. will be reversed, and the judgment of Bray J. falls with it.

PHILLIMORE L.J. and LUSH J. concurring,

Appeal allowed.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *Rubinstein, Nash & Co., for Vachell & Co., Cardiff.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1914
May 1.

BENNETT STEAMSHIP COMPANY *v.* HULL MUTUAL STEAMSHIP PROTECTING SOCIETY.

[1913 B. 1801.]

Insurance (Marine)—Collision Clause of Lloyd's Policy—"Collision with ship or vessel"—Collision with Nets of Fishing Vessel.

A steamship ran into the nets attached to and extending from a fishing vessel which was about a mile distant from the steamship; there was no contact between the hulls of the two vessels:—

Held, that the steamship had not "come into collision with any other ship or vessel" within the meaning of the collision clause attached to the usual form of Lloyd's policy.

Judgment of Pickford J. [1913] 3 K. B. 372 affirmed.

APPEAL from the judgment of Pickford J.

The plaintiffs, as members of the defendant association, brought this action to recover 509*l.* 14*s.* alleged to be due to them under the rules of the association, as an indemnity in respect of a claim against the plaintiffs for damage done by their steamship *Burma*. By agreement the questions arising in the action were stated in the form of a case for the opinion of the Court, which was as follows:—

1. On the evening of October 11, 1912, the plaintiffs' steamship *Burma* came to anchor about two miles off Boulogne, being prevented by fog from going into the roadstead. At about 8.45 P.M., the fog clearing, the anchor was lifted, but shortly afterwards the fog came down again and the anchor was let go, it being impossible to see more than about a ship's length. At 9.30 P.M., in a clearing interval, the anchor was hove on, but it was found to be foul of the nets of a fishing vessel, which nets apparently enveloped the steamer and were also foul of the propeller. When the fishing vessel to which the nets were attached was sighted she was about a mile away or more with the nets extending from her to the *Burma*. The hull of the *Burma* did not at any time come into contact with the hull of the fishing vessel.

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2. The damage done by the s.s. *Burma* to the nets and the costs and expenses in connection therewith amounted to the sum of 509*l.* 14*s.*, which had been paid by the plaintiffs to the owners of the nets with the consent of all the plaintiffs' underwriters, including the defendants, given without prejudice to the denial of each underwriter that such loss was covered by the insurance granted by him.

3. The plaintiffs were members of the defendant association and claimed payment of the 509*l.* 14*s.* from the defendants under the rules of the defendant association, which provided protection in respect of (*a*) the sums which the member might become liable to pay and should pay in respect of—By collision, &c.; (*c*) claims for losses, damages, or expenses arising from or consequent upon collision, and for losses, damages, or expenses arising from or consequent upon damage caused by the entered steamship to other ships or property without actual contact or collision so far as such claims are not recoverable under the usual form of Lloyd's or Mutual Insurance Association's policy with collision clause attached; and (*e*) loss or damage caused by such steamship to any harbour, dock or pier, or the quays or works connected therewith, or to any jetty erection or other fixed or movable things whatsoever, other than ships or vessels, whether caused by negligence or otherwise.

4. The collision clause attached to the usual form of Lloyd's policy is as follows: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship herein insured this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured."

5. The defendants contended that the proportion of three-fourths of the damages in question was recoverable by the plaintiffs under the collision clause attached to the usual form of Lloyd's policy, and that their liability extended only to the one

quarter, or the sum of 127*l.* 8*s.* 6*d.* not recoverable under such Lloyd's policy with collision clause attached.

6. The defendants paid to the plaintiffs the sum of 127*l.* 8*s.* 6*d.* prior to the commencement of these proceedings.

The question for the opinion of the Court was whether in the circumstances set forth in paragraph 1 there was a collision within the collision clause of a Lloyd's policy. If the Court should be of opinion in the negative, judgment was to be entered for the plaintiffs for the sum of 382*l.* 5*s.* 6*d.* and costs of the action. If the Court should be of opinion in the affirmative, judgment was to be entered for the defendants with the cost of defence.

Pickford J. held that there had not been a collision between the plaintiffs' steamship and another ship or vessel, and gave judgment for the plaintiffs.

The defendants appealed.

F. D. Mackinnon, for the appellants. The authorities shew that there was in this case a "collision" within the meaning of the collision clause in Lloyd's policy. The decision of the House of Lords in *The Niobe* (1) shews that an extended meaning is to be given to "ship" or "vessel" in respect of a collision, and that direct contact between the hulls is not necessary. In *In re Margetts and Ocean Accident and Guarantee Corporation* (2) it was held that running into an anchor at which a ship was riding was collision with the ship itself, and in *The Warwick* (3) running into the warp of a trawl attached to a fishing smack was held to be collision with the smack. *Gale* v. *Laurie* (4) shews that everything connected with a vessel for the purpose of her voyage and adventure is part of the vessel and her appurtenances. The principle is that, with regard to all the normal appurtenances of a ship, such as anchors, cables, boats, and, in the case of fishing vessels, nets, collision with any of those appurtenances is collision with the ship itself, so long as the appurtenance is connected with the ship itself. There is no distinction between an anchor, a rope, a spar, a boat, or a net.

(1) [1891] A. C. 401.
(2) [1901] 2 K. B. 792.
(3) (1890) 15 P. D. 189.
(4) (1826) 5 B. & C. 156.

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The distance at which the ship to which the appurtenance is attached may be cannot logically or in principle make any difference.

H. M. Robertson, for the respondents, was not called upon to argue.

LORD READING C.J. This is an appeal by the defendants from the judgment of Pickford J. upon a special case. The question raised is whether upon the facts stated the insured ship came into collision with another ship or vessel. That question, upon the facts of this case, is whether the *Burma* came into collision with the fishing vessel. The facts are stated in the special case. [His Lordship stated the facts.]

On these facts it is contended that the *Burma* came into collision with the fishing vessel. Apart from authority, I agree with Pickford J. that no one could say, giving a reasonable meaning to the words used, that this ship came into collision with the fishing vessel. Upon the words "come into collision with any other ship or vessel" alone I would have no doubt that there was not a collision. It is said, however, that there is a number of authorities which in principle have decided that there may be a collision between one ship and another although there has been no contact between the ships themselves.

We were first referred to *The Niobe* (1). In that case the decision of the House of Lords rested upon the tug and tow together being, for this purpose, one vessel—in other words, that the tug was part of the apparatus of the tow. It was accordingly held that the tow was to blame although there had not been in fact any contact between her and the other vessel. It is sufficient to say that that case goes as far as any case has yet gone in that direction, and, speaking for myself, I cannot see my way to extend that principle so as to apply it to this particular case. Indeed I have no inclination to extend the principle beyond that decision. Then *In re Margetts and Ocean Accident and Guarantee Corporation* (2) was cited, in which the words of a policy of insurance were "owing to actual collision between any such tug and any vessel, bridge, &c.," and one

(1) [1891] A. C. 401. (2) [1901] 2 K. B. 792.

of the insured tugs was damaged by striking upon the anchor to which a vessel was then riding, and it was held that the tug had come into collision with a vessel within the meaning of the policy. No doubt that decision was based upon the view that when a vessel is riding at anchor the anchor and chain are part of the vessel, and that coming into collision with either is a collision with the ship. In the words of Phillimore J. in that case, "it may fairly be said that a vessel comes into collision with another vessel if it comes into collision with any portion of that other vessel." Another authority cited was *The Warwick.* (1) Upon looking at the report of that case in Aspinall's Maritime Cases (2) it appears that the collision there was between the warps of the trawls attached to two fishing smacks. The question there was as to the jurisdiction of a county court, and that case is no authority in the present case.

I think that the decision of Pickford J. was correct and that I cannot improve upon the reasons which he gave for his decision. I do not feel impelled by any of the cases which have been cited to decide in favour of the appellants.

PHILLIMORE L.J. I am of the same opinion. Whenever any part of the tackle of a vessel is being used in connection with the vessel, although it may be outside the ambit of the hull, as the anchor or a boat towing astern or working ahead to warp the vessel, it may just as well be said to be a part of the vessel when there is a collision with it as if it were still on board the vessel itself. Upon that ground the case of *In re Margetts and Ocean Accident and Guarantee Corporation* (3) was properly decided. Nets, however, are not a part of the ship in that sense, nor are they things which it is necessary for her to have and without which she could not prudently put to sea.

I think that it would be straining language to say that the collision in this case with the nets was a collision with the ship.

LUSH J. I am of the same opinion. It does not seem to me to be possible to say, without distorting language, that running

(1) 15 P. D. 189. (2) (1890) 6 Asp. M. Law C. 545.
(3) [1901] 2 K. B. 792.

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into the nets of a fishing vessel which is a mile away is the same thing as running into the vessel itself merely because the nets are attached to it; and I do not think that the authorities would justify us in holding that it is.

Appeal dismissed.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Botterell & Roche, for Hearfields & Lambert, Hull.*

J. H. W.

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April 24, 25.

THE KING *v.* MACASKIE.

Parliament—Registration — Revising Barrister — To whom Lists of Parliamentary Voters to be delivered—Two Municipal Boroughs in Parliamentary Borough—Representation of the People Act, 1867 (30 *&* 31 *Vict. c.* 102), *ss.* 19, 47; *Sched. B—Redistribution of Seats Act*, 1885 (48 *&* 49 *Vict. c.* 23), *s.* 12, *sub-s.* 4.

Sect. 47 of the Representation of the People Act, 1867, provides as follows: "In any borough named in Schedules (B) and (C) to this Act annexed, which is or includes a municipal borough, the mayor of such municipal borough shall be the returning officer . . . ."

Sect. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, provides that: "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that municipal borough to which the writ of election is directed shall be the returning officer: Be it therefore enacted that—In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough, the mayor of which is the returning officer, shall be the town clerk who, under the Registration Acts, is to receive the revised lists of parliamentary voters from the revising barrister . . . .":—

Held, that where at the passing of the Redistribution of Seats Act, 1885, there was, within the boundaries of a parliamentary borough, only one municipal borough to the mayor of which the writ of election had always been directed, his right to continue to receive the writ of election and to act as returning officer is not affected by the fact that after the passing of the Act another municipal borough has been incorporated within the boundaries of the parliamentary borough which has a larger population

than the older municipal borough. The town clerk of the older municipal borough is therefore entitled, under s. 12, sub-s. 4, of the Act of 1885, to receive the revised lists of parliamentary voters from the revising barrister.

The parliamentary borough of The Hartlepools was created by, and was named in Sched. (B) to, the Representation of the People Act, 1867. From 1867 till 1887 the municipal borough of Hartlepool was the only municipal borough within the boundaries of the parliamentary borough of The Hartlepools. In 1887 the municipal borough of West Hartlepool was incorporated, and from that time there were two municipal boroughs, namely, Hartlepool and West Hartlepool, within the boundaries of the parliamentary borough of The Hartlepools. Since 1867 the writ of election had always been directed to the mayor of Hartlepool who, at each election, acted as returning officer. At the revision of the lists of parliamentary voters in 1913 the town clerk of West Hartlepool claimed that the revised lists should be delivered to him inasmuch as West Hartlepool was the municipal borough having the largest population within the parliamentary borough, and therefore that the mayor of that borough was entitled, by virtue of s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, to receive the writ of election and to act as returning officer. The revising barrister having delivered the revised lists to the town clerk of Hartlepool as he had done in previous years, a rule was obtained calling upon the revising barrister to shew cause why he should not deliver them to the town clerk of West Hartlepool:—

Held, discharging the rule, that the right of the mayor of Hartlepool, to whom the writ of election had always been directed, had not been prejudicially affected, but had been preserved, by s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, and that as he was the returning officer the town clerk of Hartlepool was entitled to receive the revised lists from the revising barrister.

RULE NISI directed to N. L. C. Macaskie, Esquire, the revising barrister for the parliamentary borough of The Hartlepools, to shew cause why a writ of mandamus should not issue commanding him to deliver forthwith to the town clerk of West Hartlepool, being a municipal borough within the boundaries of the parliamentary borough of The Hartlepools, the lists of parliamentary voters which were revised by him in September, 1913.

By virtue of the Representation of the People Act, 1867, and Sched. B thereto, the parliamentary borough of The Hartlepools was constituted, that borough including the municipal borough of Hartlepool, and the townships of Throston, Stranton, and Seaton Carew.

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In 1887 the municipal borough of West Hartlepool was incorporated, and thereupon the parliamentary borough of The Hartlepools consisted, and still consists, of the municipal borough of Hartlepool, the municipal borough of West Hartlepool, and certain parts of the townships of Throston, Stranton, and Seaton Carew.

According to the census of 1911, the municipal borough within the boundaries of the parliamentary borough of The Hartlepools, which had the largest population, was the municipal borough of West Hartlepool. In September, 1913, the revising barrister held his court for the purpose of revising the lists of parliamentary voters for the parliamentary borough of The Hartlepools, and the revision was completed on September 18. On that date formal application was made to the revising barrister by the town clerk of the municipal borough of West Hartlepool that the revised lists should be delivered to him as such town clerk, inasmuch as West Hartlepool was the municipal borough with the largest population within the boundaries of the parliamentary borough. The revising barrister came to the conclusion that as the writ of election had, on the occasion of the last parliamentary election, as on the occasion of every previous parliamentary election since 1867, been directed to the mayor of Hartlepool, the town clerk of Hartlepool was the proper person to receive the revised lists of parliamentary voters. The revising barrister accordingly handed those lists to the town clerk of Hartlepool.

This rule was then obtained on behalf of the mayor, aldermen, and burgesses of West Hartlepool, and the town clerk of that borough, on the ground that, as the mayor of West Hartlepool was the mayor to whom the writ of election should be directed and was the proper returning officer by virtue of s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, the town clerk of West Hartlepool was entitled to receive, and ought to have received, the lists of voters from the revising barrister.

Lewis Coward, K.C., and *G. A. Scott*, for the mayor, &c., of Hartlepool, shewed cause. The real question in this case is who is the returning officer for the parliamentary borough of The

Hartlepools. The answer to that question depends upon certain sections of the Representation of the People Act, 1867 (1), and of the Redistribution of Seats Act, 1885. (2) It is clear from s. 47 of the Act of 1867 that the mayor of the municipal borough of Hartlepool was made the returning officer, and from that date he has at each parliamentary election acted as returning officer, the writ of election having always been directed to him. In 1887 the municipal borough of West Hartlepool was incorporated, and the mayor of that borough now bases his claim to be the returning officer on s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885. It is said on behalf of the applicants for the rule that the first part of that sub-section only applies if at the time of the passing of the Act of 1885 there were more mayors than one within the boundaries of a parliamentary borough; that as in the case of The Hartlepools there were not then more mayors than one, the latter part of this sub-section applies, and as of the two municipal boroughs within the parliamentary borough West Hartlepool

(1) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 19: "Each of the places named in Schedule (B) to this Act annexed shall be a borough, and, until otherwise directed by Parliament, each such borough shall comprise such places as are specified and described in connexion with the name of each such borough in the said Schedule (B) . . . ."

Sched. B to the Act of 1867 created the parliamentary borough of The Hartlepools as consisting of the municipal borough of Hartlepool, and the townships of Throston, Stranton, and Seaton Carew.

Sect. 47: "In any borough named in Schedules (B) and (C) to this Act annexed, which is or includes a municipal borough, the mayor of such municipal borough shall be the returning officer . . . ."

(2) Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 12, sub-s. 4: "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that municipal borough to which the writ of election is directed shall be the returning officer: Be it therefore enacted that—

"In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough, the mayor of which is the returning officer, shall be the town clerk who, under the Registration Acts, is to receive the revised lists of parliamentary voters from the revising barrister . . ."

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has the larger population, the writ must be directed to the mayor of West Hartlepool, and consequently that the revised lists of voters must be delivered to the town clerk of that borough. That contention is not well founded. Sect. 47 of the Representation of the People Act, 1867, provided that the mayor of Hartlepool should be the returning officer, he being the only mayor within the parliamentary borough. That section has never been repealed, but the applicants for the rule seek to get rid of its effect by reading words into s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885—an interpolation for which there is no warrant. Sect. 12, sub-s. 4, of the Act of 1885 is quite clear as it stands; it provides that where there are more mayors than one within the parliamentary borough the writ of election shall be directed to the mayor of that one of the municipal boroughs to whom in the past it has been directed. The writ of election has always been directed to the mayor of Hartlepool, and the sub-section in terms preserves that right.

Further, s. 12, sub-s. 4, of the Act of 1885 incorporates the Municipal Corporations Act, 1882. Sect. 250 of that Act is therefore incorporated, and that section provides that "Nothing in this Act shall prejudicially affect any charter granted before the commencement of this Act, or take away, abridge, or prejudicially affect any of the rights, powers, privileges, estates, property, duties, liabilities, or obligations vested in or imposed on any municipal corporation existing at the commencement of this Act, or in or on the mayor, or the council of a borough then existing." That clearly reserves all existing rights, including the one now in question, to the mayor of Hartlepool. He therefore remains entitled to receive the writ of election, and is entitled to act as returning officer, and the town clerk of Hartlepool is entitled to receive the revised lists of parliamentary voters.

H. D. Samuels (*G. A. H. Branson* with him), for the revising barrister.

Macmorran, K.C., and *W. Mackenzie*, for the mayor, &c., of West Hartlepool, in support of the rule. The first part of s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, was only intended to apply to the case where, at the time of the passing of the Act, there were in fact two municipal boroughs to one of

whom the writ of election had been theretofore directed under the discretion entrusted to the clerk of the Crown by virtue of s. 57 of the Municipal Corporations Act, 1835, or under s. 244, sub-s. 2, of the Municipal Corporations Act, 1882. Sect. 244, sub-s. 2, of the Act of 1882, which substantially reproduces the proviso to s. 57 of the Act of 1835, provided that "If there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that borough to which the writ of election is directed shall be the returning officer." That sub-section ceased to be operative on the passing of the Redistribution of Seats Act, 1885, for s. 12, sub-s. 4, of the latter Act, after reciting the Municipal Corporations Act, 1882, says that the writ of election shall be directed to "the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed." The words "one of the municipal boroughs" clearly contemplate the existence, at the time of the passing of the Act, of more than one municipal borough within the boundaries of the parliamentary borough. As in the case of the parliamentary borough of The Hartlepools the first part of the sub-section never came into operation, as there never was a time before the passing of the Act when the writ was directed to one of two or more mayors, the latter part of the sub-section is the governing portion, and consequently the writ of election should be directed to the mayor of West Hartlepool inasmuch as West Hartlepool has the larger population of the two municipal boroughs within the parliamentary borough, and the revised lists of voters must be delivered to the town clerk of West Hartlepool. Moreover the main object of the sub-section is to satisfy, as far as possible, the public convenience by providing that where there are more municipal boroughs than one within the parliamentary borough the writ of election shall be directed to the mayor of the borough with the largest population, presumably because, for the majority of the electors, he would be in the most central position in the parliamentary borough.

DARLING J. In my opinion this rule should be discharged. The question arises in this way: the revising barrister has

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the duty of revising the lists of voters for the parliamentary borough of The Hartlepools, and he has been in the habit of handing the revised lists to the town clerk of the municipal borough of Hartlepool. That course has been followed since the Representation of the People Act, 1867, s. 47 of which says: "In any borough named in Schedules (B) and (C) to this Act annexed, which is or includes a municipal borough, the mayor of such municipal borough shall be the returning officer." If one looks at Sched. B one finds among the places which are to be boroughs the name of The Hartlepools, and it is stated that The Hartlepools shall include the municipal borough of Hartlepool, and the townships of Throston, Stranton, and Seaton Carew. It is thus plain that the municipal borough of Hartlepool being then the only municipal borough within the parliamentary borough of The Hartlepools, its mayor had the right to be the returning officer for the parliamentary borough. That continued without question from 1867 down to 1913. In 1913 the revising barrister states that a claim to receive the revised lists of voters was made on behalf of the municipal borough of West Hartlepool, and the revising barrister says this: "After hearing the arguments addressed to me by the town clerk of Hartlepool I came to the conclusion that upon the uncontradicted statement that the writ of election had on the occasion of the last parliamentary election as on the occasion of every previous parliamentary election since 1867 been directed to the mayor of Hartlepool the town clerk of Hartlepool was the proper person to receive the revised lists of parliamentary voters from me and I handed the same to him accordingly." I think the revising barrister was right. But his conduct is now called in question by the municipal borough of West Hartlepool—a borough which did not exist at the time of the passing of the Representation of the People Act, 1867, but was created in 1887, from which year down to 1913 it appears not to have occurred to the mayor of West Hartlepool that he was entitled to be the returning officer, or to the town clerk of that borough that he was entitled to receive the revised lists of voters for the parliamentary borough of The Hartlepools. However late the contention is put forward it may of course be good. Whether or not it is good depends upon the construction to be

placed upon s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, coupled with the Municipal Corporations Act, 1882. Sect. 12, sub-s. 4, of the Act of 1885 says this: "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough"—I stop there to point out that since 1887 there have been more mayors than one within the parliamentary borough of The Hartlepools, because there has been all along the mayor of Hartlepool, and since 1887 the mayor of the new borough of West Hartlepool. As far as that goes, therefore, we have the exact situation contemplated by the Municipal Corporations Act, 1882. The sub-section then proceeds: "the mayor of that municipal borough to which the writ of election is directed shall be the returning officer." Mr. Macmorran and Mr. Mackenzie say that that does not apply because of what follows. I do not agree; I think those words do apply and that the proper practice is to do what has been done since 1887, during which time both these boroughs have existed, that is, to send the writ as it was sent to the old borough which was the first to receive it. The sub-section then continues thus: "Be it therefore enacted that—In any such case"—that is where there are mayors of two or more municipal boroughs within the parliamentary borough—"the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed." It being perfectly plain that there are these two municipal boroughs and that the writ down to the present time has always been directed to the mayor of Hartlepool, it seems to me that the sub-section says that this shall continue. But then come these words in the sub-section: "or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being." That, however, does not appear to me to apply here; it only applies where the writ has not been directed to any such mayor. Here there was one mayor of a municipal borough within the parliamentary borough, and the writ was directed to him. There are now two mayors, because one municipal borough has been added. That is the very case contemplated by the Municipal

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Corporations Act, 1882, but the right of the mayor of Hartlepool has not been destroyed because of the Redistribution Act, 1885, for it postulates that before the passing of the Act the writ "has not been directed to any such mayor." Before the passing of the Act there were not two mayors, but one, and the writ has at all times been directed to him, and therefore it seems to me that the new borough of West Hartlepool does not bring itself within the section so as to entitle it to have the writ directed to its mayor or the revised lists handed to its town clerk.

AVORY J. I am of the same opinion. The applicants for the rule contend that the town clerk of the municipal borough of West Hartlepool is the person who, under the provisions of the Redistribution of Seats Act, 1885, is entitled to have delivered to him the revised lists of voters for the parliamentary borough of The Hartlepools. To sustain that contention it must be shewn that he is the town clerk of the municipal borough the mayor of which is the returning officer for the parliamentary borough. Mr. Coward has put the answer to this application very clearly and concisely, but even without that assistance I should have come to the same conclusion as Darling J. has arrived at upon the affidavit of the applicants alone and upon the admitted facts disclosed therein.

Prior to 1885 there was one municipal borough—Hartlepool—within the parliamentary borough of The Hartlepools, and the mayor of Hartlepool was, prior to 1885, the returning officer for the parliamentary borough. In 1887 the municipal borough of West Hartlepool was created, and now we have to look at the state of facts and the law applicable thereto in 1913 when the lists of voters were revised by the revising barrister. In September, 1913, when the lists of voters were revised there were two municipal boroughs within the parliamentary borough of The Hartlepools, and up to 1885 there had been no enactment applicable to such circumstances providing as to which of such mayors the writ of election should be directed. It was then in the discretion of the clerk of the Crown. In 1885 the Legislature by the Redistribution of Seats Act enacted by s. 12, sub-s. 4, that in any case where there are more mayors than one within

the boundaries of the parliamentary borough the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ had before the passing of the Act been directed. It is not disputed that till 1885 and till 1913 the writ of election had always been directed to the mayor of Hartlepool. Therefore, upon the plain enacting words of this statute, if this was a case where there were more mayors than one within the parliamentary borough, the writ is to be directed to the mayor to whom it had been directed before the passing of the Act of 1885. Then having enacted that the writ shall be directed to him, the Municipal Corporations Act, 1882, which was still in force in 1913, says that the mayor of the municipal borough to which the writ of election is directed shall be the returning officer. Consequently it follows that if the mayor of Hartlepool is the person to whom the writ of election is to be directed he is also to be the returning officer, and, if that is so, the town clerk of Hartlepool is the person to whom the revised lists of voters must be delivered under the latter words of s. 12, sub-s. 4, of the Act of 1885. It is said in answer to this that s. 12, sub-s. 4, applies only where, at the time of the passing of the Redistribution of Seats Act, 1885, there were more mayors than one within the parliamentary borough. If that contention is sound, I fail to see how the mayor and town clerk of West Hartlepool bring themselves within the sub-section at all. If the sub-section does not apply to the present case, they cannot bring themselves within the words of the sub-section, "if it has not been directed to any such mayor" then it is to go to the mayor of the municipal borough which has the largest population. They cannot say the sub-section has no application to the present case and at the same time say that it has. Furthermore, this argument on behalf of the applicants overlooks the fundamental principle on which all statutes must be construed, namely, that they have a prospective operation. It is sometimes difficult to determine whether or not a statute has a retrospective operation, but there never has been any doubt that it has a prospective operation, and giving the words of this sub-section a prospective operation, they enact in plain terms that in any case in the future, if there are more mayors than one within the

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parliamentary borough, the writ of election is to be directed to that one to whom it was directed before 1885, and the town clerk of that borough of which the mayor is the returning officer is to receive the revised lists of voters. For these reasons I agree that the rule should be discharged.

ROWLATT J. I am of the same opinion. By the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough the mayor of that borough to which the writ of election is directed shall be the returning officer. That section did not apply to The Hartlepools because there were not more mayors than one at that time within the parliamentary borough. In 1885 the Legislature carried the matter a step further, because s. 12, sub-s. 4, of the Redistribution of Seats Act of that year, after reciting that provision has been made for the returning officer being the mayor to whom the writ of election is directed, goes on to provide to whom the writ of election shall be directed. That sub-section did not at that time apply to The Hartlepools because there were not then two municipal boroughs within the parliamentary borough. In 1887 West Hartlepool was incorporated, and there were then two municipal boroughs within the parliamentary borough. When that happened, did the parliamentary borough of The Hartlepools come within the Act of 1885? If it did not it remained under the Act of 1867, unless it is outside all legislation. But if it came within the Act of 1885, which is the contention of the applicants, because there were two mayors, then we must treat this sub-section as applying. Read s. 12, sub-s. 4, as applying to The Hartlepools. Then "any such case" includes the case of The Hartlepools. The sub-section will then read: "In the case of The Hartlepools the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed." The writ was in point of fact directed to the mayor of Hartlepool all those years. Why does that part of the sub-section not apply? I can find nothing in the words used or in the supposed policy of the thing to shew that it does not. It is obvious that the sub-section intended to preserve the

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practice which had given the office of returning officer to one mayor out of several. Why should it give the office to him in the case where he enjoyed it, although there was another mayor, any more than in the case where he had enjoyed it because he was the only mayor? I see no reason for drawing any such distinction. The words of the sub-section are prima facie with the respondents, and I can see nothing in them or in the nature of the thing to make us put a different construction upon them.

Rule discharged.

Solicitors for West Hartlepool: *W. J. & E. H. Tremellen, for Higson Simpson, Town Clerk, West Hartlepool.*

Solicitors for Hartlepool: *Torr & Co., for H. W. Bell, Town Clerk, Hartlepool.*

Solicitor for revising barrister: *Treasury Solicitor.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.

1914

March 20, 23.

WOOD *v.* LEWIS.

[1913 W. 2141.]

Husband and Wife—Separate Property—Restraint on Anticipation—Date of Contract—"Separate property which at that time or thereafter she is restrained from anticipating"—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

A grantor by deed covenanted to pay to a trustee upon trust for a married woman during her lifetime the quarterly sum of 250*l.* on the usual quarter days, such sums to be for her separate use without power of anticipation. The married woman subsequently, in 1909, accepted a bill of exchange, and on December 29, 1913, judgment was recovered against her for the amount of the bill. On December 24, 1913, the grantor under the deed had paid to the trustee the quarterly sum due on the following day:—

Held, on the authority of *Barnett* v. *Howard* [1900] 2 Q. B. 784, that, as at the date of the contract the married woman was restrained from anticipating the quarterly sum, it could not be attached to answer the judgment debt.

APPEAL from the judgment of Channell J. at the trial without a jury of a garnishee issue.

C. A. 1914

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On March 1, 1909, a married woman accepted a bill of exchange for 50*l.* payable four months after date drawn by the plaintiff to his own order. On August 25, 1913, the plaintiff brought an action against her on the bill to recover the amount thereof and 10*l.* 7*s.* interest thereon at the rate of 5 per cent. per annum.

On December 29, 1913, the plaintiff signed judgment, in default of defence, against the married woman as follows: "It is this day adjudged that the plaintiff recover against" the married woman "60*l.* 7*s.* and costs 4*l.* 8*s.*, such sum and costs . . . . to be payable out of the separate property of the said defendant which she is now or may hereafter be possessed of or entitled to, and any property which she may hereafter while discovert be possessed of or entitled to, and not otherwise; provided that nothing herein contained shall render available to satisfy this judgment any separate property which at the time of entering into the contract sued on in this action or thereafter she was or may be restrained from anticipating, unless by reason of s. 19 of the Married Women's Property Act, 1882, such property shall be available to satisfy this judgment notwithstanding such restriction."

By an indenture, dated July 16, 1907, and made between a covenantor of the first part, the said married woman (then unmarried) of the second part, and Frederick Lewis of the third part, the covenantor, his executors and administrators, covenanted with the said Frederick Lewis to pay during the lifetime of the said married woman to the said Frederick Lewis or other the trustee or trustees for the time being of the said indenture (thereinafter called the said trustee or trustees) the quarterly sum of 250*l.*, payable on the usual quarter days. And it was thereby agreed that the said quarterly sum should be held by the said trustee or trustees in trust to pay the same to the said married woman and so that during coverture the same should be for her separate use without power of anticipation; and so also that the same should be subject to forfeiture if any act or event should happen whereby the quarterly sum or any part thereof if belonging absolutely to her would become vested in or payable to some other person or persons or a corporation.

On December 24, 1913, before the above-mentioned judgment was signed, a quarterly payment of the annuity under the deed of July 16, 1907, less income tax thereon, amounting to 235*l.* 8*s.* 4*d.*, was paid to Lewis, the trustee for the married woman.

On December 30, 1913, the judgment remaining unsatisfied, a garnishee order nisi was made attaching all debts owing or accruing due from Lewis to the judgment debtor (the married woman) to answer the said judgment. Upon the garnishee order nisi coming on for hearing an issue was ordered to be tried on the question whether the said sum of 235*l.* 8*s.* 4*d.* admitted by Lewis to be in his hands was at the time when the order nisi was served attachable, the judgment creditor to be plaintiff and the garnishee Lewis to be defendant in the issue.

At the trial Channell J. held that the case was concluded by the decision of the Court of Appeal in *Barnett* v. *Howard* (1), and that the money was not attachable. He accordingly gave judgment for the defendant. The plaintiff appealed.

Disturnal, K.C., and *F. Newbolt*, for the plaintiff in the issue. The sum of 235*l.* 8*s.* 4*d.* which had accrued due and was in the hands of the trustee under the deed for the married woman before the date of the judgment is attachable to answer the judgment debt. Before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the contract of a married woman could only be enforced against her separate property free from a restraint on anticipation which she had at the time when the contract was entered into and which remained at the date of the judgment. Under s. 1, sub-ss. 2, 3, 4, of the Act of 1882 her contracts bind all her separate property, subject, by s. 19, to any restraint on anticipation. Under that Act this money, having accrued due before the date of the judgment, would have been free from the restraint on anticipation: *Hood Barrs* v. *Heriot* (2), in which the House of Lords in effect adopted the dictum of Lindley L.J. in *Pillers* v. *Edwards* (3), where he said: "I should have thought that the restraint on anticipation was over the

(1) [1900] 2 Q. B. 784. (2) [1896] A. C. 174.
(3) (1894) 71 L. T. 788.

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moment that the money settled to the married woman's separate use had become due and payable to her." Sub-ss. 3 and 4 of s. 1 of that Act were repealed by s. 4 of the Married Women's Property Act, 1893, and sub-ss. (*a*), (*b*), and (*c*) of s. 1 of the latter Act were substituted for them. It is admitted on behalf of the plaintiff, upon the authority of *Hood Barrs* v. *Cathcart* (1), *Whiteley* v. *Edwards* (2), and *Bolitho* v. *Gidley* (3), that sums accruing due after the date of the judgment cannot be attached. This sum accrued due before judgment. It is said that the proviso at the end of s. 1 of the Act of 1893 has altered the law as laid down in *Hood Barrs* v. *Heriot* (4), and that the restraint on anticipation still attaches to this sum. The decision of the House of Lords in *Hood Barrs* v. *Heriot* (4), though upon the Act of 1882, was pronounced after the Act of 1893 came into operation, and there is no suggestion throughout the case that the law had been altered by the later Act. The decision in *Hood Barrs* v. *Heriot* (4) governs this case. In *Bolitho* v. *Gidley* (3) the power to attach income due at or before the date of the judgment was recognized by the Court of Appeal and the House of Lords.

In Lord Halsbury's Laws of England, vol. xvi., Husband and Wife, s. 740, the law is stated as being now the same as laid down in *Hood Barrs* v. *Heriot.* (4) It is said that the decision of this Court in *Barnett* v. *Howard* (5) concludes the present case. It is true that in that case the income had accrued due and been paid into the married woman's account at her bank before the date of the judgment, and this Court held that it was not attachable. The point, however, raised in the present case was not taken there, the only point raised being whether the proviso to s. 1 of the Married Women's Property Act, 1893, applied to sub-s. (*c*) of that section as well as to sub-ss. (*a*) and (*b*). The Court (A. L. Smith L.J. and Vaughan Williams L.J.) held that the proviso applied to all the sub-sections and that therefore it applied even after the married woman had become discovert, and that the income was protected. Vaughan Williams L.J., however,

(1) [1894] 2 Q. B. 559.
(2) [1896] 2 Q. B. 48.
(3 [1905] A. C. 98.
(4) [1896] A. C. 174.
(5) [1900] 2 Q. B. 784.

expressed considerable doubt upon the point. The point actually decided there does not arise here. Accordingly the decision in *Barnett* v. *Howard* (1) does not apply to the point now before the Court, and if it does the decision is wrong and ought not to be followed, being in conflict with *Hood Barrs* v. *Heriot*. (2)

The Court of Appeal in *Brown* v. *Dimbleby* (3) merely followed the decision in *Barnett* v. *Howard* (1) upon the point actually decided, and Collins M.R. said (at p. 32) that the result of the decision in that case was that, though s. 1 of the Act of 1893 "in certain respects enlarged the species of property to which the creditor of the married woman could have recourse for the purpose of satisfying his judgment, the effect of the proviso therein contained was to safeguard the immunity previously attaching to the separate property of a married woman as to which she was restrained from anticipation, and to leave the law with reference to this question the same as it was before the Act." That being so, the decision of the House of Lords in *Hood Barrs* v. *Heriot* (2) is in point and binds this Court. The question is, to what property does the restraint on anticipation apply? It applies here to a chose in action, namely, a right to receive under a covenant in the deed a quarterly sum of money. The married woman cannot anticipate that. The money when paid to her trustee is not the same property which she was restrained from anticipating and is therefore not subject to the restraint. The "separate property" which is subject to the restraint is the chose in action. The money is therefore attachable to answer the judgment. [*Paquin* v. *Beauclerk* (4) was also referred to.]

E. M. Pollock, K.C., and *D. M. Hogg*, for the defendant in the issue. A married woman had at common law no capacity to contract. In equity, however, which created separate property, she could contract so as to bind the free separate property which she had at the date of the contract, but where her separate property was at that date subject to a restraint on anticipation she could not contract so as to bind it, as that would be

(1) [1900] 2 Q. B. 784.
(2) [1896] A. C. 174.
(3) [1904] 1 K. B. 28.
(4) [1906] A. C. 148.

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anticipating it: *Pike* v. *Fitzgibbon*. (1) Therefore in equity she could not by any contract bind the future income of her separate property which she was restrained from anticipating. The Married Women's Property Act, 1882, s. 1, extended the power of a married woman to contract as regards her separate property, sub-s. 4 providing that every such contract shall bind her after-acquired separate property, but s. 19 preserved the full effect of a restraint on anticipation. It was decided under s. 1 of that Act that a married woman was not capable of rendering herself liable in respect of her separate property on a contract unless she had separate property at the time the contract was made: *Palliser* v. *Gurney*. (2) *Hood Barrs* v. *Heriot* (3), though decided after the passing of the Married Women's Property Act, 1893, was decided upon the Act of 1882, all the relevant facts having occurred before the passing of the Act of 1893. The point decided in that case was that an alienation of the money when due, though not actually received by the married woman, was good notwithstanding the restraint on anticipation. Lord Herschell said (at p. 178): "At all events it is clear that they did not regard an assignment after the income became due as made by way of anticipation. I am, therefore, unable to agree with the view entertained by Kay L.J., that a restraint on anticipation by its nature forbids an alienation before the fund reaches the wife's hands although the income be due to her when the alienation is attempted. In more recent times the clause restraining anticipation has assumed different forms, but its purpose and effect have, I think, always been the same. That effect was well expressed by Lord Cottenham in *Rennie* v. *Ritchie* (4), where he said that it prevents the person entitled to the income for her separate use having the dominion till it becomes due." Lord Macnaghten said (at p. 183): "It is all very well to prevent a married woman from gathering the fruit, which will be hers in time, before it becomes ripe. When it is ripe, why should she be forbidden to touch it?" That simply follows the language of James L.J. in *Pike* v. *Fitzgibbon*. (5) The decision draws th

(1) (1881) 17 Ch. D. 454.
(2) (1887) 19 Q. B. D. 519.
(3) [1896] A. C. 174.
(4) (1845) 12 Cl. & F. 204, at p. 235.
(5) 17 Ch. D. at p. 459.

distinction between alienating "ripe fruit" and the attempt to get away from the restraint on anticipation by making a contract which will be fulfilled out of money not then due. No Act has prohibited a married woman from making a contract so as to bind her income which is due at the date of the contract. If, on the other hand, she makes a contract in June purporting to bind her income which becomes due in the following November, she is attempting to anticipate her income. The property which she is restrained from anticipating at the time of the contract includes the fruit of that property when it subsequently becomes ripe. The distinction is between income which is due, whether in the hands of a trustee, or in her bank, or in her pocket, at the date of the contract, and income which becomes due after the date of the contract. The proviso to s. 1 of the Married Women's Property Act, 1893, preserves the law as it existed before, and income accrued due after the date of the contract is not attachable to answer the judgment debt. This is what Collins M.R. in *Brown* v. *Dimbleby* (1) meant when he said that the proviso to s. 1 of the Act of 1893 left the law unaltered. It is not necessary, however, to contend that, because, if *Hood Barrs* v. *Heriot* (2) can be cited for the wide proposition advanced by the plaintiff, the Act of 1893 has made an alteration in the law. Sub-ss. 3 and 4 of the Act of 1882 are repealed, and s. 1 of the Act of 1893 is substituted for them. Sub-s. (*a*) gets rid of the decision in *Palliser* v. *Gurney* (3) by providing that every contract by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether or not she has any at the time when she enters into the contract. Sub-s. (*b*) provides that the contract shall bind all separate property which she may "at that time or thereafter"—that is, at the date of the contract or thereafter—be possessed of or entitled to; and sub-s. (*c*) provides that it shall be enforceable against all property which she may thereafter while discovert be possessed of or entitled to. This latter sub-section is not material in this case. Then comes the proviso to the section: "Provided that nothing in this section

(1) [1904] 1 K. B. 28, at p. 32. (2) [1896] A. C. 174.
(3) 19 Q. B. D. 519.

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contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." "At that time or thereafter" means, as in sub-s. (*b*), at the date of the contract or thereafter. That shews that the decisions in *Barnett* v. *Howard* (1) and *Brown* v. *Dimbleby* (2) are clearly right. The contract which a married woman makes only subjects her to a "proprietary liability"—per Bowen L.J. in *Scott* v. *Morley* (3)—and can be enforced against her separate property mentioned in s. 1 (*b*) of the Act of 1893, subject to the protection given to her property by the proviso. In *Barnett* v. *Howard* (1) the question was whether, when the married woman became discovert, her separate property, which was subject to a restraint on anticipation, was liable, under s. 1 (*c*), to satisfy her contracts made when she was married, and the Court held that the proviso applied and that recourse could not be had by the creditor to the property. The Court had no doubt that the case came within the proviso which applied to sub-ss. (*a*) and (*b*). The material facts in that case are the same as here. That case was followed in *Brown* v. *Dimbleby* (2), where *Pelton* v. *Harrison* (4) was approved. In *Studley* v. *Studley* (5) Buckley L.J. said: "Under s. 1 of that Act"—the Married Women's Property Act, 1893—"upon the language of the section, and from the decisions of this Court in *Barnett* v. *Howard* (1) and *Brown* v. *Dimbleby* (2), it is plain that a married woman's contract binds only separate property which she was at the date of the contract or thereafter possessed of or entitled to, not subject to a restraint on anticipation." He bases that observation upon the true construction of the section as well as upon the authority of those two cases. In *Bolitho* v. *Gidley* (6) the present point was not raised. The only question was whether income which accrued due after judgment could be attached, and the House of Lords, approving of the decision in *Whiteley* v. *Edwards* (7), held that it could not. The

(1) [1900] 2 Q. B. 784.
(2) [1904] 1 K. B. 28.
(3) (1887) 20 Q. B. D. 120, at p. 128.
(4) [1891] 2 Q. B. 422.
(5) [1913] P. 119, at p. 128.
(6) [1905] A. C. 98.
(7) [1896] 2 Q. B. 48.

proviso to s. 1 of the Act of 1893 "prevents a creditor from having recourse to the income of separate property which, at the date of the contract, the married woman had no power to anticipate, even though between the date of the contract and the date of the judgment it may have become free by becoming due and payable, and even in fact paid into her hands": Lush on Husband and Wife, 3rd ed., p. 286. The judgment is therefore right. [*Colyer* v. *Isaacs* (1) and *In re Fieldwick* (2) were also referred to.]

Disturnal, K.C., in reply. *Hood Barrs* v. *Heriot* (3) is a distinct decision that income which has accrued due before judgment can be attached notwithstanding the restraint on anticipation. Lord Herschell said (at p. 181): "If the restriction against anticipation be, as I think it is, inapplicable to the arrears of income now in question, the 19th section of the Married Women's Property Act, 1882, obviously does not affect them." The proviso to s. 1 of the Married Women's Property Act, 1893, has no further effect than s. 19 of the Act of 1882. *Studley* v. *Studley* (4) was a decision on s. 2 of the Act of 1893, and does not touch this case. [*In re Wheeler's Settlement Trusts* (5) was also referred to.]

LORD SUMNER. In this case the plaintiff sued a married woman upon a bill of exchange accepted by her in 1909, and on December 29, 1913, he recovered judgment against her in the form appropriate since the Married Women's Property Act, 1893. A covenantor had by deed covenanted to pay to a trustee for the married woman each quarter during her life a sum of 250*l.*, and on December 24, 1913, he had paid to the trustee a quarterly instalment less income tax, amounting to 235*l.* 8*s.* 4*d.* Thereupon the plaintiff, on December 30, obtained a garnishee order nisi attaching all debts owing by or accruing due from the trustee of the deed to the married woman, and upon the garnishee order nisi coming on for hearing an issue was directed to be tried upon the question whether this sum of 235*l.* 8*s.* 4*d.* was attachable. Channell J. held that the sum was not available to satisfy the judgment.

(1) (1897) 77 L. T. 198.
(2) [1909] 1 Ch. 1.
(3) [1896] A. C. 174.
(4) [1913] P. 119.
(5) [1899] 2 Ch. 717.

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We have been referred to a number of authorities upon the point, but I myself feel no doubt as to our position in the matter. The argument for the plaintiff is that, though there is a restraint on anticipation, this sum of money, being in the hands of the married woman's trustee, is in the same position as if it were in her own hands, and that the case comes within the decision in *Hood Barrs* v. *Heriot* (1), where Lord Macnaghten said (at p. 183): "It is all very well to prevent a married woman from gathering the fruit, which will be hers in time, before it becomes ripe. When it is ripe, why should she be forbidden to touch it? Why should she have to wait until it falls into her lap?" It is therefore said that the restraint on anticipation no longer affects this sum of money, and that it is bound by the married woman's contract and can be attached to answer the judgment. It is true that there is the case of *Barnett* v. *Howard* (2) in this Court apparently to the contrary, but Mr. Disturnal sought to distinguish it. The facts in *Barnett* v. *Howard* (2) are almost identical with those in the present case; indeed, they are, if anything, stronger, because the money had been actually paid by the trustees to the married woman. The Court there decided that the words in the proviso to s. 1 of the Married Women's Property Act, 1893, "at that time or thereafter," mean, as A. L. Smith L.J. said (at p. 789), "at the time of entering into the contract or at any time afterwards"; and that learned judge went on to say: "If therefore at the time of entering into the contract or at any time thereafter she has separate property which she is restrained from anticipating, that property cannot be made available to satisfy any liability or obligation arising out of such contract." It is plain that that case did not simply decide the narrow point suggested by the plaintiff, because Vaughan Williams L.J. (at p. 790) said: "I feel considerable doubt whether we ought to give such an effect to the words 'separate property' in the proviso as to make it apply to separate property which was once fettered by a restraint upon anticipation, but which has actually been received by the defendant." The Lord Justice therefore had the very point now before us in his mind, and, probably not without some reluctance,

(1) [1896] A. C. 174. (2) [1900] 2 Q. B. 784.

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he decided it. That case has been repeatedly recognized in this Court as an authority, and it binds us. I must not be understood as in any way doubting its correctness, but as it is binding upon us it is unnecessary to do more than to consider its effect upon the present case. If we apply the decision in *Barnett* v. *Howard* (1) to the facts of this case, it is clear that this sum of money in the hands of the trustee is not available to satisfy the contract. It is said that this money when it is received by or on behalf of the married woman is not separate property which at the date of the contract or after that date she is restrained from anticipating; that it is a new form of separate property when it reaches her hands or the hands of her trustee, and is not the same property which she is restrained from anticipating; and that therefore the decision in *Hood Barrs* v. *Heriot* (2) applies to it. This point apparently was not in terms raised in *Barnett* v. *Howard*. (1) I myself should think that it must have been present to the mind of Vaughan Williams L.J., because of the doubt expressed by him to which I have already referred. Assuming that it was not raised, I cannot on that account say that the decision in *Barnett* v. *Howard* (1) does not apply. Nor can I myself acquiesce in the argument. This annuity accrued due day by day under the covenant though it was payable quarterly, and it cannot be said that the money when paid under the covenant is so separate and distinct from the married woman's rights under the covenant as to constitute new separate property which has never been subject to the restraint on anticipation.

That might be sufficient to dispose of the case. As, however, the matter has been elaborately argued I desire to state that, in my opinion, there is a well-founded distinction between *Hood Barrs* v. *Heriot* (2) and *Barnett* v. *Howard*. (1) The latter case was decided under the Married Women's Property Act, 1893, the contract sued upon having been made by the married woman after that Act had come into operation, and therefore after s. 1, sub-ss. 3 and 4, of the Married Women's Property Act, 1882, had been repealed. Speaking of the Act of 1893 Buckley L.J. in

(1) [1900] 2 Q. B. 784.

(2) [1896] A. C. 174.

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Studley v. *Studley* (1) said: "Under s. 1 of that Act, upon the language of the section, and from the decisions of this Court in *Barnett* v. *Howard* (2) and *Brown* v. *Dimbleby* (3), it is plain that a married woman's contract binds only separate property which she was at the date of the contract or thereafter possessed of or entitled to, not subject to a restraint on anticipation. In clause (*b*) it is quite plain that the words 'at that time or thereafter' mean at or after the date of the contract. When I come to the same words 'at that time or thereafter' at the end of the section, they must mean the same thing. The result of that is that the married woman's contract is enforceable only against separate property which she was possessed of or entitled to at or after the date of the contract and which was not subject to a restraint on anticipation." Therefore since the Act of 1893 the question is whether the property is separate property which at the date of the contract or thereafter the married woman is possessed of or entitled to not subject to a restraint on anticipation. The repealed portions of s. 1 of the Act of 1882 dealt with the matter otherwise. Under that Act, as under the Act of 1893, the married woman's contract bound not only the separate property which she was possessed of or entitled to at the date of the contract, but also all her after-acquired separate property. Sect. 19 preserved the restraint on anticipation in this way: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." In *Hood Barrs* v. *Heriot* (4) the contract on which judgment was recovered was entered into before the passing of the Married Women's Property Act, 1893. The contract bound the separate property specified in s. 1, sub-s. 4, of the Act of 1882, and the only question was whether s. 19 prevented the income which had accrued due at the date of the judgment from being made

(1) [1913] P. 119, at p. 128.
(2) [1900] 2 Q. B. 784.
(3) [1904] 1 K. B. 28.
(4) [1896] A. C. 174.

available to satisfy the judgment. The House of Lords held that it did not, because the restraint on anticipation was at an end. This is not so under the Act of 1893, and therefore the decision in *Hood Barrs* v. *Heriot* (1) does not conflict with the decision in *Barnett* v. *Howard*. (2) Reliance is placed upon the statement of Collins M.R. in *Brown* v. *Dimbleby* (3) that the result of the decision in *Barnett* v. *Howard* (2) was that the proviso to s. 1 of the Act of 1893 left the law with reference to the question then before the Court the same as it was before the Act. That is not material here because the question for decision in *Brown* v. *Dimbleby* (4) was different from that in the present case. In that case a married woman, who was entitled to the income of certain trust funds for her life without power of anticipation, entered into a contract, and after her husband's death judgment was recovered against her. It was sought to enforce the judgment by the appointment of a receiver of the income. The contention was that, as the restraint had gone with the coverture, the property could be made available to satisfy the judgment. Collins M.R. said (at p. 32): But, when I look at the case"—*Barnett* v. *Howard* (2)—"it appears to me that, so far as concerns the question raised in this case, it simply follows a series of other decisions in the Court of Appeal." The decision in *Barnett* v. *Howard* (2) is binding upon us with regard to the meaning of the words "at that time or thereafter" in the proviso to s. 1 of the Act of 1893, even if I disagreed with it, which I do not. This sum of money is therefore not attachable to answer the judgment, and the appeal must be dismissed.

LAWRENCE J. I am of the same opinion. I should have preferred, if I could have done so, to have held that the protection was gone when the quarterly instalment had been received by the married woman or her agent. But I cannot so hold having regard to the authorities. The construction which has been placed upon s. 1 of the Married Women's Property Act, 1893, changes the law from what it was when *Hood Barrs* v. *Heriot* (1) was decided, and under the Act of

(1) [1896] A. C. 174.
(2) [1900] 2 Q. B. 784.
(3) [1904] 1 K. B. 28, at p. 32.
(4) [1904] 1 K. B. 28.

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1893 it is essential to look at the date of the contract to see if the property of the married woman which is in question is separate property which is subject to the restraint on anticipation. If it is separate property which "at that time or thereafter" is subject to the restraint on anticipation, it cannot be taken to satisfy the judgment. It is only if the separate property is at the date of the contract not subject to the restraint that it can be taken. That seems to me to be the result of the decision in *Barnett* v. *Howard*. (1)

Appeal dismissed.

Solicitors for plaintiff: *Telfer Leviansky & Co.*
Solicitor for defendant: *W. B. Glasier.*

W. F. B.

C. A. 1914 *April* 1, 7.

[IN THE COURT OF APPEAL.]

LAMBERT *v.* HOME.

[1913 L. 1800.]

Practice—Discovery—Inspection of Documents—Privilege—Transcript of Shorthand Notes of Proceedings in Previous Actions—Note taken in Anticipation of Future Litigation—Reproduction of Material publici juris.

A transcript of the shorthand notes of proceedings in open Court in a previous action, being a mere reproduction in a physical form of material which is publici juris, is not privileged from inspection.

So *held* by Cozens-Hardy M.R. and Buckley L.J., Channell J. dissenting.

Nordon v. *Defries* (1882) 8 Q. B. D. 508 overruled.

Lyell v. *Kennedy* (1884) 27 Ch. D. 1 distinguished.

APPEAL from a decision of Lawrence J.

The action was brought by the plaintiff Lambert against the defendant Home for damages for personal injuries.

The facts were as follows. On May 4, 1913, a collision occurred between the defendant's motor car and a taxi-cab the property of the National Motor Cab Company, Limited. The taxi-cab was

(1) [1900] 2 Q. B. 784.

driven by a driver named Sutton. The plaintiff Lambert was riding in the taxi-cab at the time of the collision. Proceedings were subsequently taken in the county court by the defendant against the National Motor Cab Company, Limited, to recover the amount paid by him for repairs to his motor car. An action was also brought in the county court by Sutton, the driver of the taxi-cab, against the defendant for damages for personal injuries. The two actions—*Home* v. *National Motor Cab Company, Limited*, and *Sutton* v. *Home*—were heard together on July 23, 1913, before the judge of the West London County Court, who held that the driver of the defendant's car was to blame for the collision, and he accordingly gave judgment for the defendants in the first action and for the plaintiff in the second action. The defendant's solicitors were aware, prior to the hearing of these actions, that the plaintiff Lambert was riding in the taxi-cab at the time of the collision and that he received serious injuries, and they anticipated that in all probability an action would be brought by him after the determination of those two actions. They, therefore, for the purposes of an appeal, if necessary, but mainly in order to be in a position to advise the defendant in the present action whether or not he should defend the proceedings, if any, which might subsequently be brought by the plaintiff Lambert, had a short-hand note taken of the proceedings in the county court actions and a transcript thereof made. As anticipated, the present action was brought by the plaintiff Lambert. In the course of the action an affidavit of documents was made by the defendant, in which he objected (inter alia) to produce the transcript on the ground that it was privileged. The Master held that the plaintiff Lambert was entitled to have inspection of it. The defendant appealed to Lawrence J. in chambers, who dismissed the appeal, but gave leave to the defendant to appeal to the Court of Appeal. The present appeal was accordingly brought.

J. Sankey, K.C., and *Harold Brandon*, for the appellant. The transcript of the shorthand notes of the evidence in the county court actions is a document prepared in relation to an intended action and as such is privileged from inspection: *Southwark and*

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Vauxhall Water Co. v. *Quick.* (1) The present case is covered by *Nordon* v. *Defries* (2), in which it was held that the shorthand notes of proceedings in a previous action were privileged from inspection in a second action.

[COZENS-HARDY M.R. I observe in Bray on Discovery, p. 398, that that decision is not regarded as correct.]

The decision has been adversely commented on only once.

If counsel had been given a watching brief in the county court cases to take a note of the evidence on behalf of the defendant for the purposes of the present action, it could not, it is submitted, have been contended that his note would not have been privileged. How then does such a note differ from the present transcript? In certain events the transcript may become the proof of the shorthand writer, and if the defendant has to disclose it he will be disclosing a possible proof of one of his witnesses. The depositions of a master and crew taken by the Receiver of Wreck have been held to be privileged: *The Palermo.* (3) In *Rapson* v. *Cubitt* (4) it was held that the Court would not order a defendant to produce the transcript of the shorthand writer's notes of proceedings had at a trial at law. The appellant does not rely on that case as the report is not a satisfactory one.

[COZENS-HARDY M.R. No argument which has any bearing on the point appears to have been addressed to the Court.]

Nicholl v. *Jones* (5), *In re Worswick* (6), *Goldstone* v. *Williams, Deacon & Co.* (7), and *Ainsworth* v. *Wilding* (8) were cases in which the documents in question did not come into existence for the express purpose of contemplated litigation and are distinguishable on that ground from the present case. *Rawstone* v. *Preston Corporation* (9), in which shorthand notes of proceedings before an arbitrator were held not to be privileged in subsequent proceedings in Court, is the only case in which there was any anticipation of future proceedings. No case with the exception of *Nordon* v. *Defries* (2) was there cited, and the case stands alone.

(1) (1878) 3 Q. B. D. 315.
(2) 8 Q. B. D. 508.
(3) (1883) 9 P. D. 6.
(4) (1842) 7 Jur. 77.
(5) (1865) 2 H. & M. 588.
(6) (1888) 38 Ch. D. 370.
(7) [1899] 1 Ch. 47.
(8) [1900] 2 Ch. 315.
(9) (1885) 30 Ch. D. 116.

[BUCKLEY L.J. referred to *Anderson* v. *Bank of British Columbia*. (1)]

In *Lyell* v. *Kennedy* (2) the decision turned on this, that if the plaintiff were compelled to disclose certain rubbings of inscriptions on tombstones which had been made on his behalf he might thereby be disclosing the way in which he was going to put his case.

T. C. Gibbons, K.C., and *C. Paley Scott*, for the respondent. No privilege can attach to the transcript in question. It is a mere record of matters which took place in open Court which were publici juris. It is not a compilation made by the solicitor as in *Lyell* v. *Kennedy*. (3) There the solicitor had worked hard in collecting the documents and had framed them into an argument. If the transcript in the present case is held to be privileged the defendant will be able to check the plaintiff's witnesses but the plaintiff will be unable to check those of the defendant. The disclosure of the transcript will not affect the confidential relationship between the solicitor and his client. There was nothing confidential in the matter. The respondent relies on *Nicholl* v. *Jones* (4), *Rawstone* v. *Preston Corporation* (5), *In re Worswick* (6), *Ainsworth* v. *Wilding* (7), *Goldstone* v. *Williams, Deacon & Co.* (8), *Anderson* v. *Bank of British Columbia* (1), and *Jones* v. *Great Central Ry. Co.* (9) as shewing that documents of the nature of that in the present case are not privileged from inspection and that the mere fact that one party has been prudent enough to have a shorthand note taken does not enable him to use it as a weapon of attack against the other party. Why should not the plaintiff be entitled to refresh his memory with regard to something which took place in his presence? The county court judge took no note of the evidence before him and the only record of it is that contained in the transcript. In these circumstances it would not, it is submitted, be right to allow the claim of privilege to prevail.

Nordon v. *Defries* (10) is queried in Bray's Digest of the Law

(1) (1876) 2 Ch. D. 644.
(2) 27 Ch. D. 1.
(3) 27 Ch. D. 1, 31.
(4) 2 H. & M. 588.
(5) 30 Ch. D. 116.
(6) 38 Ch. D. 370.
(7) [1900] 2 Ch. 315.
(8) [1899] 1 Ch. 47.
(9) [1910] A. C. 4.
(10) 8 Q. B. D. 508.

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of Discovery, p. 31, and has in fact never been followed. As regards *The Palermo* (1) it is clear that the inquiry in that case was of a most informal character. There was no cross-examination and no hearing in public or in fact.

Harold Brandon replied.

Cur. adv. vult.

April 7. The following written judgments were delivered:—

COZENS-HARDY M.R. On May 4, 1913, there was a collision between the defendant's motor car and a taxi-cab in which the plaintiff was riding. Two actions were commenced in the county court, one by the defendant against the taxi-cab company, and the other by the driver of the taxi-cab against the defendant. Both the driver of the taxi-cab and the plaintiff Lambert were injured in the collision. These two actions were tried together. The defendant Home, anticipating that an action would be brought against him by Lambert, caused a shorthand note of the county court proceedings to be taken and a transcript thereof made. The anticipated action was commenced. An affidavit of documents was made by the defendant in which he objected to produce (inter alia) the transcript on the ground of privilege. Master Archibald and Lawrence J. held that the plaintiff was entitled to have inspection, and this is an appeal against that decision.

It is admitted that the transcript relates to the matters in question in this action, but it is contended that the document is privileged—that it is in substance a part of the defendant's brief, as a statement of what some, or possibly all, of the witnesses who were present at the collision have sworn, and that it is not fair to require the defendant to produce that which has been brought into existence under the instructions and at the cost of the defendant in anticipation of the present litigation. Now the proceedings in the county court were public. Any one present could listen and take a note of what the witnesses said. The transcript did not involve any such "professional knowledge, research and skill" as Bowen L.J. referred to in *Lyell* v. *Kennedy*. (2) There is no original composition in the document.

(1) 9 P. D. 6. (2) 27 Ch. D. 1, 31.

It is a mere transcript of that which was publici juris. A defendant who has obtained at his own cost a copy of a document, not in his possession, which is not itself privileged, cannot decline to produce the copy, although he obtained it in anticipation of future litigation. So here a mere reproduction in a physical form of material which was publici juris cannot, I think, be privileged.

With one exception, the authorities seem to me to support this view. Wood V.-C. in *Nicholl* v. *Jones* (1), Kay J. in *Rawstone* v. *Preston Corporation* (2), North J. in *In re Worswick* (3), and Stirling J. in *Ainsworth* v. *Wilding* (4) all laid down principles which seem to me to cover the present case. The only exception is the decision of a Divisional Court in *Nordon* v. *Defries* (5), which, with great respect, I am unable to follow. The reasoning on which Mathew J. based the judgment of the Court has not, in the argument before us, been attempted to be supported. The authority of *Nordon* v. *Defries* (5) has been questioned by text-writers. In my opinion the order made by Lawrence J. was quite right, and this appeal must be dismissed with costs.

BUCKLEY L.J. The proposition which the appellant is here to affirm may, I think, be stated in the following terms: "That which was said by the witness in the box is, I agree, public property. And it is relevant. It exists in the form of a document. That relevant document is privileged because I wrote the document, or my solicitor for my benefit wrote it or procured it to be written for me." This is privilege based upon reproduction by writing. In my opinion, no such privilege exists. If it did a copy of a document as distinguished from the original would be privileged. The document is not one which has been composed by the writer, or of which the writer is in any way the author. He has done nothing more than reproduce in a physical form that which came into existence in its relevant form when the witness spoke in the box. The writer is comparable to a

(1) 2 H. & M. 588.
(2) 30 Ch. D. 116.
(3) 38 Ch. D. 370.
(4) [1900] 2 Ch. 315.
(5) 8 Q. B. D. 508.

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gramophone or a photographic camera. The document as distinguished from its contents is not relevant. The writing itself is not available at all in evidence. It is nothing more than the proof of the shorthand writer.

It has been sought to sustain the claim to privilege upon the familiar ground that materials coming into existence for the purposes of the trial, or collected by the solicitor for the purposes of the trial, are privileged. The doctrine, in my opinion, is not applicable. The case of *Lyell* v. *Kennedy* (1) is no doubt authority for the proposition that if the solicitor has by search and selection procured copies of or extracts from sources open to any member of the public the collection may be privileged. The point is best stated by Bowen L.J. (2) He says: "A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them." In that class of case the solicitor has done original work and by his professional skill and research has obtained a collection of materials to be used for the purpose of the trial. In the present case there is no original work or collection of materials leading to a result. The only original act done is to reproduce physically material which was publici juris and of which any one was at liberty to avail himself.

The authorities are in my opinion uniformly in favour of this view. *Nicholl* v. *Jones* (3), *Rawstone* v. *Preston Corporation* (4), *In re Worswick* (5), *Goldstone* v. *Williams, Deacon & Co.* (6), and *Ainsworth* v. *Wilding* (7) are all cases in which the principle

(1) 27 Ch. D. 1.
(2) Ibid. at p. 31.
(3) 2 H. & M. 588.
(4) 30 Ch. D. 116.
(5) 38 Ch. D. 370.
(6) [1899] 1 Ch. 47.
(7) [1900] 2 Ch. 315.

which I have stated is, in my opinion, to be found. *Nordon* v. *Defries* (1), with great respect to the learned judges who decided it, is in my judgment wrong. The decision is rested upon a proposition which I think cannot be maintained. The shorthand notes had been taken in an action of *Nordon* v. *Nordon*. Discovery of them was asked for the purpose of using them in an action of *Nordon* v. *Defries*. (1) Mathew J. says that in the action of *Nordon* v. *Nordon* the shorthand notes would seem to have been clearly privileged. In my judgment they would not have been privileged at all. If there had been subsequent proceedings in *Nordon* v. *Nordon*, as upon an inquiry as to damages or a reference before the Master or any subsequent step, the notes taken at the trial of *Nordon* v. *Nordon* would not have been privileged. That decision was said to follow the principles laid down in *Southwark and Vauxhall Water Co.* v. *Quick*. (2) That case did not, I think, contain the principle which is supposed to be found in it. There were three classes of documents in that case. The third was plainly privileged. The first two were certain transcripts, and in both cases it will be seen that they were transcripts of conversations at interviews held for the purpose of obtaining information to be submitted to the solicitor for advising in relation to an intended action. The oral statement which was included in the document was a confidential statement, and the question did not arise in a case where the facts were that the oral statement was public and the only work done was to record that public statement in writing.

For these reasons I think that the privilege claimed in this case for the transcripts of the proceedings in the county court in the actions of *Sutton* v. *Home* and *Home* v. *National Motor Cab Company, Limited*, cannot be supported, and that this appeal must be dismissed.

CHANNELL J. I regret that in this case, for the first time since I have had the privilege of sitting temporarily in this Court, I am unable to come to the same conclusion as the other members of the Court. I think that the proposition of the appellant is

(1) 8 Q. B. D. 508. (2) 3 Q. B. D. 315.

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not so fully stated in the commencement of the judgment of Buckley L.J. as to raise the points on which my opinion is based. Adopting his words, with what I think the necessary additions, I should state it: "That which was said by the witness in the box is, I agree, relevant, and it was public property in the sense that it might have been heard and might have been recorded by any one; but words are evanescent, other people did not record them, and I did, and I did so solely for my use and protection in the present litigation which I then anticipated. I brought into existence as a document the document of which inspection is asked, and I brought it into existence through my solicitor for the express purpose of instructing my solicitor and counsel both as to advising me whether I should defend the present claim and to enable them to conduct my defence for me if I did defend. It is a part of my brief and I claim privilege for it. The record is not public property, though the words which it records may have been." That, I think, is a full statement of the appellant's case. I see no distinction in principle between the foresight, knowledge, professional skill, and the labour involved in bringing into existence this record as materials to be used at the trial and the professional care and skill used in making a collection of inscriptions on tombstones or extracts from registers for use at the trial, as in *Lyell* v. *Kennedy*. (1) Privilege does not appear to me to depend on the same considerations as copyright. Here the document is a full transcript of all the evidence. If it had been a note taken by counsel instructed to watch the previous proceedings, with a view to taking a note of the part of the evidence which in his judgment would be material in the present proceedings, would not that be privileged? And is there any difference? Here the solicitor is said to have in fact underlined the material passages. If this document is to be considered as the proof of the shorthand writer it is I think clearly privileged.

I do not think any of the cases are authorities against my view except *Rawstone* v. *Preston Corporation* (2), because I think that in no other case but that was there actual evidence that the transcript was made for the protection of the party in the litigation

(1) 27 Ch. D. 1. (2) 30 Ch. D. 116.

then before the Court. In *Rawstone* v. *Preston Corporation* (1) it is true that the facts raised the point and the argument, which I think sound, was addressed to Kay J., but he disregarded it without giving any reasons except that the case was plain. On the other hand, *Nordon* v. *Defries* (2) is an express authority the other way. I think that was rightly decided. I do not think that that decision depends solely on the view that the document was privileged in the action in which it was taken, and I do not think the authority of the decision is destroyed even if that proposition is wrong. But I am not sure that it was wrong from the point of view of the judges who decided that case. It probably would not have been privileged in such further proceedings as an inquiry as to damages or a reference to a Master, but such proceedings do not take place except in very rare cases in the King's Bench Division, and would not have been in the contemplation of Mathew J. I do think that no judge of the King's Bench Division would make an ordinary order for inspection, for the purpose of an appeal, of shorthand notes of the case appealed from taken by one party at his own expense; and that is what Mathew J. probably meant by his statement that the notes would have been privileged in that case.

It is said by counsel that there is a difference of opinion and practice on the point before us between the Chancery and the King's Bench Divisions, and this is quite possible, as the litigation in the two Divisions is of a somewhat different character. In the King's Bench Division there are more cases of disputed facts and of contradictory evidence by unreliable witnesses, and there are more cases of fraudulent claims supported by such evidence, than there are in the Chancery Division, although no doubt such claims do sometimes appear there too. I made, in the course of the argument in this case, some remarks to this effect, and the counsel for the defendant very properly stated to the Court that the plaintiff in this case was personally beyond suspicion, and I hope that nothing which I have said indicates a view to the contrary; but having regard to the nature of the case, he may probably have to rely on the evidence of witnesses of whom the same cannot be said. Moreover, the contradiction

(1) 30 Ch. D. 116. (2) 8 Q. B. D. 508.

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between witnesses in collision cases is not by any means always due to dishonesty. It is often a matter of memory, more often still from other causes not necessary to specify now. In cases of this character, in my opinion, the extensive discovery now allowed is mischievous. The disclosure of the case on the other side, which now can generally be obtained, often gives fraudulent claims a chance of success which they would not otherwise have, for they can be framed to meet the case against them. All this may account for the King's Bench judges being inclined to give less wide discovery than the Chancery judges.

I think that the defendant in this case is entitled to retain the advantage which the foresight of his solicitor has for the express purpose of this litigation procured for him. It is said by Mr. Gibbons for the plaintiff that, if there is any chance of a misuse of this information by the plaintiff if he gets it, there is as great or even greater chance of misuse of it by the defendant if he is allowed to keep it to himself, and that seems true, but I do not think it justifies the order asked for. If discovery is ordered the plaintiff will be entitled to obtain a copy of the transcript at a small price per folio, whereas the defendant will have paid a large sum for having the notes taken and transcribed. It may be, indeed I think it is, a case where it would be reasonable for the defendant to agree to treat the notes as having been taken for joint use, each party paying half of the cost, but that is matter for agreement and not for adverse order under the process of discovery. If I were now sitting as judge at chambers I should endeavour to get the parties to come to such an agreement. An adverse order is, under Order xxxi., r. 14, to be made "as the Court or judge shall think right," and although no doubt it has been held that an order should be made in respect of any relevant document for which the party in whose possession it is cannot establish privilege, yet I cannot think it would be a just order to take from a party the advantage which the foresight of his solicitor has obtained for him, and that without even securing payment to him of the expense to which he has been put to obtain it. Further, in this case the document which the defendant has is stated to have been so underscored as to direct attention to the passages which the defendant's solicitor considers

material. That part of it certainly is privileged, and so the order made amounts to an order to make a new copy for the plaintiff's benefit, and I do not think such an order ought to be made. These difficulties, however, would not arise if the document is privileged, and my view is that the transcript should be held privileged as a document which has only come into existence for the purpose of this litigation.

I regret that, owing to my being only a temporary member of the Court, it is impossible for me to ask for further time before delivering judgment. I have, unfortunately, not time to write a fuller judgment going more in detail into the authorities, and I should personally prefer to give way to the much better opinions of the Master of the Rolls and Buckley L.J.; but as the matter rather affects the practice of the Division with which I am more familiar, I feel bound to give my judgment for what it is worth. I think the appeal should be allowed.

Appeal dismissed.

Solicitors: *White & Co.; Bell & Sugden.*

W. I C.

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[IN THE COURT OF APPEAL.]

SMITH AND WIFE *v.* SELWYN.

[1913 S. 3879.]

Action—Cause of—Felony—Stay of Proceedings until Defendant prosecuted.

An action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shewn for his not having been prosecuted, and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted.

APPEAL from an order of Lord Coleridge J. at chambers.

The plaintiffs were husband and wife. The statement of claim alleged in substance, in paragraph 2, that the defendant intending and contriving to corrupt and violently or otherwise have criminal relations with the female plaintiff induced her to attend at a certain place, and that, while the said plaintiff was there, he induced her to partake of some liquid which he alleged and she believed to be brandy, but which, as the defendant well knew, was not brandy, but was brandy or a liquid mixed with some noxious narcotic or other drug, which was calculated and was by him intended to have the effect of rendering the plaintiff powerless and incapable of muscular control or resistance and of reducing her to a state of collapse and insensibility. Paragraph 3 alleged that the said plaintiff, being so induced by the defendant, drank part of the liquid, and almost immediately thereafter in consequence thereof became injuriously affected and was rendered powerless and incapable of muscular control or resistance, and was reduced to a state of collapse and insensibility, and while she was so affected as aforesaid and under the influence of the drug the defendant unlawfully and indecently assaulted her and violently against her will had or alternatively attempted to have carnal knowledge of and intercourse with her. Paragraph 4 alleged that in consequence thereof the said plaintiff became ill and suffered much mental and physical pain, and for a long time feared pregnancy, and was unable to discharge her

household duties as theretofore, and her marital relations with her husband became strained and impaired and she lost for a long time the consortium of her husband, and was unable to follow her occupation and was injured in her character and reputation; and the husband lost the services of his wife in the discharge of her household duties, and his marital relations with her became strained and impaired, and he lost the consortium of his wife. The plaintiffs claimed damages.

The defendant applied at chambers for an order to stay further proceedings in or to dismiss the action as being an abuse of the process of the Court, upon the ground that the statement of claim was based upon a felony for which the defendant had not been prosecuted.

Lord Coleridge J., affirming an order of the Master, dismissed the application. The defendant appealed.

C. W. Lilley, for the defendant. The statement of claim is founded upon a felony, alleged to have been committed by the defendant, within s. 22 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), and the defendant has not been prosecuted for it nor has any excuse been shewn for his not having been prosecuted. The drug is alleged to have been administered by the defendant to the female plaintiff with intent to enable him to commit an indictable offence, and the action is therefore founded on a felony. This section is not affected by s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), which makes it a misdemeanour to administer to a woman a drug with intent to stupefy her so as to have "unlawful carnal connection with such woman." That sub-section deals with "unlawful," that is, non-matrimonial, carnal knowledge of a woman. The words "unlawful carnal connection" first occur in s. 2, sub-s. 1, of the Act of 1885, where they clearly mean non-matrimonial. The section therefore does not overlap s. 22 of the Act of 1861. The plaintiffs are claiming damages for a felony, and the action cannot be proceeded with unless the defendant has been prosecuted or a reasonable excuse shewn for his not having been prosecuted. This is clear law and has been laid down in many cases. It was recognized in

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Stone v. *Marsh* (1) and *White* v. *Spettigue*. (2) In *Ex parte Ball* (3) Baggallay L.J. (at p. 674) in his third and fourth propositions laid it down that, "notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice"; and "that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Marsh* v. *Keating* (4), or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence." The authorities are elaborately reviewed by Watkin Williams J. in *Midland Insurance Co.* v. *Smith*. (5) The only difficulty is as to how the objection to the further maintenance of the action ought to be taken. In *Ex parte Ball* (3) Bramwell L.J., with whose judgment James L.J. concurred, while saying (at p. 671) that "for 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way," discusses the four possible ways in which the rule of law might operate to prevent the claim being enforced, one being that "the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied," and states that there are great difficulties in the way of each. *Roope* v. *D'Avigdor* (6) shews that the objection cannot be taken on demurrer, and Cave J. seemed to think that an application to stay the action would be the right method. In *Wells* v. *Abrahams* (7) it was held that, where the action had gone to trial, it was the duty of the judge, who was at that date a commissioner, to try the issues, and not to nonsuit the plaintiff. The Court there referred to the difficulty of enforcing the rule of law. Blackburn J. (at p. 560) said that the defendant could not raise the point by plea,

(1) (1827) 6 B. & C. 551, at p. 564.
(2) (1845) 13 M. & W. 603.
(3) (1879) 10 Ch. D. 667.
(4) (1834) 1 Bing. N. C. 198.
(5) (1881) 6 Q. B. D. 561, at pp. 568—576.
(6) (1883) 10 Q. B. D. 412.
(7) (1872) L. R. 7 Q. B. 554.

and Cockburn C.J. (at p. 557) suggested that the summary jurisdiction of the Court might be invoked to stay the proceedings in the action. This was the course suggested in *A.* v. *B.* (1), and it is the proper course to adopt. It is immaterial that the action here is brought by husband and wife, and that the felonious act is alleged to have been committed on the wife. The test is whether the action is brought against the alleged felon: per Pigott B. in *Osborn* v. *Gillett.* (2) The statement in *Appleby* v. *Franklin* (3) that the test is whether the plaintiff is the party injured by the felonious act is based upon *Osborn* v. *Gillett* (4), which does not bear it out. No doubt Bramwell B. in this latter case (at p. 93), founding his observation upon *White* v. *Spettigue* (5), seemed to think that the test was whether it was the duty of the plaintiff to prosecute; but *White* v. *Spettigue* (5) does not support that view. There the action was between two innocent parties, and therefore the rule of law could have no application. The decision in *Appleby* v. *Franklin* (3) is, no doubt, correct, but the above statement went too far. The Court must consider, first, what is the cause of action, and second, against whom is the action brought. The present action is founded on an alleged felony and is brought against the person who is alleged to have committed the felony. The rule of law therefore applies, and the Court ought to stay the proceedings in the action.

C. E. Jones, for the plaintiffs. The statement of claim is not necessarily founded on a felony. It is really based upon s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885, under which the offence is a misdemeanour, and not upon s. 22 of the Offences against the Person Act, 1861. It is admitted that paragraph 2 of the statement of claim leads up to paragraph 3, and that only one cause of action is alleged. Assuming, however, that the claim is founded on a felony under s. 22 of the Act of 1861, the proper course is, as was done in *Wells* v. *Abrahams* (6), to allow the action to proceed to trial, and after the verdict, if the jury find that a felony was committed by the defendant, the judge, who is not now merely a commissioner to

(1) (1889) 24 L. R. (Ir.) 235.
(2) (1873) L. R. 8 Ex. 88, at p. 93.
(3) (1885) 17 Q. B. D. 93.
(4) L. R. 8 Ex. 88.
(5) 13 M. & W. 603.
(6) L. R. 7 Q. B. 554.

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try the issues, may decline to enter judgment for the plaintiff on the ground that the defendant has not been prosecuted and no reasonable excuse has been shewn for his not having been prosecuted. In that case Blackburn J. (at p. 559) suggested that the summary jurisdiction of the Court would only be exercised where criminal proceedings were actually pending. There is no case in conflict with that. *Ex parte Ball* (1) was a bankruptcy case, and the only question was whether the trustee could prove. That case is no authority for the broad proposition stated by Wills J. in *Appleby* v. *Franklin* (2) that "the authorities which have been referred to leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant, until public justice has been vindicated by a prosecution of the criminal." In Pollock on Torts, 9th ed., p. 207, it is stated that there is no instance of the Court having summarily stayed proceedings in a civil action on this ground. The action therefore ought not to be stayed. Further, this is an action by the husband as well as the wife, the former alleging loss of the services and the consortium of his wife in consequence of the act complained of. There is no obligation upon him to prosecute the defendant. The rule of law does not apply to his cause of action. Upon those grounds the Court ought not to stay the proceedings in the action. [*Ward* v. *Lloyd* (3) was also referred to.]

C. W. Lilley in reply. With regard to the husband's claim, the observations of Lord Tenterden in *Stone* v. *Marsh* (4) cover it: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action . . . . that he shall not sue the felon." The bar is against suing the felon, and therefore the husband's claim stands on the same footing as the wife's. The facts alleged in the statement of claim disclose a felony, and the Court will stay the action.

KENNEDY L.J. This case raises a somewhat difficult, but at the same time an interesting, question. The appeal is against

(1) 10 Ch. D. 667.
(2) 17 Q. B. D. 93, at p. 95.
(3) (1843) 7 Scott, N. R. 499, at p. 507.
(4) 6 B. & C. 551, at p. 564.

an order of Lord Coleridge J., who affirmed an order of the Master refusing an application to stay or dismiss the action. The ground of the appeal is that the statement of claim on its face alleges facts which, if true, constitute a felony on the part of the defendant, that the claim to damages is based upon that alleged felony, and that, as the defendant has not been prosecuted, or a reasonable excuse shewn for his not having been prosecuted, as, for instance, his being out of the country, it is not open to the plaintiffs to claim damages in a civil action in respect of the felony.

It is not easy to find a statement in any case as to what is the course which the Court ought to adopt in a matter of this kind. Some of the decisions are not easy to reconcile. This, however, is certain, that the Court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff. It is unnecessary to traverse the ground again by going through the authorities which have been so fully dealt with in the argument. In my opinion the result of them is this. It is in the power of the Court to grant a stay, and it is the duty of the Court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damages is based upon a felony committed by the defendant. I have come to the conclusion myself that, while portions of paragraphs 2 and 3 of the statement of claim, taken separately, might be construed as alleging facts upon which the plaintiffs will rely as giving them a claim for damages for such an assault upon the female plaintiff as constitutes only a misdemeanour, yet the scheme of the paragraphs is substantially to allege—and it is admitted that they are so intended—that the defendant induced the female plaintiff to go to a particular place with intent to have carnal knowledge of her, and when she was there, with the same intent or design, as the statement of claim calls it, he induced her to take some liquid with a drug in it so as to render her incapable of muscular control and resistance, and while she was in that condition he carried out his design of assaulting her, and against her will either had or attempted to

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Kennedy L.J.

have carnal knowledge of her. In my opinion, apart from the allegation that the defendant had carnal knowledge of her, there is here a statement of facts which, if proved, would constitute a felony within s. 22 of the Offences against the Person Act, 1861. I do not think that s. 22 is in any way affected by s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885, whereby a somewhat similar act is made a misdemeanour. On the face of the statement of claim there is an allegation of felony upon which the claim for damages is based. That being so, it is within the power of the Court to stay the proceedings, and the fair result of the cases is that that is the proper course to adopt. We ought, however, to give the plaintiffs an opportunity of alleging, as the ground of their claim to damages, an assault on the female plaintiff which will amount to a misdemeanour only. It would not, in my opinion, be irrelevant to that action to allege and prove that the person assaulted was unable to resist owing to a drug having been administered to her. Though it may not, perhaps, be easy, I conceive it to be possible to state a good cause of action without at the same time alleging a felony as its basis. The plaintiffs are entitled to be allowed to put forward such a case and to have it tried. I should be very loth to exercise our power in such a way as absolutely to deprive the plaintiffs of all civil remedy. Of course if the defendant is prosecuted the bar to the further continuance of the action in its present form will disappear. I only wish to add that there are here two plaintiffs, husband and wife, and if any real distinction could be made between them it might be that the husband might maintain his claim upon the ground that the felonious act was not committed on him. I am not prepared to differ from the opinion expressed by Bramwell B. in *Osborn* v. *Gillett* (1), and by Huddleston B. and Wills J. in *Appleby* v. *Franklin*. (2) But here the two claims are so interlaced as to make it difficult to separate them, and moreover the husband's claim is a mere bagatelle, the real claim being in respect of the injury to the wife. In these circumstances I cannot separate them, and I draw no distinction between them.

The order, therefore, will be in substance to stay all further proceedings in the action on the present statement of claim;

(1) L. R. 8 Ex. 88, at p. 93. (2) 17 Q. B. D. 93.

with leave to the plaintiffs to amend the statement of claim within twenty-one days; and if no amendment is made within that time, the action to be stayed until after criminal proceedings have been taken against the defendant.

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SWINFEN EADY L.J. I am of the same opinion. It is well established that according to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shewn for his non-prosecution. In 1827 in *Stone* v. *Marsh* (1) Lord Tenterden, delivering the judgment of the Court of King's Bench, stated the law thus: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action." That is the rule, and then he proceeds to state the ground of the rule. "The rule is founded on a principle of public policy . . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose." In *White* v. *Spettigue* (2) the law was laid down in somewhat similar terms by Rolfe B., who said: "I think the true principle is, that where a criminal, and consequently an injurious act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion." The learned judge is there speaking of an injurious act which amounts to a felony. So too Cockburn C.J. in *Wells* v. *Abrahams* (3) said (at p. 557): "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil

(1) 6 B. & C. 551, at p. 564. (2) 13 M. & W. 603, at p. 608.
(3) L. R. 7 Q. B. 554.

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Winfen Eady L.J.

remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted." That being the established law, the question arises as to how it is to be enforced where an action is brought upon alleged facts which, if true, disclose a felony. Cockburn C.J. said in the same case: "But it may very well be that, if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this Court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this Court, in which case the Court is always willing to interfere to prevent such abuse." Blackburn J. (at p. 559) took the view that the Court could in certain circumstances stay the proceedings. Lush J. (at p. 563) said: "It is undoubtedly laid down in the text-books that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced we are nowhere informed."

We have now to lay down the proper course of procedure in such a case. The proper course is, in my judgment, that indicated by Cockburn C.J. in the passage I have cited, that is to say, to stay the action, if the present statement of claim is persisted in, until criminal proceedings have been taken against the defendant, with leave to the plaintiffs to amend their statement of claim, and thus give them an opportunity of stating a cause of action without alleging a felony. I agree with the form of order proposed by Kennedy L.J.

PHILLIMORE L.J. I am of the same opinion. It is a well-established rule of law that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shewn for his not having been prosecuted. The prosecution need not necessarily be at the suit of the injured person. We are enabled now to pronounce a decision as to the mode of enforcing that rule, because hitherto no mode of procedure has been

definitely laid down. I agree with the order which has been suggested. I only desire to add a few words as to the statement of claim. There seems to me to be two distinct felonies alleged therein. There is a charge of rape at the end of paragraph 3, and there is charge of felony in paragraphs 2 and 3 combined. It might be uncertain whether paragraph 2 alleged the administration of a drug to the female plaintiff with a view of making her unable to resist so that the defendant might have carnal knowledge of her. It is, however, frankly admitted that paragraphs 2 and 3 are intended to be read together and to have that meaning. It comes therefore within s. 22 of the Offences against the Person Act, 1861, and it is none the less a felony within that section because it may also be a misdemeanour within s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885. Various distinctions have been attempted to be drawn between the two sections, but it matters not, because there is a clear charge of felony under s. 22 of the Act of 1861 as the foundation of the action. The statement of claim therefore alleges two different felonies on the same facts. I agree that the proper order is that stated by my Lord.

Appeal allowed.

Solicitors for plaintiffs: *Surridge & Mullis, for Mullis & Walmisley, Ilford.*

Solicitors for defendant: *Walter Martin & Co.*

W. F. B

1914
May 18.

COWDEN *v.* McEVOY.

Shops—Weekly Half-Holiday—Sale elsewhere than in Shop on Half-Holiday —Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 4, 9.

Sect. 4 of the Shops Act, 1912, provides for the closing of shops not later than 1 o'clock in the afternoon on one weekday in every week, and it enables the local authority, by order, to fix the day on which a shop is to be closed, but where the day fixed is a day other than Saturday, the order is to provide for enabling Saturday to be substituted for such other day as respects any shop in which notice to that effect is affixed by the occupier. A person contravening the section is guilty of an offence.

Sect. 9: "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act."

In Liverpool the local authority fixed Wednesday as the weekly half-holiday, but the order provided that if the occupier of a shop elected to close his shop on Saturday instead of on Wednesday he might close from 1 o'clock P.M. on that day. The respondent carried on retail trade in her private house in Liverpool on a Wednesday afternoon. No notice under the Shops Act was affixed in her house:—

Held, that it was no answer to a charge under s. 9 of the Act for the respondent to say that as any shopkeeper in the locality might, by affixing a notice, have substituted Saturday afternoon for Wednesday afternoon as the weekly half-holiday, it was not unlawful to carry on retail trade on Wednesday after 1 o'clock P.M.

CASE stated by the stipendiary magistrate for Liverpool.

An information was preferred by the appellant, Cowden, against the respondent, Mary McEvoy, for having, on Wednesday, February 18, 1914, carried on the retail trade or business of a grocer in a place not being a shop after 1 P.M., when it was unlawful in the particular locality to keep a shop open for the purposes of the said retail trade or business.

On the hearing of the information the following facts were proved:—

(1.) The respondent, on February 18, 1914, was the occupier of No. 6, Queen Anne Street, Liverpool, which was an ordinary dwelling-house.

(2.) The respondent's mother was the occupier of a grocer's

shop in the immediate neighbourhood, which she closed on Wednesday afternoons in compliance with the Liverpool Half Holiday Order (No. 1) made by the Liverpool City Council under the Shops Act, 1912, and her shop was in fact so closed at 1 P.M. on Wednesday, February 18, 1914.

(3.) On Wednesday afternoon, February 18, 1914, some of the furniture was removed from the front room on the ground floor of the house No. 6, Queen Anne Street, and part of the room was screened off. In the front portion of the room and in the window groceries supplied by the respondent's mother were exposed for sale, and the front door of the house was wide open.

(4.) Groceries were sold by the respondent at 7.50 P.M. on Wednesday, February 18, 1914, but on all the other days of that week the house No. 6, Queen Anne Street was used solely as an ordinary dwelling-house.

(5.) The corporation inspector asked the respondent, "Do you sell groceries?" and she replied, "Only on Wednesday afternoons after 1 o'clock." No notice under the Shops Act was affixed in the house No. 6, Queen Anne Street.

(6.) Clause 2 of the Liverpool Half Holiday Order (No. 1) was as follows: "All shops to which this order applies shall close for serving customers on Wednesday in each week from one o'clock P.M., provided that where the occupier of a shop elects to close his shop for the weekly half-holiday on a Saturday instead of Wednesday he may close from one o'clock P.M. on that day."

The magistrate was of opinion that the front room of the house No. 6, Queen Anne Street was not a shop within the meaning of the Shops Act, 1912. He was further of opinion that, as any grocer carrying on business in Liverpool could carry on business on Wednesday afternoons after 1 o'clock if he or she had elected to open on that day and close at 1 P.M. on Saturday, it could not be deemed to be unlawful (within the meaning of s. 9 of the Shops Act, 1912) in that locality to keep a shop open for the purposes of a retail grocer's business after 1 P.M. on Wednesday, February 18, 1914. He therefore decided that it was not unlawful to carry on in No. 6, Queen Anne Street the retail business of a grocer on Wednesday, February 18, after 1 P.M., and dismissed the information.

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The question for the opinion of the Court was whether the magistrate was right in so deciding.

Rigby Swift, K.C. (*F. E. Bodel* with him), for the appellant. The question in this case turns on ss. 4 and 9 of the Shops Act, 1912. (1) By s. 4 all shops, with certain exceptions not material to this case, must be closed in the afternoon on one weekday in every week, and in Liverpool, by the order made by the city council, Wednesday is made the weekly half-holiday. The proviso to s. 4 enables a shopkeeper to elect to close on Saturday afternoon instead of on Wednesday afternoon, if a notice to that effect has been affixed by the occupier. No such notice was affixed in this case. Sect. 9 of the Act, under which the respondent was prosecuted, prohibits the carrying on in any place not being a shop retail trade or business of any class at any time "when it would be unlawful" in that locality to keep a shop open for the purposes of retail trade or business of that class. The words "when it would be unlawful" obviously refer to the weekly half-holiday. The fact that a shopkeeper, by complying with a certain condition, namely, affixing a notice, might substitute Saturday for Wednesday does

(1) Shops Act, 1912 (2 Geo. 5, c. 3):—

Sect. 4, sub-s. 1: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week."

Sub-s. 2: "The local authority may, by order, fix the day on which a shop is to be so closed (in this Act referred to as 'the weekly half-holiday'), and any such order may either fix the same day for all shops, or may fix—

"(*a*) different days for different classes of shops; . . . .

"Provided that—

"(i.) Where the day fixed is a day other than Saturday, the order shall provide for enabling Saturday to be substituted for such other day . . . .

as respects any shop in which notice to that effect is affixed by the occupier . . . ."

Sub-s. 7 makes any contravention of, or failure to comply with, the section an offence against the Act.

Sect. 9: "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act: . . . . ."

not, where that condition has not been complied with, make it lawful to keep open premises for retail trade or business on the Wednesday. If the view taken by the stipendiary magistrate is right, s. 9 can have no operation whatever.

The respondent was not represented.

RIDLEY J. In my opinion the view taken by the stipendiary magistrate was wrong. Sect. 4 of the Shops Act, 1912, enacts that shops are to be closed on one afternoon in every week. It further provides that the particular day is to be fixed by the local authority in the first instance; but the shopkeeper is given the right to substitute another day, and the order of the local authority is to be drawn so as to give this alternative. Sect. 9 is then added, and it prohibits the carrying on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class. In this case proceedings were taken against the respondent, and the charge was that she carried on the retail trade or business of a grocer "in a place not being a shop, to wit, No. 6, Queen Anne Street, in the city aforesaid after one o'clock P.M. when it was unlawful in that locality to keep a shop open for the purposes of the said retail trade or business." This was done on a Wednesday, and by the Liverpool Half Holiday Order that was the afternoon on which it was unlawful to keep a shop open. In my opinion it is no answer to that charge to say that any shopkeeper could, if he had thought proper, have applied to have Saturday substituted for Wednesday as regards himself. If that were held to be a sufficient answer, the Act would be unworkable. The case must go back to the stipendiary magistrate with a direction to convict the respondent.

ROWLATT and SHEARMAN JJ. concurred.

Appeal allowed; case remitted.

Solicitors for appellant: *F. Venn & Co., for Edward R. Pickmere, Liverpool.*

J. S. H.

1914
May 19.

PURDIE *v.* THE KING.

[1913 P. 1430.]

Revenue—Income Tax—Income of Married Woman living with her Husband—Charge of Income Tax—Deduction of Tax at Source—Claim for Repayment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 45.

A married woman living with her husband was the registered proprietor of shares in an English company and the holder of foreign bonds. Income tax was deducted by the company from the dividends on the shares, under s. 54 of the Income Tax Act, 1842, and by the bankers who paid the interest on the bonds, under s. 2 of the Income Tax (Foreign Dividends) Act, 1842, and was paid by the company and the bankers to the proper officer for the receipt of taxes.

The first proviso to s. 42 of the Income Tax Act, 1842, provides that "the profits of any married woman living with her husband shall be deemed the profits of the husband and the same shall be charged in the name of the husband and not in her name":—

Held, that the tax was not charged upon the married woman contrary to the provisions of s. 42, but was charged upon the company and the bankers, and that therefore the amount of the tax was properly retained by the Crown and could not be recovered by her.

PETITION OF RIGHT heard before Rowlatt J. without a jury.

The suppliant, who was a married woman living with her husband, was the registered proprietor of shares in an English company and the holder of some foreign bonds for her sole and separate use. The company deducted income tax from the dividends payable to her, under the provisions of s. 54 (1) of

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 54: "Every such officer before described of any corporation . . . . shall also, within the like period, prepare and deliver in like form and manner a true and correct statement of the profits and gains to be charged on such corporation . . . . computed according to the directions of this Act, together with such declaration of the manner of estimating the same as aforesaid; and such estimate shall be made on the amount of the annual profits and gains of such Corporation . . . . before any dividend shall have been made thereof to any other persons . . . . having a share, right, or title in or to such profits or gains, and all such other persons . . . . shall allow out of such dividends a proportionate deduction in respect of the duty so charged; . . . ."

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the Income Tax Act, 1842, and the bankers through whom the interest on the bonds was paid deducted income tax from the interest under the provisions of s. 2 (1) of the Income Tax (Foreign Dividends) Act, 1842; and the sums so deducted were paid by the company and the bankers to the proper officer for the receipt of taxes.

The suppliant claimed repayment from the Inland Revenue of the sums so deducted for income tax upon the ground that she, being a married woman living with her husband, could not be

(1) Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80), s. 2: "All persons intrusted with the payment of annuities, or any dividends or shares of annuities, payable out of the revenue of any foreign State to any persons . . . . in Great Britain, or acting therein as agents or in any other character, shall, without further notice or demand thereof, deliver or cause to be delivered into the head office for stamps and taxes in England an account in writing containing their names and residences, and a description of the annuities, dividends, and shares intrusted to them for payment within one calendar month after the same shall have been required by public notice in the London Gazette, and shall also, on demand by the inspector authorized for that purpose by the commissioners of stamps and taxes, deliver or cause to be delivered to him, for the use of the said commissioners for special purposes, true and perfect accounts of the amount of annuities, dividends, and shares payable by them respectively; and the said commissioners for special purposes shall make an assessment thereon under Schedule (C.) of the said last recited Act" (5 & 6 Vict. c. 35), "at the rate therein prescribed, subject to diminution on occasion of any exemptions to be allowed by the said commissioners for special purposes, giving notice of the amount of such assessment to the respective persons intrusted with such payments, who shall respectively pay the duty on the said annuities, dividends, and shares, on behalf of the persons . . . . entitled unto the same, out of the monies in their hands, and they shall be acquitted of such payments in like manner, and the like proceedings in all respects shall be had under the said commissioners for special purposes, as are by the said last recited Act directed in respect of annuities payable out of the public revenue of the United Kingdom: Provided always, that the persons intrusted with such payments shall from time to time pay the duty so assessed thereon into the Bank of England, to the account to be kept at the Bank of England with the Receiver General of Stamps and Taxes, as directed by the said Act, and shall be answerable for such payment, and which duty so assessed shall, in default of such payment, be recoverable against the persons respectively intrusted with such payment, as other duties charged on the parties may be recovered against them; . . . ."

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charged with income tax by reason of the provisions of s. 45 (1) of the Income Tax Act, 1842. The claim for repayment having been refused, she presented a petition of right asking for repayment. The Crown demurred to the petition upon the ground that it disclosed no ground in law why the sums so deducted should be repaid to the suppliant.

The Suppliant in person. The effect of s. 45 of the Income Tax Act, 1842, is that a married woman living with her husband cannot be charged with income tax. When the tax is deducted at the source from the income of such a married woman she is charged with income tax contrary to the provisions of s. 45, and therefore has a right to have the amount of tax so deducted repaid to her by the Inland Revenue authorities to whom it has been paid over. The provisions of s. 54 of the Act, and of s. 2 of the Income Tax (Foreign Dividends) Act, 1842, under which a company in respect of dividends, or a banker or other agent in respect of foreign investments, pays the income tax to the Inland Revenue and deducts it from the dividend or interest, are mere machinery for collection and do not impose any liability to taxation. It is true that the company or banker must obey those provisions and cannot be sued for deducting the amount of the tax, but when they have paid it to the proper officer for the receipt of taxes it is the proceeds of a tax which has been illegally imposed and ought therefore to be repaid to the person upon whom it has been imposed. [She referred to *Partington* v. *Attorney-General* (2); *Gilbertson* v. *Fergusson* (3); *Coltness Iron Co.* v. *Black* (4); *Income Tax Commissioners* v. *Pemsel.* (5)]

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 45: "Any married woman acting as a sole trader by the custom of any city or place, or otherwise, or having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties, and in like manner except as hereinafter is mentioned, as if she were actually sole and unmarried: Provided always, that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee: . . . ."

(2) (1869) L. R. 4 H. L. 100, 122.

(3) (1881) 7 Q. B. D. 562.

(4) (1881) 6 App. Cas. 315.

(5) [1891] A. C. 531.

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W. Finlay (with him *Sir S. O. Buckmaster, S.-G.*), for the Crown. Sect. 45 manifestly refers and can only refer to a personal charge or assessment upon the married woman living with her husband, and has no reference to cases where the tax is deducted at the source. The provisions of s. 54 as to the deduction of income tax in the case of dividends upon shares in an English company clearly apply in terms to this case, and compliance with those provisions is in no way contrary to s. 45. By s. 54 the charge or assessment to the tax is imposed upon the company and not upon the shareholder. In the same way the provisions of s. 2 of the Income Tax (Foreign Dividends) Act, 1842, charge the tax upon the banker or other agent and not upon the person to whom the interest is paid, and the tax has to be paid to the proper officer, and the banker or agent has a right to deduct the amount of the tax. The result is that in this case the suppliant clearly has not been charged with income tax, within the meaning of s. 45, and there has not been any contravention of the provisions of that section.

The Suppliant replied.

ROWLATT J. The point raised is a short one, and has been put very clearly by the suppliant. She says that although the dividends on shares and the interest on foreign bonds rightly, as between herself and the company and the bankers, suffered deduction of income tax and the money so deducted was rightly paid by them to the Crown, yet no liability to pay income tax having been imposed upon her, she being a married woman living with her husband, the Crown ought to pay the money back to her, because it was only through machinery, if I may use that expression, that this money was paid to the Crown. That contention is founded upon the first proviso to s. 45 of the Income Tax Act, 1842, but I think that it is founded upon a complete misapprehension.

I will explain exactly how, as I understand it, the law on this matter stands. Income tax is charged by an annual statute which applies the Income Tax Acts, 1842 and 1853, and other Acts, and it is charged under the terms of five schedules. Sched. C under the Act of 1853 charges, among other things,

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the interest payable to any person out of any public revenue, which includes foreign revenue. That kind of interest is there charged whether it is payable to a man or a woman, or to a married woman whether living with her husband or not; all persons entitled to such interest are so far made subject to this charge. The machinery for collecting the tax on that interest is found in s. 2 of the Income Tax (Foreign Dividends) Act, 1842, which provides that in the case of annuities or dividends payable out of the revenue of any foreign State an assessment shall be made upon the agents here who are entrusted with the payment. Those agents are assessed upon the total sum which they have to pay as interest in this country and they have to pay the duty "on behalf of the persons . . . . entitled unto the same." So far, then, there is a statute which provides that the interest on a foreign loan, to whomsoever payable, is to be charged with income tax, and another statute which provides that the agents for payment are to be assessed and are to pay on behalf of the persons entitled to the interest. In the same way, with regard to a company, Sched. D charges income tax upon the profits of the company made on behalf of its shareholders; and s. 54 of the Income Tax Act, 1842, provides that every company shall deliver a true statement of its annual profits before any dividend has been made to any persons and that such persons shall allow out of the dividends a proportionate deduction in respect of the duty charged. The company, therefore, is assessed and pays the tax. There is, strictly speaking, no tax upon dividends at all; the company has to pay income tax upon its profits as a company, and, having paid the income tax, the effect is that there is less to divide among the shareholders. Sometimes a company declares what it calls a dividend "free of income tax," which means that having paid income tax the dividend paid is less because there is less to divide. Sometimes it declares a dividend which it does not call free of income tax, and then it deducts a certain percentage from the dividend, stating that it is for income tax. The real effect of the latter course is, not that the company has declared a dividend of the full amount and then deducted income tax from it, but that it has declared a dividend of the net amount and told the

shareholders that it would have been so much more but for the fact that the profits of the company were charged with income tax before the dividend was made. Strictly speaking, therefore, the suppliant has not been charged with income tax at all in respect of her interest and dividends. The charge is imposed upon the agents who pay the interest and upon the company which pays the dividends, and the agents and the company have to pay the amount of the income tax to the Crown in respect of that charge.

The suppliant has been misled by the provisions of s. 45. That section consists of the enacting part and two provisoes. It is a frequent source of error to take a proviso and treat it as a substantive enactment; a proviso is something which limits the apparent generality of the enacting part. When this section is read through, it is in my opinion quite clear. It says [the learned judge read the section]. The enacting part, therefore, says that a married woman shall be charged exactly as if she were sole. If she carried on a separate business she would be assessed and charged; and if she were in receipt of dividends or interest she would be assessed and charged or would suffer deduction of the tax at the source. Those are the two ways in which she would have to bear the burden of the income tax. Then comes the proviso. It is true that the word "charged" may be wide enough to include the case of deduction from dividends or interest, and the suppliant pointed out a section in which the word is used in that large sense. But the framework of this section shews clearly to my mind that this proviso is dealing only with a charge made in the name of the taxpayer, that is to say, when he is assessed, because if it were extended to the case where income tax is only deducted it would become nonsensical. The suppliant contends that this income tax ought to have been charged in the name of her husband; but that clearly cannot be so, because it is of the very essence of deduction of income tax that the person entitled to the dividends or interest cannot himself be charged, as I have pointed out, but that it is charged upon the company or agents who pay the dividends or interest and make a deduction in respect thereof.

This income tax was accordingly properly deducted from the

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suppliant's income, and quite properly and legally retained by the Crown. The petition must, therefore, be dismissed.

Judgment for the Crown.

Solicitors for suppliant: *Tiddeman & Enthoven.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. H. W.

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April 3, 6.

[IN THE COURT OF APPEAL.]

EGYPTIAN HOTELS, LIMITED *v.* JAMES MITCHELL.

Revenue—Income Tax—Company resident in England—Trade carried on Abroad—Income Tax Act, 1842 (*5 & 6 Vict. c.* 35), *s.* 100, *Sched. D, 1st Case, 5th Case—Income Tax Act,* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2; *Sched. D.*

A company incorporated in the United Kingdom carried on from there an hotel business in Egypt till 1908. In that year they altered their articles of association by resolutions which provided that all the company's affairs and business in Egypt should be carried on and managed by a local board to the exclusion of any board of directors other than the local board. The local board were to meet only in Egypt, were to be affected by resolutions of general meetings held in Egypt only, and were to exercise all the powers of the company requisite for the Egyptian business. They were to retain the profits in Egypt and remit to England what might be necessary to pay dividends to shareholders resident here, and for expenses incurred by the London board. The London board were to keep accounts, recommend dividends, and control the capital. The only business carried on by the company was the Egyptian hotel business. The resolutions were strictly acted upon from the date of their confirmation, and the company appealed from an assessment to income tax for the year ending April 6, 1909 :—

Held (reversing the decision of Horridge J.), that the powers still exercised by the London board were only powers to deal with profits after they were made, and did not refer to the trade of the company; that no part of the trade was now carried on in the United Kingdom; and that the company was not assessable to income tax since the date of the resolutions, except in respect of profits remitted to this country.

APPEAL from a decision of Horridge J.

This was a case stated under the statute 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

At a meeting of the Commissioners held on December 1, 1910, the Egyptian Hotels, Limited, appealed against an assessment to income tax of 43,332*l.* for the year ending April 5, 1909, made by the Additional Commissioners of Income Tax on April 7, 1909, and allowed and confirmed by the General Commissioners on June 29, 1909, made upon the company under Sched. D, case 1 of s. 100 of the Income Tax Act, 1842 (computed according to the rules of the Income Tax Acts), under the following circumstances.

The assessment was based on the profits of the company calculated on the average of the three previous years ending April 30, 1907, in accordance with the rules of the Income Tax Acts.

The company was registered in England on January 12, 1897, under the Companies Acts, 1862 to 1893, as a company limited by shares.

The memorandum of association provided (inter alia):—

"Clause 2. The registered office of the company will be situate in England."

"Clause 3. The objects for which the company is established are:—

"(1.) To enter into and carry into effect with such modifications (if any) as may be agreed upon the agreement referred to in clause 3 of the company's articles of association.

"(2.) To carry on the business of hotel, restaurant, and other kindred trades and occupations as in the said articles mentioned.

"(6.) To procure the company to be registered or recognised in Egypt or elsewhere abroad.

"(16.) To borrow or raise money for the purpose of the company, and to give any security for the payment of money which may be deemed necessary or desirable and for the purposes of securing money borrowed or otherwise to create execute and issue or re-issue mortgages, bonds, perpetual or redeemable debentures etc."

"Clause 5. The capital of the company is 230,000*l.* divided into 11,500 preference shares of 10*l.* each and 115,000 ordinary shares of 1*l.* each."

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By the articles of association (inter alia) it was provided:—

"Clause 3. The company shall forthwith enter into an agreement with Mr. J. Ornstein for the purchase of Shepheard's Hotel and other hotels and property in Egypt in the terms of the draft agreement which has already been prepared."

"GENERAL MEETINGS.

"Clause 58. The first general meeting shall be held at such time (not eing more than four months after the registration of the memorandum of association of the company) and at such place in London as the directors may determine."

"Clause 59. Subsequent general meetings shall be held once a year at such time and place in London as may be prescribed by the company in general meeting and if no time or place is so prescribed at such time and place in London as may be determined by the directors."

"Clause 116. The management of the business and affairs of the company shall be vested in the directors and the directors in addition to the powers and authority by these presents expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute directed or required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the statutes and of these presents and to any regulations from time to time made by the company in general meeting provided that no such regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

"Clause 117. Without prejudice to the general powers conferred by the last preceding clause and so as not in any way to limit or restrict those powers and without prejudice to the other powers conferred by these presents it is hereby expressly declared that the directors shall have the following powers that is to say power." Then followed certain sub-sections to the following effect, viz.:—

"(1.) To pay preliminary expenses.

"(2.) To acquire property.

"(3.) To pay for property in shares, debentures &c.

"(4.) To secure contracts by mortgage.

"(5.) To appoint officers &c.
"(6.) To accept surrenders of shares.
"(7.) To appoint trustees.
"(8.) To bring and defend actions &c.
"(9.) To give receipts.
"(10.) To authorise acceptances &c.
"(11.) To invest moneys.
"(12.) To give security by way of indemnity.
"(13.) To give percentages.
"(14.) To establish reserve fund.
"(15.) To make, vary, and repeal by-laws.
"(16.) To make, rescind, and vary contracts."

"LOCAL MANAGEMENT.

"Clause 118. The directors may from time to time provide for the management and transaction of the affairs of the company in any specified locality whether at home or abroad in such manner as they think fit and the provisions contained in the three next following clauses shall be without prejudice to the general powers conferred by this clause."

"Clause 119. The directors from time to time and at any time may establish any local board or agency for managing any of the affairs of the company in any specified locality or may appoint any persons to be members of such local board or managers or agents and may fix their remuneration And the directors from time to time and at any time may delegate to any persons so appointed any of the powers authorities and discretions for the time being vested in the directors other than their power to make calls and may authorise the members for the time being of any such local board or any of them to fill up any vacancies therein and to act notwithstanding vacancies and any such appointment or delegation may be made on such terms and subject to such conditions as the directors may think fit and the directors may at any time remove any person so appointed and may annul or vary any such delegation."

Clause 120 empowered the directors by power of attorney under seal of the company to appoint any persons to be the attorneys of the company for such period and subject to such conditions as the directors might from time to time think fit, and any such

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appointment might if the directors thought fit be made in favour of the members of any local board.

"Clause 122. The company may exercise the powers conferred by the Companies Seals Act 1864 and such powers shall accordingly be vested in the directors."

"Clause 124. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits."

"Clause 125. No larger dividend shall be declared than is recommended by the directors but the company in general meeting may declare a smaller dividend."

"Clause 127. The declaration of the directors as to the amount of the net profits of the company shall be conclusive."

"Clause 135. The directors shall cause true accounts to be kept . . . . "

"Clause 137. Directors shall lay before the company a profit and loss account and a balance sheet."

The company acquired certain hotels in Egypt known as Shepheard's Hotel and the Ghezireh Palace Hotel at Cairo, and the said hotels during the period covered by the assessment were and are now the property of the company.

An extraordinary general meeting of the company was held in London on August 10, 1908, when the following special resolutions were passed and subsequently confirmed at a confirmatory meeting also held in London on August 27, 1908 (during the year of assessment appealed against in this case). Such special resolutions became operative on and from August 27, 1908.

The special resolutions were as follows:

That clauses 118, 119, 120, 121 and 122 of the articles of association of the company with the words 'local management' be repealed and that the following new clauses be substituted for the same that is to say:—

Local Board. 118. The Egyptian business of the company (which expression in these articles means and includes all the company's affairs and business whatsoever in Egypt and the Soudan inclusive amongst other things of the business of carrying on the company's hotels in Egypt and the Soudan and

everything connected therewith including the incurring of debts and liabilities buying selling and supplying goods, the hiring using and supplying labour paying of debts and the doing of all things necessary or in any way incidental to such business) shall be carried on and managed by a local board and that to the exclusion of any board of directors of the company other than the local board, and such local board shall be wholly independent of any other directors and board of the company and of general meetings of the company (not being general meetings of the company held in Egypt) and in no way under the control thereof. Only general meetings of the company held in Egypt shall (to the exclusion of general meetings held elsewhere) be competent to pass any resolution binding on the local board or having any binding force upon or in regard to the Egyptian business of the company. The local board shall meet only in Egypt or the Soudan and not elsewhere.

119. The local board shall consist of not less than three and not more than seven persons to be from time to time appointed by resolution of a general meeting of the company held in Egypt and every member of the local board shall ipso facto vacate office if and when he is requested by resolution of a general meeting held as aforesaid to resign. The qualification of a member of the local board shall be the holding of shares of the company of the nominal value of 200*l.* and he shall receive such remuneration as the directors may from time to time determine. A director may hold the office of member of the local board in conjunction with his directorship.

120. Save as aforesaid clauses 93 to 115 inclusive shall mutatis mutandis (with any modifications necessary to make them applicable to the local board) apply to the local board and the members thereof as if the same were here repeated but with the term 'local board' substituted for the term 'directors' and with the term 'member of the local board' substituted for the term 'director' and with the year 1909 substituted for the year 1899 and with the condition that any reference to a general meeting shall mean a general meeting held in Egypt.

121. The Egyptian business shall be under the control of the

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local board (to the exclusion of any other board of directors of the company) who may in relation thereto exercise all such powers of the company as the local board in their opinion think requisite for the purpose of working developing and dealing with the Egyptian business, and the profits of the Egyptian business shall be from time to time ascertained as and when the directors consider expedient and unless and until and except as otherwise directed by the directors the local board shall retain in Egypt the profits of the Egyptian business and shall remit to England such sums only (*a*) as shall be necessary to enable dividends payable to persons in the United Kingdom to be paid and (*b*) as may be specifically and specially required by the London board to be transmitted to London for expenses of the company incurred by that board in London. Dividends to persons outside the United Kingdom shall be satisfied out of profits retained in Egypt and sufficient profits to pay any dividends from time to time declared which are payable to persons outside the United Kingdom shall be retained in Egypt and that notwithstanding any direction from the directors.

122. The company may exercise the powers conferred by the Companies (Seals) Act 1864 and such powers shall be vested in and exercisable by the local board.

122A. The first members of the local board shall be Edward Aubrey Harrison Esq. Jean Jaques Hug Esq. and Emmanuel Constantin Zervudachi Esq. The local board shall be constituted and empowered to act as such on and from the 1st day of April 1908.

122B. The general meetings of the company may be held from time to time in Egypt. One such meeting shall be held in every year at such time and place as the local board may from time to time consider convenient.

122C. Clauses 59 to 65 and 67 to 85 of the articles of association of the company shall apply with the necessary modifications to general meetings of the company held in Egypt and any reference to directors therein shall include a reference to members of the local board so far as relates to any general meetings held or to be held in Egypt. General meetings in Egypt shall only be concerned with Egyptian business.

122D. The eight last preceding clauses shall be taken to override all the other regulations of the company not consistent therewith."

The business carried on by the company during the year of assessment was the carrying on of Shepheard's Hotel and the Ghezireh Palace Hotel, which are situate in Egypt. These hotels were under the direct management of servants of the company. Since August 27, 1908, these servants were under the orders of the Egyptian local board in accordance with the powers and provisions set out in the special resolutions above referred to. During the year of assessment the company's profits were derived from the said hotels and no other source. Transfer fees of small total amount were received in England on transfers of shares. All the profits (except transfer fees) included in order to arrive at the average of the 43,332*l.* upon which the company was assessed as above mentioned were in fact derived from the said hotels.

Before and after August 27, 1908, all the meetings of the directors of the company had been held from time to time at the offices of the company in England and not elsewhere, and such directors were empowered to and did deal with the general affairs of the company, including all general financial arrangements of the company. The preference share capital amounted to 115,000*l.* The ordinary share capital amounted to 115,000*l.* The first mortgage 4½ per cent. debenture capital amounted to 75,000*l.* and the second debenture capital amounted to 49,000*l.*, and various reserve funds were in existence. In addition to the management of the financial arrangements of the company by the board of directors in England they had in 1897, immediately after the company was formed, invested large sums in the purchase of Shepheard's Hotel (Cairo), the Ghezireh Palace Hotel (Cairo), and the Victoria Hotel (Ismailia) and other lands in Egypt, including some lands forming part of the Ghezireh Palace site and surroundings and included in the purchase of the hotel. Such land had to be purchased as part of the terms of purchase of the hotel. In 1899 the company purchased a small piece of land opposite the Ghezireh Palace Hotel which was necessary to preserve its amenities. The Ghezireh Palace Hotel purchase

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included with the hotel about sixty acres of land, part of which the company did not require and accordingly sold as occasion offered, the latest sale, which was the compulsory sale to the Government of a small piece of land, taking place in March, 1907. For many years the company had also been engaged in developing portions of the above lands for building purposes and spent large sums for that purpose in roadmaking, laying down water mains and electric lighting, and had made large sales and realized large sums for the sale of plots of such building land. Payment of part of the purchase-money on the sales was made by instalments extending over a period of ten years from April, 1906. The company had created a sinking fund for the redemption of the debentures invested in the names of trustees for the debenture-holders under the debenture trust deed. On April 30, 1909, 29,791*l.* 3*s.* 5*d.* had been allocated for this purpose, but all of that fund except 44*l.* had been from time to time applied in the purchase or drawing of first and second mortgage debentures.

After August 27, 1908, no meeting of the company's board of directors was held in England or elsewhere until June 15, 1909, and no meeting of the Egyptian local board had been held in England nor outside Egypt.

The report of directors and accounts at April 30, 1909, were submitted and adopted at the twelfth annual meeting of the company held on June 29, 1909, in London.

Mr. W. B. Peat (a director of the company and a member of the firm of W. B. Peat & Co., the secretaries of the company who carried on business in England) gave evidence that the annual meetings of the shareholders (other than Egyptian meetings provided for by the amended articles of association) were held in England; that a considerable area of land was pledged by the trust deed dated January 29, 1897, to the trustees for the company's debenture-holders who held the deeds, and the above sales of land by the company were carried through from England and effected in accordance with the terms of the trust deed and were sold by the Egyptian attorneys for the debenture trustees (under power of attorney) in Egypt; that the common seal of the company was kept in this country; that the company

had a bank account in England, but the main bank account was and is kept in Egypt; that the dividends proposed to be paid were recommended by the directors in England and declared by general meetings in England once a year in or about June; that in the year of assessment the dividend was declared in June; that the dividends due to shareholders in the United Kingdom were paid in England to such shareholders and the dividends due to foreign shareholders were not transmitted to the United Kingdom but paid in Egypt or Switzerland (in which latter country the company also had another banking account); that since August 27, 1908, the special resolutions which then became operative had been strictly observed and acted upon; that the local management of the hotels was carried on exclusively by the local board in Egypt, who reported the financial trading results to the board of directors of the company in England for the purpose of being incorporated in the company's accounts and balance-sheets and acted upon for the declaration of dividends. After August 27, 1908, no dividends were declared during the year of assessment.

It was admitted that the appellant company resided in England. The company had offices and a secretary in Egypt as well as in England. The hotels and Egyptian accounts were made up in Egypt and were there audited and certified locally in Egypt by Mr. Alfred Busby, chief accountant of Messrs. Thomas Cook & Son (Egypt), Limited, and were subsequently forwarded to the company's office in England and submitted to the general meetings of the company in London. The balance-sheets and the profit and loss accounts of the company were made out in London. All the accounts of the company were, except so far as rendered unnecessary by the local audit in Egypt, audited in England.

In reference to clause 118 of the amended articles of association of the company, it was admitted that no general meetings of shareholders of the company had during the year of assessment or ever been held in Egypt. The local board in Egypt had from time to time regularly met in Egypt. This local board was composed of gentlemen permanently resident in Egypt. The board of directors had not met out of England except once about ten years ago, when it met in Paris.

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It was contended on behalf of the company that the available profits of the company were made in Egypt alone; that the profits in fact came home to the company in Egypt from transactions and operations in and not outside Egypt; that since August 27, 1908, the company had in no sense whatever carried on business in connection with their hotels in the United Kingdom, and that neither partly nor otherwise; that *Colquhoun* v. *Brooks* (1) governed the case, and not *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (2); that in every sense since August 27, 1908, the hotel businesses were carried on or exercised exclusively in Egypt; that the company had ceased to carry on any of the hotel business in the United Kingdom on August 27, 1908, and in any event (if taxable at all under Sched. D, case 1) they were under obligation to pay income tax under case 1 only in respect of the period April 6, 1908—August 27, 1908, and not otherwise. The company expressed their willingness to pay in respect of this last-mentioned period.

The Commissioners having considered the evidence found that the head and seat and controlling power of the company remained in England with the board of directors of the company, and were of opinion on the facts that the assessment was duly and properly made, and they dismissed the appeal.

The company thereupon expressed their dissatisfaction with the decision of the Commissioners as being erroneous in point of law, and duly required them to state and sign a case for the opinion of the High Court of Justice.

Horridge J. held that the decision of the Commissioners was right, and the company appealed.

Danckwerts, K.C., and *Bremner*, for the appellants. Down to August 27, 1908, the trade of the company was in fact carried on partly in this country and partly in Egypt. After that date it ceased to be carried on in England and the business was carried on entirely in Egypt by the local board appointed for that purpose, the constitution of the company having been altered to effect that object. That alteration deprived the English directors of any power to control the business.

(1) (1889) 14 App. Cas. 493. (2) [1896] A. C. 31.

[COZENS-HARDY M.R. By whom are the dividends declared?] It is submitted that that is not a relevant consideration. Dividends are only declared after they have been earned in the business.

The words of Sched. D are very wide, and, as was pointed out by Lord Macnaghten in *Colquhoun* v. *Brooks* (1), the whole schedule must be read together. The Crown seeks to tax the whole of the profits of the company whether remitted to this country or not. This, it is submitted, is wrong.

[BUCKLEY L.J. The question seems to be whether a company which is resident here, and which exists only to own a foreign possession and does not control it from here, is assessable to income tax.]

Upon that the appellants rely upon *Colquhoun* v. *Brooks* (2); *Ogilvie* v. *Commissioners of Inland Revenue* (3); *Denver Hotel Co.* v. *Andrews* (4); *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5); *American Thread Co.* v. *Joyce.* (6) Here the English directors are in the position of sleeping partners having no power to control the business carried on in Egypt.

The whole of the trade is carried on abroad. The first question is what transactions constitute the trade? Secondly, who are the persons who carry it on, and thirdly, where do they carry it on? On the first point the appellants submit that the only transactions to be considered are such as are carried on with a view to making a profit: *Sulley* v. *Attorney-General* (7); *Gramophone and Typewriter* v. *Stanley* (8); *Lovell & Christmas* v. *Commissioner of Taxes.* (9) The expression used in s. 2, Sched. D, of the Income Tax Act, 1853, is "exercising" a trade in the United Kingdom, and the appellants' trade is not exercised here according to the tests specified in *Grainger & Son* v. *Gough.* (10) The word "exercise" includes carrying on: *Erichsen* v. *Last.* (11) It is immaterial that some meetings are held here. Nothing is done in this country for the direct

(1) 14 App. Cas. 493, 514.
(2) 14 App. Cas. 493.
(3) 1908 S. C. 1003.
(4) (1895) 3 Tax Cases, 356.
(5) [1896] A. C. 31.
(6) (1912) 6 Tax Cases, 1.
(7) (1860) 5 H. & N. 711.
(8) [1908] 2 K. B. 89.
(9) [1908] A. C. 46.
(10) [1896] A. C. 325, 332, 334.
(11) (1881) 8 Q. B. D. 414.

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purpose of making profits. Sched. D of the Income Tax Act, 1842, first case, r. 1, says that the tax is to be paid on the balance of the profits. Transactions which are merely ancillary to the making of profits are not to be taken into consideration. Secondly, the Egyptian board are the persons who carry on the trade, and no one else can interfere with them. That is provided for by the new articles. It is much as if the English board did not exist. Thirdly, all the trade operations are carried on in Egypt.

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the Crown. The real question is whether any part of the trade of this company, however small, is carried on in this country. The relative importance of the two branches of trade operations does not matter; any operations here make the whole of the profits liable to taxation: *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (1) Trade involves two classes of transactions—acts of buying and selling, and acts of financial control. The financial control of the appellants' trade is vested entirely in the English directors. Questions of capital are decided by them only. Under s. 106 of the Income Tax Act, 1842, trade is "carried on" and financial control is "exercised," and the burden is on the appellants to shew that neither is done in this country. They are liable to pay income tax on the true construction of the articles of association, clauses 116, 119, 121. The English directors control the profit and loss account and give to the officials in Egypt the only authority and the only salaries they possess: *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (2) In *Colquhoun* v. *Brooks* (3) the business was exclusively carried on in Australia, so that decision is irrelevant.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of Horridge J. which raises a question whether, within the meaning of the Income Tax Acts, the company, which is an English company and resident in London, with registered offices here, is chargeable in respect of annual profits arising from carrying

(1) [1896] A. C. 31. (2) [1896] A. C. 31, 41.
(3) 14 App. Cas. 493.

on a trade. In my view this question is really a very simple one and does not involve any elaborate consideration of facts. The company at one time admittedly were carrying on a business in London, not because the hotels, which are their only assets, were in the United Kingdom, for they were in Egypt, but because the control of the company was in the hands of the London board of directors. The brain and management and control were here, and the authorities have plainly settled that if you find that, it does not in the least matter where the actual selling of the goods and buying of the goods takes place. Many an English company with offices in London, with a board of directors in London, carries on a business in a remote part of the world; nevertheless it has its trade carried on in London, because the management and brain of the undertaking are at the head office in London.

But in August, 1908, the articles were altered, not colourably altered, but altered, and they have been acted upon ever since. [His Lordship referred to articles 116 and 118 of the original articles.] These articles and the subsequent ones were altered and provision was made for not merely having a local board in Egypt, but for entrusting that Egyptian board with the exclusive management and control of the Egyptian business; and the London board after that controlled no part of the carrying on of the trade, which trade was in Egypt.

Now the new articles, so far as they are material, are these. [His Lordship read clauses 118, 121, and 122D of the new articles.] The special case finds that these were not mere forms, but that the trade has since been carried on in accordance with those amended articles.

Now the whole question is this, not whether the trade has been carried on in this country in the sense of contracts being made here, but whether, although the buying and selling was out of the jurisdiction, there has been such control and direction of the London board, the general board of the company, as makes the profits earned by the trade in Egypt subject to the Income Tax Acts.

The Solicitor-General has said that the London board can starve out the Egyptian directors, because their remuneration

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is entirely dependent upon the London board. That does not make it carrying on the business in London. It is said, "Oh, but the London board are the people who have and who alone have the power to raise fresh capital, to exercise the financial control of the company, and do all that sort of thing." Well, I agree that is so, but the point remains, is that carrying on trade or exercising control over the trade which produces those profits within the meaning of the Acts? In my opinion quite apart from decisions, for I do not think any decision really touches this case, the view taken by the learned judge was wrong, and there was no justification here for saying this company is taxable upon the whole of the profits earned by the trading in Egypt. The only profits which are taxable are such profits as are remitted from Egypt to this country. It makes no difference that the London board are the persons to recommend the amount of the dividend which is payable as the result of trading. That is not the control or the brain of the company in the sense in which those words are used.

On these grounds I think the appeal must be allowed. The profits up to August 27 are admitted to be properly taxable here, since that date no such profits are taxable here, and the appeal ought to be allowed.

BUCKLEY L.J. This company is incorporated in the United Kingdom; it is therefore resident here. It follows that under Sched. D of the Income Tax Act, 1842, it is taxable for and in respect of the annual profits or gains arising or accruing to it from any trade carried on or exercised within the United Kingdom. The question to be answered is does this company carry on or exercise a trade in the United Kingdom? In my opinion it does not. It was down to the date of 1908 governed by articles under which that, no doubt, was the case; it was exercising a trade in the sense that it was controlling the trade from here, managing the trade from here; but in that year alterations were made in the articles by special resolution, and no doubt with the express object, which is a legitimate object, of relieving the company from the payment of income tax on profits earned abroad.

The business of the company consists wholly, solely, and exclusively of carrying on two hotels in Egypt, both at Cairo. In this country the company is registered, and it has certain directors here. Under the articles as they formerly stood, it was provided by article 116 that "the management of the business and affairs of the company shall be vested in the directors," and down to 1908 those directors were persons exercising their office in this country. In 1908 the company passed special resolutions, and those special resolutions provided that certain clauses, of which the new article 118 is one, should be taken to override all other regulations of the company not consistent therewith. They override therefore article 116, if not consistent therewith.

The new article 118 provides that all the company's affairs and business whatsoever in Egypt and the Soudan "shall be carried on and managed by a local board and that to the exclusion of any board of directors of the company other than the local board," with certain ancillary provisions. The result in my judgment is that as regards "the company's affairs and business whatsoever, in Egypt," the carrying on and management is confided to persons out of the United Kingdom, and there is no power of control whatever over what is called "all the company's affairs and business whatsoever in Egypt and the Soudan" exercised in this country. Stopping there, the result is that management, control, and administration are not in this country but elsewhere. There is no trade of any sort or kind here in the sense that there are orders given here or goods sold here or anything of that kind. The considerations relevant in such cases as *Grainger & Son* v. *Gough* (1) are not relevant here. We are not troubled about there being any soliciting orders in this country or anything of that sort; nothing whatever is done in this country in the way of trading. The whole question is whether the control and management of the trade is here. The result so far is that all management and carrying on are remitted by the new articles to persons who are not here. But then the Solicitor-General has argued, and it is true, that there are certain powers still remaining here. There is a board of directors here, and they have certain powers. I do not know that I need travel through them.

(1) [1896] A. C. 325.

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Buckley L.J.

The most substantial, I think, are the provisions relating to accounts and the provisions relating to dividends. It is provided by article 135 onwards that the directors, that is to say the London directors, are to cause true accounts to be kept, and they are to lay them before the company in general meeting and so on. Then, under article 123 onwards, it is still left to the London directors to recommend what the dividends shall be. It is said that that is in some way carrying on or exercising the trade. To my mind, that is not so. The purpose of the accounts is to shew what is the result of the trade that has been carried on; the clauses as to dividends are clauses relating to the disposition of the profits arising from the trade that has been carried on. Then it is said that if the directors do not in their recommendation as to dividends exhaust the fund, there will be a surplus which will be left in the business. That is true but irrelevant. The profits which in the past have been earned in carrying on the trade are dealt with by dividing so much amongst the shareholders and leaving so much of them alone. That is not carrying on the trade.

Another matter which was observed upon is that increase of capital is not remitted to the local board in Egypt, but is to be dealt with by the company in general meeting. As to this and indeed as to everything the company in general meeting no doubt still retain control; they can by exercising their powers in general meeting alter the existing state of affairs; but what we have to consider is, what is the state of affairs now? Is there a carrying on or exercise of the trade in the United Kingdom? To my mind there is none. As from the date when these special resolutions were confirmed, August 27, 1908, the company was not taxable, I think, in respect of these profits, and the appeal must be allowed.

CHANNELL J. I am of the same opinion. I think the case may be put very shortly. It is obvious that the spending of the profits, if any, of a business is not a carrying on of the business, nor is any other way of dealing with the profits, other than spending, any more a mode of carrying on the business. The matters relied on by the respondent are merely powers to deal

with the profits of the business. I have heard what the Master of the Rolls and Buckley L.J. have said, and I entirely agree with it.

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EGYPTIAN HOTELS, LIMITED v. MITCHELL.

Appeal allowed.

Solicitors: *Broad & Co.; Solicitor of Inland Revenue.*

H. C. R.

[IN THE COURT OF APPEAL.]

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RYALL *v.* KIDWELL & SON.

Landlord and Tenant—House let for Habitation—Defective Premises—Undertaking to keep fit for Human Habitation—Accident arising from Defect—Personal Injury to Daughter of Tenant—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15.

By s. 14 of the Housing, Town Planning, &c., Act, 1909, in any contract made for letting for habitation a house to which the Act applies there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation.

By s. 15, sub-s. 1, s. 14 shall, where applicable, take effect as if the condition implied in that section included an undertaking that the house shall during the holding be kept by the landlord in all respects reasonably fit for human habitation. By sub-ss. 3, 4, and 5, if it appears to the local authority that the implied undertaking is not complied with, the local authority may require the landlord to execute such works as they shall specify as necessary. The landlord may thereupon close the house for human habitation; otherwise the authority may do the necessary work and recover the expense from the landlord as therein provided. By sub-s. 6 the landlord may appeal to the Local Government Board. By sub-s. 9 any remedy given by the section for non-compliance with the undertaking implied by virtue of the section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord either at common law or otherwise:—

Held, that the effect of these enactments is to import into the contract of tenancy an implied undertaking by the landlord towards the tenant alone that the demised premises shall be during the holding in all respects reasonably fit for human habitation, and that a stranger to the contract of tenancy has no remedy for a breach of this implied undertaking.

Cavalier v. *Pope* [1905] 2 K. B. 757; [1906] A. C. 428 applied.

Decision of Divisional Court (Ridley and Avory JJ.) [1913] 3 K. B. 123 affirmed.

APPEAL by the plaintiff from the decision of a Divisional Court affirming a judgment of the judge of the county court of Kent holden at Rochester; reported [1913] 3 K. B. 123.

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The plaintiff, Frances Alice Ryall, an infant, by Henry Charles Ryall, mason, her father and next friend, brought an action in the county court against the defendants to recover damages for personal injuries sustained by her on October 31, 1912, owing to the alleged negligence of the defendants in allowing the floor of a bedroom in a house known as 35, Britton Street, Gillingham, to be in a defective and dangerous condition.

Henry Charles Ryall was tenant and the defendants were landlords of the house in question, which was let by the defendants to the said Henry Charles Ryall at a weekly rent of five shillings. On October 31, 1912, the plaintiff, who had been standing on a window-sill cleaning windows, stepped from the window-sill on to a chair. One leg of the chair slipped into a hole in the floor. The plaintiff fell and sustained the injuries complained of.

The county court judge gave judgment for the defendants, holding, upon the authority of *Cavalier* v. *Pope* (1), that the relation created by the statute was contractual and between the landlord and the tenant only, and therefore that the plaintiff had no cause of action. The plaintiff appealed, and the Divisional Court (Ridley and Avory JJ.) affirmed the judgment of the county court judge.

The plaintiff appealed.

C. T. Williams, for the appellant. The house in question is one to which ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909 (2), apply. Those sections are an extension of the provisions of s. 75 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). The statute ought to be construed as widely as possible in favour of the classes to whom it was intended to apply, namely, the working classes. The county court judge held that the present case was covered by the principle of *Cavalier* v. *Pope* (1), where it was decided that in an ordinary case of landlord and tenant a breach by the landlord of an agreement to repair the demised premises gave no cause of action to the tenant's wife who suffered injury through the breach. But from the decision in that case Collins M.R. at the

(1) [1905] 2 K. B. 757; [1906] A. C. 428. (2) See note on p. 144, post.

end of his judgment (1) expressly excluded cases to which the Housing of the Working Classes Act, 1890, might apply. The point left undecided in *Cavalier* v. *Pope* (2) now comes for decision. It cannot be doubted that the Act of 1909 was passed for the benefit of the working classes, and that not only the workman himself but his wife and children are within the benefit of the Act. When a statute imposes a duty for the benefit of a class, then, unless there is some indication to the contrary, any member of the class may sue who is injured by a breach of the duty. If a special penalty is imposed for breach of the duty, that is an indication to the contrary; but by s. 15, sub-s. 9, of the Act in question the remedies provided for breach of the landlord's undertaking are to be in addition to and not in derogation of any other remedy available to the tenant against the landlord. Therefore the special remedy is no indication that the general law, giving a remedy to each member of a class for breach of a duty imposed for the benefit of a class, is not to apply: *Dawson & Co.* v. *Bingley Urban Council.* (3)

The statutes place the same duty on the landlord towards the working classes as do the Factory and Workshop Acts upon factory owners. The limit of the protection is that it only extends to those persons who are reasonably within the contemplation of both parties to the contract: *Groves* v. *Lord Wimborne.* (4)

The effect of the Act of 1909 is to introduce the local authority and in certain events the Local Government Board into the discussion, and thereby to give a public aspect to the duty imposed upon the landlord. *Miller* v. *Hancock* (5) shews that a liability may arise apart from contract. The Act of 1909 places a definite duty upon the landlord in relation to the property, and therefore a person injured by the landlord's default has his remedy. Under the statute the control and possession are in the landlord before the tenant enters, and a duty is imposed on the landlord to repair during the tenancy and power is given to him to enter for that purpose. The control of the premises

(1) [1905] 2 K. B. at p. 764.
(2) [1905] 2 K. B. 757; [1906] A. C. 428.
(3) [1911] 2 K. B. 149.
(4) [1898] 2 Q. B. 402.
(5) [1893] 2 Q. B. 177.

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therefore remains with the landlord during the tenancy, [*Walker* v. *Hobbs & Co.* (1), *Middleton and Wife* v. *Hall* (2), and Maxwell on the Interpretation of Statutes were also referred to.]

A. H. Richardson, for the respondents, was not heard.

LORD READING C.J. This is an appeal from the decision of the Divisional Court affirming the decision of the county court judge that the plaintiff had made out no cause of action, and that therefore the defendants were entitled to judgment. The case was presented before the county court judge and in the Divisional Court upon facts which are shortly as follows: The father of the injured girl was tenant of premises which came within the operation of the Housing, Town Planning, &c., Act, 1909, and his daughter, who was living with him in the house, was injured in consequence of the want of repair in the condition of the premises tenanted by him. It was contended on behalf of the injured girl that she had a right of action against the landlord.

There is, prima facie, no such right of action at common law, nor can it be implied from the fact of the letting of the house by the landlord to the father. The point was discussed in *Cavalier* v. *Pope* (3), where the following passage from the judgment of Erle C.J. in *Robbins* v. *Jones* (4) was quoted by Lord Macnaghten in giving judgment in the House of Lords: "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any."

Now, that being the common law, the Housing of the Working Classes Act, 1890, in substance and within certain limits was incorporated into the Housing, Town Planning, &c., Act, 1909, whereby the Legislature thought fit to impose upon landlords a condition which otherwise would not have existed, namely, that in any contract of letting premises for habitation within the limits mentioned either in s. 75 of the Housing of the

(1) (1889) 23 Q. B. D. 458.
(2) (1912) 108 L. T. 804.
(3) [1905] 2 K. B. 757; [1906] A. C. 428.
(4) (1863) 15 C. B. (N.S.) 221, at p. 240.

Working Classes Act, 1890, or in s. 140 of the Act of 1909, there should be an implied condition (which has been construed in the broader meaning of a promise by the landlord) that he will keep the premises in repair. The effect of those statutory amendments is that a promise by the landlord is imported into the contract of letting which otherwise would not be in that contract. Further than that the Housing and Town Planning Act, 1909, does not go, except that it provides a remedy which is one altogether apart from the remedy given to the tenant of one of these dwellings. It seems to me quite plain that a resident tenant of such a dwelling would have the right by virtue of this statute to bring an action against his landlord for breach of the covenant implied by the statute to keep the premises in a state reasonably fit for human habitation. The promise which is imported into the contract enures for the benefit of the tenant with all the obligations it places upon the landlord, except in so far as it may be said that they are limited or restricted by the statute. No doubt Parliament saw great practical difficulty in the enforcing of such a remedy by a member of the working classes against his landlord. It may be that it was thought that he might be rather careless and would not take the trouble to enforce it, or that the costs would be too heavy for a working man to incur, and possibly also that he might not like to sue his landlord for fear of losing his right of living there by having his tenancy determined. Parliament certainly thought that it was necessary to give some other remedy, and therefore it enacted that, in addition to the remedies which are implied in this statutory condition which it imposed upon the landlord, the local authority should have the right to enter the premises under certain conditions and in certain circumstances to examine them, and if it thinks the premises are not in a fit state of repair, to call upon the landlord to put them into a fit state of repair. The landlord has an option under the statute, within twenty-one days of notice given to him, to say, if he chooses, that he will close the premises absolutely as a place of habitation. If he does not do that, and if he does not put the premises into repair, then the local authority has the right to do the repairs, notwithstanding that the landlord does not wish

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Lord Reading C.J.

t or has not agreed to it, and to charge him with the expense. All those provisions are means given by the Legislature for the purpose of enabling the tenant to obtain the benefit of the condition which it has seen fit to impose in the letting of premises which are within the statute. Mr. Williams, who has argued this case with ability, ingenuity, and courage on behalf of the appellant, admitted that if the obligation upon the landlord is simply contractual the Divisional Court was right and this appeal must fail; but he asked the Court to come to the conclusion, upon the language of the statute and having regard to the object which the Legislature had in mind when it so enacted it, that Parliament meant to impose a statutory obligation upon the landlord arising altogether apart from contract. If he could have established that contention, he would, in my opinion, have gone far, if not the whole way, towards success in this appeal. But there lies his difficulty. In my judgment there is imposed by this statute upon the landlord no duty, such as is imposed by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), upon an employer to keep his premises in a fit state of fencing or protected and guarded. That is not the character of the obligation placed upon the landlord. That obligation is limited entirely to imposing upon him the promise to keep the premises in a state of repair. That is purely contractual, and there is no further duty such as it is sought to impose upon him by the contention on behalf of the appellant. Moreover, even if the Court came to a different conclusion it would not, in my judgment, be able to give effect to it; it would be bound to follow the decision in *Cavalier* v. *Pope*. (1) That decision—see especially Lord Atkinson's judgment in the House of Lords—makes it perfectly plain that there is no such duty on the landlord as is contended for in this case. There is also the further case of *Middleton and Wife* v. *Hall* (2), which was tried last year before my brother Bankes, in which he gave a judgment to the same effect as that of the Divisional Court in the present case, resting his decision upon *Cavalier* v. *Pope* (3), as did the Divisional Court. In truth, *Cavalier* v. *Pope* (3) is a fence which it is impossible to

(1) [1905] 2 K. B. 757; [1906] A. C. 428, 433. (2) 108 L. T. 804.
(3) [1905] 2 K. B. 757; [1906] A. C. 428.

get over; it stands there as an insurmountable obstacle to all the arguments which have been put forward upon behalf of the appellant, and I do not therefore propose to repeat the reasoning contained in the speeches of the noble Lords in that case in the House of Lords, or in the judgments of the Court of Appeal, in which it was made clear by the majority of the Court that even if the Court might wish to impose such an obligation upon the landlord, it could not do it. We are confined, whatever our own views may be, to giving effect to the statute, and however sympathetic we might be to such a claim as that advanced on the appellant's behalf, it does not rest with judges to extend and stretch an Act of Parliament to something beyond that which Parliament has itself declared. If it was the intention of Parliament to give such an extended right as is contended for in this case, it could have done it quite simply, and without difficulty. It would not have been necessary to import a condition into the contract; Parliament could have said—as it has said in the Factory and Workshop Act, 1901, and in many other statutes—that the landlord shall keep the premises in repair, and if so there would have been an obligation imposed upon him by statute which would, as it appears to me, have justified the argument which has been put before us to-day. But those are not the words of the statute, the language of which is very different. Therefore in my judgment the decisions of the county court judge and of the Divisional Court were right, and *Cavalier* v. *Pope* (1)—which is on all fours with this case—is a binding authority upon us in the application of its principles, and therefore I think that this appeal must fail and should be dismissed.

PHILLIMORE L.J. I am of the same opinion. The social or economical mischief which seemed to me to arise in certain cases, and against which I struggled unsuccessfully to provide in *Cavalier* v. *Pope* (1), is very largely removed by the provisions of the Housing, Town Planning, &c. Act, 1909, on which the appellant relies, and I have therefore little reluctance in complying with my obvious duty of following the principle laid down in *Cavalier*

(1) [1905] 2 K. B. 757; [1906] A. C. 428.

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v. *Pope* (1) in the House of Lords. I only now desire to observe that it is worthy of consideration that, having regard to s. 15 of the Act, there might be a very serious hardship upon a perfectly innocent landlord if the construction sought for by Mr. Williams on behalf of the appellant were to be applied. It is one thing to say that a landlord shall not let a house which is not fit for habitation, but quite another to say that he continuously undertakes to keep it reasonably in repair. If that is an undertaking in covenant with the tenant there is no harm done, because if the tenant complains that it is not reasonably fit the landlord puts it in repair, and if the tenant brings an action without first making a complaint to the landlord no Court would enforce the duty upon him, at any rate, without safeguarding him as to costs, because the tenant who is in possession, and who has knowledge of the want of repair, ought to give the landlord notice of it. But if third persons are to be entitled to avail themselves of this section the landlord might be in this position: he might have let the house in perfectly good repair, but it might have got out of repair by reason of the acts of the tenant, his guests, or licensees, and the landlord might know nothing about the want of repair. Then if some third person (not the individual who put it out of repair by, for instance, breaking the windows, or pulling down the ceiling, or, in such a case as I have tried at Liverpool, using chunks of a mantelpiece to throw at his neighbour) other than that misdoer suffered in consequence of the house being out of repair, the landlord would not be able to say, if that third person made a claim, that he (the third person) ought to have told him of the want of repair, because that third person has not a duty to do so, and it might be that the landlord would then be held responsible for something which he could not have prevented. I only throw out that consideration as a further reason why I do not feel reluctant to decide in favour of the defendant in the present case as I am compelled to do.

LUSH J. The appellant, in order to succeed, must shew two things: first, that the Housing, Town Planning, &c., Act, 1909,

(1) [1905] 2 K. B. 757; [1906] A. C. 428.

imposes an absolute duty upon the landlord to repair, and secondly that the person injured is within the class of persons for whose benefit that duty is imposed. Now, the plaintiff fails to establish the first of those two propositions. All that the Act of 1909 does is to enact that if the contract between the landlord and tenant contains no warranty (I think the word "condition" is used in that sense in ss. 14 and 15 of the Act of 1909) that the house is reasonably fit for human habitation, and no undertaking on the part of the landlord that it shall be kept in a state reasonably fit for human habitation, those two terms shall be implied. But the character and quality of the obligation which is imported by the statute are none the less contractual, although the contract is derived from and owes its existence to the statute. Therefore the obligation on the part of the landlord in the present case is purely a contractual one. That is all that the statute has effected.

Now, it was decided in *Cavalier* v. *Pope* (1) that no action lies for the breach of the contractual obligation at the suit of a stranger to the contract, and that decision seems to me to dispose of the contentions which have been placed before us on behalf of the appellant. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *O. L. Richardson.*
Solicitors for respondents: *Hair & Co.*

NOTE.—Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), s. 4: "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding—

"(*a*) in the case of a house situate in the administrative county of London forty pounds;

"(*b*) in the case of a house situate in a borough or urban district with a population according to the last census for the time being of fifty thousand or upwards, twenty-six pounds;

"(*c*) in the case of a house situate elsewhere, sixteen pounds;

there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation, but the condition aforesaid shall not be implied when a house or part of a house is let for a term of not less than three years upon the terms that it be put by the

(1) [1905] 2 K. B. 757; [1906] A. C. 428.

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lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term."

Sect. 15: "(1.) The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation.

"(2.) The landlord or the local authority, or any person authorized by him or them in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any house, premises, or building to which this section applies for the purpose of viewing the state and condition thereof.

"(3.) If it appears to the local authority . . . . that the undertaking implied by virtue of this section is not complied with in the case of any house to which it applies, the authority shall, if a closing order is not made with respect to the house, by written notice require the landlord, within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as the authority shall specify in the notice as being necessary to make the house in all respects reasonably fit for human habitation.

"(4.) Within twenty-one days after the receipt of such notice the landlord may by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house.

"(5.) If the notice given by the local authority is not complied with, and if the landlord has not given the notice mentioned in the immediately preceding sub-section, the authority may, at the expiration of the time specified in the notice given by them to the landlord, do the work required to be done and recover the expenses incurred by them in so doing from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts, or, if they think fit, the authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding that of the interest of the landlord in the house, nor in any case five years, with interest at a rate not exceeding five pounds per cent. per annum, until the whole amount is paid, and any such instalments or interest or any part thereof may be recovered from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts.

"(6.) A landlord may appeal to the Local Government Board against any notice requiring him to execute works under this section, and against any demand for the recovery of expenses from him under this section or order made with respect to those expenses under this section by the authority, by giving notice of appeal to the Board within twenty-one days after the notice is received, or the demand or order is made, as the case may be . . . .

"(9.) Any remedy given by this section for non-compliance with the undertaking implied by virtue of this section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord, either at common law or otherwise."

J. E. A.

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[1911 G. 1353.]

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April 23, 24, 28, 29.

Foreign Judgment—French Judgment—Whether enforceable in England—Appearance in French Proceedings, whether voluntary—Default Judgment set aside and subsequently restored.

The plaintiff, who resided and carried on business in Paris, commenced proceedings in the Tribunal of Commerce of the Seine against the defendants, who were merchants carrying on business in London, for breach of contract. A notification of those proceedings was sent to the French Consul in London, who informed the defendants that certain legal documents had been received by him for them and requested them to take them up. The defendants, although they had reason to suspect to what the documents related, declined to take them. Thereafter judgment by default for damages and costs was entered against the defendants in the Tribunal of Commerce, and intimation thereof was given in the same way as in connection with the commencement of the proceedings, but the defendants took no notice thereof until the plaintiff obtained the issue of a saisie-arrêt or conditional order attaching any moneys belonging to them in the hands of the Crédit Lyonnais bank in Paris. The defendants had a sum of 4*l.* or 8*l.* due to them in the bank at the time, and the bank intimated to them that the saisie-arrêt had been issued, whereupon the defendants filed an "opposition" in the Tribunal of Commerce asking that the default judgment should be reopened. The Tribunal of Commerce allowed the "opposition," heard the case on the merits, and gave judgment for the defendants with costs. The plaintiff appealed to the Court of Appeal in Paris, and that Court held that, the first judgment of the Tribunal of Commerce having been executed by the plaintiff, the defendants' "opposition" was too late and was therefore not receivable, and accordingly the plaintiff's appeal was allowed. The plaintiff now sued on the judgment of the Court of Appeal restoring the first judgment of the Tribunal of Commerce:—

Held, that the judgment was enforceable inasmuch as (1.) the defendants had voluntarily appeared in the French proceedings, and (2.) the judgment took its whole force and effect from the decision of the Court of Appeal and was not merely the original default judgment.

Action tried by Lawrence J. without a jury.

The plaintiff, who resided and carried on business in Paris, sued the defendants, who carried on business in London, claiming 524*l.* 14*s.* 9*d.*, or 13,256.48 francs, upon a judgment of the Court of Appeal of Paris in favour of the

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plaintiff against the defendants dated April 3, 1909, reversing a decision of the Tribunal of Commerce of the Seine dated March 10, 1908, and restoring a previous decision of the Tribunal of Commerce dated May 3, 1907, and for costs, under which judgment of the Court of Appeal the defendants were, as the plaintiff alleged, indebted to him in the said sum of 13,256.48 francs. In the alternative the plaintiff claimed damages for breach of contract.

The plaintiff alleged that by an oral agreement made in Paris in August, 1906, between him and the defendants' Paris agent the defendants agreed to sell to the plaintiff 1000 dozen pickled goat skins at the price of 31.50 francs per dozen c.i.f. Havre, to be paid for by the plaintiff's acceptance at ninety days from the arrival of the goods at Havre. These terms were afterwards reduced into writing in letters passing between the plaintiff in Paris and the defendants in London. In performance of the contract the defendants despatched 1000 dozen pickled goat skins to the plaintiff from Madras as follows: 6000 on October 6, 1906, 2334 on November 12, 1906, and 3666 on January 5, 1907. The plaintiff alleged that the skins were not in accordance with the contract and he refused to accept the third consignment of 3666 skins, and in respect of the loss he had sustained both in respect of that consignment and the first two consignments he claimed to recover damages from the defendants by proceedings which he instituted in the Tribunal of Commerce of the Seine. Notice of those proceedings was sent to the French Consulate in London, and a letter was sent from the Consulate on April 12, 1907, to the defendants stating that a legal document had been received intended for them and adding that it would be handed to them on delivery of a receipt duly signed and payment of 3*d.* to cover the cost of a registered letter. The defendants wrote asking to what the document referred and were informed in reply that the Consulate could give no information regarding legal documents as they had no right to inspect the same. The defendants declined to take up the document. On May 3, 1907, judgment by default was given against the defendants in the Tribunal of Commerce, and on May 17 that judgment was entered. On May 24 notice of the judgment was given to the French Consulate in

London to be notified to the defendants. Notification was sent to the defendants, who, however, declined to take up the document from the Consulate. On May 28 an attempt to enforce the judgment in France produced no result, the huissier making a return of nulla bona. On September 14, 1907, the plaintiff obtained the issue in France of a saisie-arrêt, or conditional order for the seizure or attachment of any moneys standing to the credit of the defendants in the Crédit Lyonnais bank at Paris. A sum amounting to 4*l.* or 8*l.* was then standing to the credit of the defendants, and on October 4, 1907, the Crédit Lyonnais gave notice to the defendants of the saisie-arrêt. On receipt of that letter the defendants on October 12 entered an "opposition," or application to reopen the default judgment, and on December 19 the plaintiff by notice of motion in writing moved the Tribunal of Commerce to quash the defendants' "opposition" on the ground that the time for making any such application had expired. Both applications came on for hearing before the Tribunal of Commerce, and by a judgment of March 10, 1908, the tribunal dismissed the plaintiff's motion, and, allowing the defendants' "opposition," reopened the judgment of May 3, 1907, reheard the case, and decided in the defendants' favour on the merits with costs. From that judgment the plaintiff appealed to the Court of Appeal in Paris, and that Court on April 3, 1909, by its judgment, after stating that the parties were each represented by counsel and solicitor, and after reciting the various proceedings in the French Courts, that the writs and other documents therein had been duly transmitted to London, that the defendants refused to take up these documents although they had cognizance of the proceedings, and thus sought to defeat a judgment regularly obtained against them, stated that, the judgment of May 3, 1907, having been executed by the plaintiff, the "opposition" lodged by the defendants was not receivable, and that the Tribunal of Commerce was wrong in admitting the "opposition." For these reasons the Court of Appeal admitted the plaintiff's appeal, reversed the judgment appealed against, relieved the plaintiff from the provisions and condemnation charged against him, and, decreeing anew, declared that the defendants' "opposition" was not receivable, rejected the same, and condemned

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them in costs. That judgment the plaintiff now sought to enforce.

By their defence the defendants admitted that the three French judgments referred to were duly pronounced and given in the terms stated, but they said they were never under any duty or obligation to submit to the jurisdiction of the French Courts and had never in fact so submitted; and that the judgment sued on was in effect a default judgment pronounced in their absence and against which they had never had an opportunity of defending themselves. Alternatively, they said that in the circumstances above set out any submission by the defendants to the jurisdiction of the French Courts was involuntary and under the duress of the saisie-arrêt or execution practised upon their property. They further stated defences on the merits.

Evidence was given on behalf of the defendants by a French advocate that in his opinion the decision of the Court of Appeal would in all probability have been reversed if the case had been taken to the Cour de Cassation.

Schiller, *K.C.*, and *S. S. Ogilvie*, for the plaintiff. The French judgment sued upon is enforceable against the defendants, they having appeared in the proceedings in France and taken their chance of succeeding. In *Liverpool Marine Credit Co.* v. *Hunter* (1) Wood V.-C. said that it was part of the law of nations to recognize the judgments of foreign countries unless it appeared that a course of procedure had been adopted which was inconsistent with natural justice, as, for example, where the Court had proceeded in the absence of the defendant or after inadequate notice of trial. In this case it must be taken that the defendants had notice of the French proceedings, and by entering an "opposition" to the original judgment of the Tribunal of Commerce they submitted to the jurisdiction of the French Courts. That appearance was voluntary: see *Voinet* v. *Barrett* (2); *Gaboriau* v. *Maxwell* (3); *The Dupleix.* (4) In *Boissière* v. *Brockner* (5) Cave J. held that where defendants

(1) (1867) L. R. 4 Eq. 62.
(2) (1885) 55 L. J. (Q.B.) 39.
(3) (1908) *The Times*, Dec. 12
(4) [1912] P. 8.
(5) (1889) 6 Times L. R. 85.

appeared and objected to the jurisdiction of the French Court and, failing success on that plea, asked for judgment on the merits the appearance was voluntary. [They also cited *Simpson* v. *Fogo* (1); *Schibsby* v. *Westenholz* (2); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3); Dicey's Conflict of Laws, 2nd ed., p. 361.]

Maurice Hill, K.C., and *Harold Murphy*, for the defendants. The defendants are not bound by the judgment sued on, which is merely a default judgment. The "opposition" has gone and the judgment of the Court of Appeal only deals with the preliminary point, namely, whether the defendants' "opposition" was receivable or not, and the Court decided that the "opposition" was not receivable. It is quite clear that in a personal action a decree pronounced in absentem by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law a mere nullity: per Earl of Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (3) Of course if a party submits to the jurisdiction of the foreign country and is permitted to have a trial on the merits he is bound. In this case the defendants' appearance was not voluntary, as it was made to protect their property which had been seized. In *Schibsby* v. *Westenholz* (2) the question was left open as to the effect of the appearance of a defendant "where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal," and in *Voinet* v. *Barrett* (4) Lord Esher said that an appearance is not voluntary if it is made "in a case in which property of the party so appearing is already in the foreign country and has been seized by the foreign tribunal before appearance has been entered, so that the party appears in order to save the property so seized, and in order to get it out of the hands of the foreign tribunal"; see also Dicey's Conflict of Laws, 2nd ed., p. 371. The case of *Boissière* v. *Brockner* (5) merely decided that an appearance under protest is none the less an appearance.

Schiller, K.C., in reply. The judgment sued on is not a mere default judgment; its whole force is derived from the decree of

(1) (1860-1863) 1 J. & H. 18; 1 H. & M. 195.
(2) (1870) L. R. 6 Q. B. 155.
(3) [1894] A. C. 670.
(4) 55 L. J. (Q.B.) 39.
(5) 6 Times L. R. 85.

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the Court of Appeal. As to appearance: the appearance by the defendants was precisely the same as the appearance which was in question in *Gaboriau* v. *Maxwell* (1), which Pickford J. held was voluntary. In this case, moreover, the defendants asked to have the case heard on the merits by the Tribunal of Commerce, and it was so heard. The reservation of opinion in *Schibsby* v. *Westenholz* (2) "as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal" refers, as Cotton L.J. put it in *Voinet* v. *Barrett* (3), to a case "in which the defendant has appeared to protect property which has been seized by the foreign tribunal in order to compel appearance," that is, to found jurisdiction. In the present case there was no seizure of property to found jurisdiction; the seizure was in execution. Furthermore, the defendants are bound by the recital in the judgment of the Court of Appeal that they appeared by counsel and solicitor: *Molony* v. *Gibbons*. (4) [*Rousillon* v. *Rousillon* (5) and *Godard* v. *Gray* (6) were also referred to.]

LAWRENCE J. In this case the plaintiff sues the defendants upon a foreign judgment for a sum amounting to 524*l.* 14*s.* 9*d.* That judgment was obtained in proceedings in France, and it will be necessary for me to state shortly the course of those proceedings, because the argument has turned to a large extent upon the effect of the judgment. The proceedings were commenced by the plaintiff in France for damages for breach of contract in connection with the sale of certain goat skins. The defendants were merchants carrying on business in England, and they appear to have entered into a contract which is stated in the judgment to have been made in Paris apparently by word of mouth by the defendants' agent, and confirmed by letters passing between Paris and London. The contract was for the delivery of goat skins which were despatched from Madras to Havre in three consignments. The first two of those consignments had been delivered and paid for before any question arose between

(1) (1908) *The Times*, Dec. 12.
(2) L. R. 6 Q. B. 155.
(3) 55 L. J. (Q.B.) 39.
(4) (1810) 2 Camp. 502.
(5) (1880) 14 Ch. D. 351.
(6) (1870) L. R. 6 Q. B. 139.

the parties. The third consignment came forward to Havre and was paid for by bill. A dispute then arose between the plaintiff and the defendants about the third consignment, and the dispute extended to the first two, which were said not to have been in conformity with the contract. Letters passed between the parties with regard to the dispute; the defendants sought to get the plaintiff to come to have an arbitration in England; the plaintiff declined to do that, and finally he brought an action in the Tribunal of Commerce of the Seine. The proceedings in that action followed the usual course of French proceedings where a defendant is resident abroad. The documents were registered and sent to the French Consulate in London, and notification thereof was sent to the defendants, who, however, were very shy of having anything to do with them. They were asked by the Consulate to give a receipt and to pay 3*d.* for the documents. The defendants sought by letters to get information as to the contents of the documents, and I think it is pretty plain that they knew that they were in the nature of process dealing with this claim. They did not actually see any of the documents and to that extent did not know, but they had every reason to suspect what they were. They declined to appear in France or to take any part in the proceedings, and in the ordinary course judgment by default was passed in the Tribunal of Commerce, and notification thereof was given in the same way, and again the same process of interrogation and shyness of having any actual knowledge of the documents was exhibited by the defendants. They did not desire to come within the jurisdiction of the French Court, and, if they had maintained that attitude throughout, their position would have been unassailable. But judgment having passed as I have said and notification having been given, the plaintiff proceeded to obtain a saisie-arrêt, which we have been told is analogous to our garnishee order nisi. This saisie-arrêt was issued by the Court and addressed to the Crédit Lyonnais attaching any moneys of the defendants which might be in the hands of that bank. A notification of this was given to the defendants in the same way as before, and on October 4, 1907, the Crédit Lyonnais wrote to the defendants informing them that they had received this attachment. On October 12

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the defendants seem to have changed their minds with regard to the French proceedings, for they filed an "opposition" in the Tribunal of Commerce, by which they asked to have the judgment by default set aside, to have judgment given in their favour, and to have the plaintiff condemned in costs, saying in effect that there was no breach of contract. This "opposition" was duly heard and the defendants were allowed to have the case reheard by the Tribunal of Commerce. The defendants of course appeared by solicitor and avocat. The case was reheard on March 10, 1908, and the Court gave judgment for the defendants. After that had been done, an appeal was lodged on March 31, 1908, by the plaintiff, and the Court of Appeal in Paris heard the case and gave judgment on April 3, 1909. The Court of Appeal held that the decision of the Tribunal of Commerce upon the merits was wrong, and they use the word which has been very much relied upon by the defendants that the opposition was "non-receivable" or "inadmissible." I see that that word is used in the proceedings when the Court mean to say that the argument is a bad one, but it has been used here by counsel as meaning that there was no jurisdiction or that some condition precedent had not been complied with. I do not think that "non-receivable" necessarily means that, but, however that may be, the judgment of the Court of Appeal seems to be based upon this, that the contract was made in Paris, that payment was to be made in Paris, and that delivery was to be at Havre. The Court of Appeal undoubtedly considered that they had jurisdiction to deal with the contract just as on similar facts we should give leave to serve a writ out of the jurisdiction. The Court then proceeded to consider the case and the "opposition"; they treat the attitude of the defendants, who, they say, knew all the time of these proceedings, as a systematic and calculated refusal to accept documents. In these circumstances the Court thought that, according to their construction of the Code, the defendants were out of time with their "opposition" and ought not to be allowed to reverse the original judgment. The Court of Appeal therefore reversed the judgment given for the defendants and directed that the judgment by default in favour of the plaintiff should be restored, the plaintiff to have the costs of all the

proceedings, that is to say, of the rehearing and the proceedings in the Court of Appeal. That is the judgment which is being sued upon in this case, and the question is whether in this Court that judgment is binding upon the defendants.

It is not necessary that I should go into the law as to foreign judgments. The different grounds upon which foreign judgments can be questioned are stated both in the text-books and in the judgment of Fry J. in *Rousillon* v. *Rousillon* (1), where they are admirably and conveniently stated. It is said that the present case comes within the principle of those decisions as to foreign judgments which say that a defendant's appearance must be voluntary, and that it is not voluntary if he appears merely to save goods which have been seized. The proposition of law that it must be a voluntary appearance in order that the party should be bound by a foreign judgment is clearly a good one where he owes no allegiance to, and was not present within, the country of the Court, so that his appearance is the thing which causes him to have the duty to submit to the foreign judgment. According to English law he has such a duty if he voluntarily submits to the jurisdiction and takes his chance of getting a judgment in his favour. But the present defendants say that that does not apply if the person's appearance was caused by a seizure of his goods, and what I have to consider in this case is, was the defendants' appearance caused by the seizure of their goods? It is a peculiar case in this respect, that the "opposition" contains no reference to the saisie-arrêt, which is the only thing that can be called a seizure of goods in this case. Neither of the parties seem to have taken any notice of the saisie-arrêt from the time it was issued till this moment. I thought at first that the defendants had obtained the money when they got a judgment in their favour, but it seems that no steps have been taken in the matter. It was then explained that the money in the Crédit Lyonnais was a very small sum, somewhere about 4*l.* or 8*l.* Is it to be said that for this purpose the mere existence of the seizure of anything is sufficient? It is quite true that for certain purposes the seizure of any property is sufficient. That

(1) 14 Ch. D. 351.

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is the doctrine of seizing property to found jurisdiction. In some countries the existence of property there is a sufficient ground for going to the Court and getting an arrest of that property, and so founding jurisdiction. That is not the case here. This attachment was a process of execution, and it was for a very small sum of money. I have to ask myself whether the proposition that an appearance is not voluntary where it is merely to save goods which have been seized is a doctrine of law, or whether it is a fact from which you may infer the further fact that it was involuntary. If it is a proposition of law, and I ought to infer necessarily, from the mere fact that there was, for instance, 1*l.* or 1 franc in the Crédit Lyonnais, that the appearance was involuntary, of course the defendants are right. I do not, however, think that is what is meant. I think "involuntary" means what it says, that it is involuntary, and I do not think the defendants' appearance was involuntary in this case. I think that the defendants have made the mistake throughout, of never acting upon a definite opinion. At one moment they held one opinion, and at another moment they held another opinion. Unfortunately for them it was at the wrong moment that these opinions were held. They now say that the judgment of the Court of Appeal is wrong, and that the Cour de Cassation would have held otherwise with regard to the "opposition." According to what they say, they had a perfect remedy by taking the case to the Cour de Cassation. I have doubts about that because, although there may be some grounds stated in this judgment which the Cour de Cassation has in other cases said were wrong, I do not know that they would have overruled the Court of Appeal in view of the calculated refusal on the part of the defendants to accept documents where there had been proper notification. It is quite true that there is no duty upon the defendants in this country to accept those documents; but if they ultimately submitted voluntarily to the jurisdiction I am not entitled to say that the French Court of Appeal was not right. The mere fact that that Court may have been wrong does not affect the matter. I do not think I can hold that, in the circumstances of this case, this was an involuntary appearance. It was not a case of entering an appearance where a seizure had been made to

found jurisdiction, which, in *Voinet* v. *Barrett* (1), was held to be a different matter. Here there was merely a seizure in process of law, or rather an attachment in the nature of a garnishee order nisi, and I ought not to hold that that makes this appearance and the whole proceedings in France so much wastepaper. The defendants disputed everything, and they come here and fight the whole case, and they have to admit that as to certain costs they have no defence whatever. They have put their argument with regard to the judgment very skilfully, and they put it in two ways. They say the appearance was not voluntary because of this saisie-arrêt. I have dealt with that. Secondly they say that the judgment upon which they are now sued is a default judgment and nothing more. In a sense that is true, but I do not think it is true in the sense which enables them to treat it as a default judgment with regard to which they have not appeared, seeing that that judgment now takes its whole force and effect not from the original decision of the Tribunal of Commerce of the Seine of May 3, 1907, but takes its force and validity from the judgment of the Court of Appeal of 1909. The judgment of the Tribunal of Commerce was dead and of no effect for over a year before this judgment was passed. In the defence it is admitted that the judgment sued upon was duly pronounced and given by the Courts of the Republic of France in the terms stated. That is an admission that this is a good judgment of the Court of Appeal so far as its terms and effect are concerned. It is clear that it was a judgment to which they were parties, and in which they took the chance of obtaining a decision in their favour. As I have already said, they succeeded in the Tribunal of Commerce in getting a decision in their favour. It is very unfortunate that they should not have pursued the matter further if they are right in saying that the Cour de Cassation would have reversed it. They have come to the wrong place to reverse it. They ask me to say it is wrong, and that they ought not to have the judgment enforced against them. I very much regret that they have to have it enforced against them, but, as I have said, I cannot hold that their appearance was involuntary within the

(1) 55 L. J. (Q.B.) 39.

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authorities, or that this is merely the original default judgment of the Tribunal of Commerce. I think it was a judgment given in their presence by a Court in which they had voluntarily appeared. My judgment must therefore be for the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff: *Withers, Bensons, Birkett & Davies.*
Solicitors for defendants: *Stephenson, Harwood & Co.*

J. S. H.

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May 14, 15.

MEADE-KING, ROBINSON & CO. *v.* JACOBS & CO. AND OTHERS.

[1912 M. 2022.]
[1912 M. 2771.]

Ship—Charterparty—Hire for Fixed Period—Provision for Cessation of Payment of Hire—"Loss of time through damage preventing efficient working of vessel for more than forty-eight running hours"—Loss of Time exceeding forty-eight Hours—Cessation of Payment for first forty-eight Hours.

A charterparty of a steamer for three years, under which the hire was payable monthly in advance, provided that "in the event of loss of time through deficiency of men or stores, repairs . . . . or damage preventing the efficient working of the vessel for more than forty-eight running hours the payment of hire shall cease until she be again in an efficient state to resume her service":—

Held, that, in the event of loss of time for a period exceeding forty-eight running hours through any of the specified causes, payment of hire ceased for the whole period, including the first forty-eight hours.

ACTION tried before Bailhache J. without a jury as a commercial cause.

By a charterparty dated August 29, 1910, the plaintiffs hired the steamer *Batoum* for a period of three years and nine months from the date of the charterparty to carry all lawful merchandise in any part of the world except Baltic and White Sea ports between October 1 and April 1 and all ports in British North America. The sum payable for hire was 1722*l.* per calendar month and after the same rate for any part of a month, to be paid in cash monthly in advance.

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Clause 25 of the charterparty was as follows: "In the event of loss of time through deficiency of men or stores, repairs, breakdown of machinery, pumps, pipes, or boilers (whether partial or otherwise), collision or stranding, or damage preventing the efficient working of the vessel for more than forty-eight running hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should the vessel, from any of the aforementioned causes, put into any other ports than those to which she is bound under the instructions of the charterers, the port charges, pilotages, and other expenses at those ports, loss of time consequent upon putting in shall be borne by the owners, also should the steamer put back while on voyage, by reason of any accident, the hire shall be suspended from the time of her putting back until she be again in the same position, and the voyage resumed therefrom; but should the vessel be driven into port or to anchorage by stress of weather such detention or loss of time shall be at the charterers' risk and expense. In the event of the nation to which this vessel belongs becoming engaged in hostilities the hire to cease during the continuance of such hostilities, if the charterers find it impossible to employ the steamer in consequence. It is agreed that all detention or loss of time provided for in this clause and not paid for shall not count as part of the guaranteed time specified under this charter. All graving dock charges to be at owners' expense."

The steamer lost time, owing to some of the causes specified in clause 25 preventing her efficient working, for a period much longer than forty-eight running hours. The plaintiffs contended that in that case the time during which the payment of hire ceased under the above clause was the whole period, including the first forty-eight hours; the defendants contended that the first forty-eight hours ought to be excluded in computing the time during which the payment of hire ceased. There were other claims in the action, but the parties during the hearing came to an agreement upon all matters in dispute except the above question.

Greer, K.C., and *F. D. Mackinnon*, for the plaintiffs.
Roche, K.C., and *Raeburn*, for the defendants.

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BAILHACHE J. One question has been left for my decision, that is, upon the construction of clause 25 of the charterparty, which was a time charter for three years and some months and provided for the payment of hire monthly in advance. I need not refer to any clause before clause 25. By that clause the parties were minded to provide for the event of loss of time, and they deal with it under five different heads. First, they deal with time lost "through deficiency of men or stores, repairs, breakdown of machinery . . . . preventing the efficient working of the vessel for more than forty-eight running hours," which is the part of the clause which I have to construe. The remaining part of that clause deals with four other cases of loss of time; and clause 26 deals with a sixth case. The parties, therefore, have provided, as far as one can see, for every imaginable case of loss of time.

The question which I have to decide is what is the meaning of the provision with respect to the first head of loss of time. Upon reading the words of the first part of the clause, it is obvious that there are two possible meanings which they may bear. They may mean that, in the event of loss of time for more than forty-eight running hours, hire shall cease at the expiration of forty-eight hours, or they may mean that, if there is loss of time from any of those causes for a period of more than forty-eight running hours, hire ceases from the time at which the loss of time began. To put it in a concrete form, if there is a loss of time for fifty running hours, the clause may mean that payment of hire shall cease for two hours, or it may mean that it shall cease for fifty hours.

Now it seems to me to be quite clear that the object of this clause was to prevent the owners having claims made against them by the charterers for cesser of hire in respect of short periods. Loss of time through a variety of causes is here dealt with, and it is obvious that in the ordinary working of a vessel, particularly on a long time charter, there may be a number of causes of this description which from time to time cause a short loss of time. Then it became necessary to define what is a short loss of time, which is to be treated between the parties as giving no claim to cesser of hire, and it is defined as being

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a period not exceeding forty-eight running hours. Having got so far we come to the crux of the matter. What is to happen if there is a loss of time exceeding forty-eight hours? I think that the true meaning of the clause is that if there is from any of the specified causes a loss of time exceeding forty-eight hours, that is a loss of time of sufficient importance to justify the charterers in claiming and the owners in allowing a cesser of hire, and that in such a case the charterers are entitled to a cesser of hire for the whole of the time so lost and not merely for the difference between forty-eight hours and the time actually lost; cesser of hire does not begin at the expiration of forty-eight hours, but when once the loss of time exceeds forty-eight hours the whole is a loss of time which disentitles the owners to hire and entitles the charterers to a cessation of hire. To state the effect of this part of the clause in a sentence, I think it means: Given a loss of time from any of the specified causes which exceeds forty-eight hours that time counts and the payment of hire ceases from the time when the cause of loss of time commenced to operate and not only from forty-eight hours after.

The result is that upon this question my judgment must be for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Bateson, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *William A. Crump & Son.*

J. H. W.

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May 2.

KATES *v.* JEFFERY.

Justices—Case stated—Point not taken before Justices raised in Divisional Court—Unsound Meat—Information by Sanitary Inspector—Evidence of Appointment and Authority to prosecute—Point as to Evidence of Authority not raised before Justices—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 259; *Sched. I., r.* 10.

Upon the argument of an appeal from justices by way of case stated a point cannot be taken before the Divisional Court upon the facts stated which was not taken before the justices, except upon a question of law which no evidence could alter.

Judgment of Blackburn J. in *Knight* v. *Halliwell* (1874) L. R. 9 Q. B. 412 followed.

Judgment of Lord Alverstone C.J. in *Gieblier* v. *Manning* [1906] 1 K. B. 709; 75 L. J. (K.B.) 463 explained.

Case stated by justices for the county of Kent.

At a Court of summary jurisdiction sitting at Tonbridge a complaint was preferred by the respondent, Edgar Thomas Jeffery, of Southborough, inspector of nuisances under the Public Health Act, 1875, against the appellant, Edward Kates, also of Southborough, for having in his possession for the purpose of sale or of preparation for sale and intended for the food of man a carcase of a cow which was unfit for the food of man. The justices convicted the appellant.

Upon the hearing of the information the following facts were proved or admitted :—

(*a*) On or about November 17, 1913, the respondent acting as inspector of nuisances for the urban district of Southborough inspected and examined the carcase of the cow, which was then in the possession of the appellant, and the meat appearing to him to be diseased and unfit for the food of man, he seized and carried away the same in order to have the same dealt with by a justice.

(*b*) The meat was subsequently examined by a justice of the peace for the county of Kent and was adjudged by him to be unfit for the food of man and was condemned by him accordingly and ordered by him to be destroyed in pursuance of the Public Health Act, 1875. The meat was destroyed in accordance with the order.

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(c) The respondent in giving evidence in support of his complaint swore that he was the inspector of nuisances for the urban district of Southborough, and this was not questioned by the appellant until the close of the case for the prosecution, nor was he cross-examined upon the point, and the case for the prosecution proceeded on the assumption that the respondent was an inspector of nuisances and that the appellant raised no point thereon.

On the part of the appellant it was contended that the complaint having been made by the respondent as the inspector of nuisances for Southborough, and he having been so described in the summons, his appointment by the urban district council of Southborough and the approval of his appointment by the Local Government Board should have been formally proved in evidence before any conviction of the appellant could take place.

On the part of the respondent it was contended that if the complaint was made by an inspector of nuisances, then his statement on oath that he was such inspector and was so acting was sufficient proof in law, and that as the respondent was not cross-examined as to his appointment or power to act and the case for the prosecution proceeded without the point being raised, the appellant had waived any objection and accepted such evidence.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

Barrington-Ward, for the appellant. The only point which appears upon the face of the case stated by the justices is whether the oath of the respondent that he was the inspector of nuisances and was so acting is sufficient proof of his appointment. It is not now desired to rely upon the objection as to his appointment which was taken before the justices, as it must be admitted that the objection is probably not good in law, having regard to *Ross* v. *Helm*. (1)

But it is desired to rely upon a second point which does not appear upon the face of the case stated by the justices and which for the purpose of this appeal is assumed not to have been

(1) [1913] 3 K. B. 462.

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taken before the justices, namely, that there was no evidence given before them that the respondent was authorized to bring the prosecution as required by s. 259 and Sched. I., r. 10, of the Public Health Act, 1875. (1) Even though the point was not taken before the justices and they thought it was not in dispute, it is their duty to see that there is evidence in law that an offence has been committed.

[AVORY J. Do not *Purkis* v. *Huxtable* (2) and *Knight* v. *Halliwell* (3) shew that a point can only be taken in this Court which was not raised before the justices when a question of law appears on the face of the case which no evidence could alter? If the point had been taken that the inspector was not duly authorized the justices might have granted an adjournment in order that the necessary evidence might be produced.]

Even though the point was not taken before the justices it was their duty not to proceed to conviction in the absence of proof of circumstances without which the offence cannot be proved. In *Gieblier* v. *Manning* (4) Lord Alverstone C.J. is reported in the *Law Journal* reports as saying that "We have invariably taken the view in cases of this class, that where the particular point arises on the facts as found, even although it was not raised in the Court below, we are entitled to give our judgment upon it," although it is only fair to say that his language as there reported is modified in the report in the *Law Reports*, where the words are

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 259: "Any local authority may appear before any Court, or in any legal proceeding by their clerk, or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act."

Sched. I., r. 10: "Any minute made of proceedings at a meeting, and copies of any orders made or resolutions passed at a meeting, if purporting to be signed by the chairman of the meeting at which such proceedings took place or such orders were made or resolutions passed, or by the chairman of the next ensuing meeting, shall be received as evidence in all legal proceedings; and, until the contrary is proved, every meeting where minutes of the proceedings have been so made shall be deemed to have been duly convened and held, and all the proceedings thereat to have been duly had."

(2) (1859) 1 E. & E. 780.

(3) L. R. 9 Q. B. 412.

(4) [1906] 1 K. B. 709; 75 L. J. (K.B.) 463.

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"this Court has invariably taken the view in this class of cases that where on the facts found in the case the proceedings are regular, they ought to be supported, even though the particular point on which the judgment of this Court is based was not raised in the Court below." [*Connor* v. *Butler* (1), *Dodd* v. *Pearson* (2), and ss. 116, 117, and 253 of the Public Health Act, 1875, were also referred to.]

Rowland Harker, for the respondent, was not heard.

DARLING J. I am of opinion that this appeal must be dismissed. With regard to the first point, i.e., whether there was sufficient evidence of the appointment of the respondent as sanitary inspector, that was the only point which was taken in the Court below, and Mr. Barrington-Ward on behalf of the appellant does not now rely upon it. There is no ground for suggesting that there was not sufficient evidence that the respondent was a sanitary inspector.

But Mr. Barrington-Ward raises the point that no evidence was given before the justices that the sanitary inspector obtained the authority from the local authority which was necessary to enable him to take these proceedings against the appellant. That point was not taken before the justices. If the point had been taken, the justices would in all probability have adjourned the case if necessary for the evidence to have been produced, and if it had been forthcoming would have then again proceeded with the hearing. In *Knight* v. *Halliwell* (3) Blackburn J. said, after referring to *Purkis* v. *Huxtable* (4) and observing that if the point which was attempted to be raised before the Court of Queen's Bench in that case had been taken before the justices evidence with regard to it could have been supplied, "here a question of law, which no evidence could alter, arises on the statement of facts." I think that if Lord Alverstone C.J. used the words attributed to him in the report in the *Law Journal* in *Gieblier* v. *Manning* (5)—"We have invariably taken the view in cases of this class, that where the

(1) [1902] 2 I. R. 569.
(2) [1911] 2 K. B. 383.
(3) L. R. 9 Q. B. 412.
(4) 1 E. & E. 780.
(5) [1906] 1 K. B. 709; 75 L. J. (K.B.) 463.

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particular point arises on the facts as found, even although it was not raised in the Court below, we are entitled to give our judgment upon it"—and which have been quoted by Mr. Barrington-Ward, he must have been speaking in the same sense as Blackburn J. did in *Knight* v. *Halliwell* (1), and that his language is equivalent to what Blackburn J. laid down, namely, that a question of law arising on the facts stated by justices, but which was not taken before them, can only be taken before this Court if it is one which no evidence could alter. In my judgment, if this Court sees that a question of law arises upon the face of a case stated by justices which no evidence could alter, this Court is entitled to take the point and to deal with the question of law although the point was not taken before the justices. And this Court cannot refuse to raise such a point merely because one of the parties has not taken it in the Court below. For example, if a case stated by the justices alleged that a lease for five years was an estate in fee simple, this Court would not only be entitled but bound to take the point of law. But no such point of law arises upon the facts stated in the present case. The question whether the respondent was duly authorized to take proceedings against the appellant was a pure question of fact, and if the point of law had been taken that, without evidence of that fact, the prosecution would not lie, the justices might and probably would have adjourned the hearing in order to enable the authority of the sanitary inspector to be produced. In my judgment, therefore, the point is not now open to the appellant, and this appeal must be dismissed.

AVORY J. I am of the same opinion.

ROWLATT J. I agree.

Appeal dismissed.

Solicitors for appellant: *Neve, Beck & Kirby, for Neve & Peach, Tonbridge.*

Solicitor for respondent: *Wilfred Dell, for R. Vaughan Gower, Tunbridge Wells.*

(1) L. R. 9 Q. B. 412.

J. E. A.

PHELON & MOORE, LIMITED, APPELLANTS *v.* KEEL, RESPONDENT.

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April 23.

Motor Car—Manufacturer—General Identification Mark—Unauthorized User of Motor Cycle—Failure to keep a Record—Offence—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 2, *sub-s.* 4 (*b*)—*Motor Car Registration and Licensing Order*, 1903, *art. XII.*

Art. XII. of the Motor Car Registration and Licensing Order, 1903, provides that on every occasion on which the general identification mark (which by s. 2, sub-s. 4 (*b*), of the Motor Car Act, 1903, may be assigned to a manufacturer of motor cars) is used, the manufacturer shall keep a record of the distinguishing number on the identification plate and of the name and address of the person driving the car.

The appellants were manufacturers of motor cycles to whom a general identification mark had been assigned. Their stock of motor cycles was placed by them under the charge of a man in their employment. This man took out one of their motor cycles without their knowledge or authority and used it for his own private purposes. No record as required by art. XII. was kept on the occasion of this user of the motor cycle, and the appellants were in consequence charged with the offence of a breach of art. XII. :—

Held, that as the user of the motor cycle was unauthorized by and unknown to the appellants, the failure to keep a record did not render them guilty of the offence charged.

Strutt v. *Clift* [1911] 1 K. B. 1 distinguished.

CASE stated by justices in and for the petty sessional division of East Morley in the West Riding of Yorkshire.

An information was preferred by the respondent against the appellants under s. 2, sub-s. 4 (*b*), of the Motor Car Act, 1903 (1),

(1) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 2: "(1.) Every motor car shall be registered with the council of a county or county borough, and every such council shall assign a separate number to every car registered with them.

"(2.) A mark, indicating the registered number of the car and the council with which the car is registered, shall be fixed on the car or on a vehicle drawn by the car, or on both, in such manner as the council require in conformity with regulations of the Local Government Board made under this Act.

"(4.) If a car is used on a public highway without being registered, or if the mark to be fixed in accordance with this Act is not so fixed, ... the person driving the car shall be guilty of an offence under this Act . . . .

"Provided that— . . . .

"(*b*) The council of any county or county borough, in which the

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and art. XII. of the Motor Car Registration and Licensing Order, 1903, that the appellants being manufacturers of motor cycles and having had assigned to them a general identification mark, and such mark being used on a motor cycle on August 30, 1913, did fail to keep a record of the distinguishing number placed on or annexed to the identification plate, and the name and address of the person driving the motor cycle on the occasion on which the said mark was so used.

The following facts were proved or admitted:—

The appellants were motor cycle manufacturers, and had had assigned to them a general identification mark under s. 2, sub-s. 4 (*b*), of the Act of 1903, and the said identification mark was affixed to a motor cycle bearing the letters and number C. C. 2. The appellants had at the time material to the matters in question in their employ one William Drake, and the whole of the motor cycles which the appellants had in stock (including the motor cycle C. C. 2) were placed by the appellants under the charge of William Drake.

On August 29, 1913, William Drake for his own private

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business premises of any manufacturer of or dealer in motor cars are situated, may on payment of such annual fee, not exceeding three pounds, as the council require, assign to that manufacturer or dealer a general identification mark which may be used for any car on trial after completion, or on trial by an intending purchaser, and a person shall not be liable to a penalty under this section while so using the car, if the mark so assigned is fixed upon the car in the manner required by the council in accordance with regulations of the Local Government Board made under this Act."

Art. XII. of the Motor Car Registration and Licensing Order, 1903, provides (inter alia) that: "On every occasion on which the general identification mark is used on a motor car, the manufacturer or dealer shall keep a record of the distinguishing number placed on or annexed to the identification plates on that occasion, and of the name and address of the person driving the motor car on that occasion, and that record shall be open to inspection by the council or by any superior officer of police or constable authorised by such an officer."

The Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 6, enacts that the Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used, and s. 7 of the same Act provides that a breach of any regulation made under the Act may on summary conviction be punished by a fine not exceeding ten pounds.

enjoyment and purpose took out the motor cycle with the general identification mark affixed thereon unknown to the appellants (his employers) and without their authority, and took it to his home. From the evening of August 29 and for the next seven consecutive days the works were closed for holiday, such period being known as the wake or feast week.

On August 30, William Drake having gone away to the Isle of Man for two or three days for a holiday, leaving the motor cycle with the general identification mark affixed thereon at his home, his brother, who was not employed by or in any way connected with the appellants, on that morning, in the absence of William Drake, took out the motor cycle and used it without the knowledge of either William Drake or the appellants. This was the day and the occasion in respect of which the information was laid.

No record of the distinguishing number placed on or annexed to the identification plates on the occasion of the use of the general identification mark on the motor cycle was kept by the appellants as required by art. XII. of the Motor Car Registration and Licensing Order, 1903.

On the part of the appellants it was contended that on these facts no offence had been committed on August 30, 1913. On the part of the respondent it was contended that the offence described in the information had been committed on the date charged.

The justices came to the following conclusion :—A general identification mark having been assigned to the appellants for use in accordance with the provisions of the Act and Order, there was placed upon the appellants the duty of seeing that the provisions of art. XII. of the Order were duly complied with. Further, that the appellants having placed William Drake in charge of the motor cycles kept on their premises, including the motor cycle in question, they were responsible for his acts which led to the use of the motor cycle and the general identification mark on the date in question, and the justices convicted the appellants.

The question of law for the opinion of the Court was whether on these facts the appellants were lawfully and rightfully convicted of the offence complained of in the information.

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R. M. Montgomery, for the appellants. On the facts found by the justices the appellants are not guilty of the offence charged. The record which is required to be kept under art. XII. is a record of the occasions on which a motor car or motor cycle is used for the purposes for which under s. 2, sub-s. 4, the general identification mark may be used. It is not a contravention of art. XII. if a manufacturer fails to make the record when his car has been used by his servant without his knowledge or authority and for the servant's own purposes. The position in this case is just the same as if a thief had stolen the appellants' motor cycle and ridden away on it. As the appellants knew nothing about the user of the motor cycle on the day in question it was impossible for them to make the record required by art. XII.

[He was stopped.]

Macmorran, K.C. (*Godfrey Hutchinson* with him), for the respondent. The permission given by s. 2, sub-s. 4 (*b*), to manufacturers and dealers to obtain and use a general identification mark is a privilege which is only granted if certain conditions are fulfilled, one of which is that on every occasion on which the general identification mark is used the record required by art. XII. is to be kept. That is an absolute condition, and a breach of it constitutes an offence even though in the circumstances it may have been impossible to comply with the condition. The offence of non-compliance with art. XII. would be committed by a manufacturer even if a burglar broke into his premises and took a motor cycle away with him. It is the duty of a manufacturer, who accepts the privilege of using a general identification mark, to take care that his cars and cycles do not get into the hands of wrong-doers. The word "used" in art. XII. means used in fact, whether rightly or wrongly. In *Strutt* v. *Clift* (1) the Court placed that construction upon the same word in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888.

DARLING J. In my opinion this appeal succeeds. The appellants are manufacturers of motor cycles, and therefore they are within the class of persons to whom a concession has been made, by s. 2, sub-s. 4 (*b*), of the Motor Car Act, 1903, as to

(1) [1911] 1 K. B. 1.

the manner in which their motor cycles shall be identified when being used for the purposes mentioned in sub-s. 4.

The appellants had had assigned a general identification mark under that section, and art. XII. of the Motor Car Registration and Licensing Order, 1903, provides that on every occasion on which the general identification mark is used on a motor car, the manufacturer shall keep a record of the distinguishing number placed on the identification plates on that occasion, and of the name and address of the person driving the car. In the present case a motor cycle belonging to the appellants had the general identification mark upon it, but the cycle was taken out from the appellants' premises without any record being made of the distinguishing number or of the name and address of the person using the cycle. The person who took it out was a man named Drake, who was in the appellants' employment, and the case states that the whole of the motor cycles which the appellants had in stock, including the one in question, were placed by the appellants under Drake's charge. Now, if the case had stopped there, it might possibly have been successfully contended that Drake took out this motor cycle at a time when he was in charge of it with the authority of the appellants, but the next paragraph of the case absolutely negatives that suggestion, for it says that he took it to his home for his own private enjoyment and purpose unknown to the appellants and without their authority, and then on the following day whilst the motor cycle was being ridden by Drake's brother the offence charged against the appellants is alleged to have been committed. I make no point that the user on that day was by Drake's brother, because Drake himself took the cycle from the appellants' premises and used it without their knowledge and without their authority, express or implied. When Drake did that he was in no way acting within the scope of his authority. He was as regards the cycle on that occasion just as much a trespasser as a burglar would be who broke into the appellants' premises and stole the cycle and rode away on it. That was not denied by Mr. Macmorran, but he contended that, even if the cycle had been taken away by a burglar, so that it would have been impossible for the appellants to record the name

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and address of the person using the cycle, the appellants' omission to make that record would have been an offence under these regulations. That argument appears to me to be in conflict with the well-known maxim Lex non cogit ad impossibilia. Drake was no doubt a servant of the appellants who was generally in charge of their motor cars, but on this occasion he was a mere trespasser, and in order to uphold this conviction we should be compelled to decide that the failure to make a record of the name and address of the person using the motor car is an offence although the user is by an unauthorized person in circumstances in which it is manifestly impossible for the owner to ascertain the name and address. In my opinion there is nothing in the language of the Act of Parliament or of the regulations made under it which compels us to hold that in those circumstances an offence is committed, nor do I think that the Legislature ever intended that a man should be guilty of an offence if he failed to do something which it was impossible for him to do.

The appeal will therefore be allowed, and the conviction must be quashed.

AVORY J. I am of the same opinion. I do not dispute that the Legislature may, and sometimes does, impose an absolute duty on a person, a breach of which duty is made a criminal offence even in the absence of mens rea. *Strutt* v. *Clift* (1) is an example of that class of case. But once it is admitted, as it must be in the present case, that it was impossible for the appellants to comply with this regulation, that is to say, that it was impossible for them to make a record of the name and address of the person using the motor cycle on the occasion in question, it becomes the duty of this Court to consider whether any construction can be placed upon the language of the regulation which will relieve the appellants from being criminally liable for not doing that which it was impossible for them to do.

I have come to the conclusion that the justices have misinterpreted the language of art. XII. I do not think that this was an occasion on which the appellants' motor cycle was being

(1) [1911] 1 K. B. 1.

"used" within the meaning of the regulation. It was really an occasion on which a motor cycle was being used on a highway without being registered, and the person so using it, either Drake or his brother, was guilty of an offence under s. 2, sub-s. 4, of the Motor Car Act, 1903. It is to be observed that the provision as to manufacturers or dealers having a general identification mark is an exception to or exemption from the provision of s. 2 which requires that every motor car shall be registered and shall have a separate number assigned to it, and the privilege of having a general identification mark conferred by sub-s. 4 (*b*) on manufacturers and dealers can only be exercised when a car is out on trial after completion, or is being tried by an intending purchaser. Then, for the purpose of carrying out the objects of sub-s. 4 (*b*), art. XII. of the Order of 1903 provides that "on every occasion on which the general identification mark is used on a motor car" certain things are to be recorded. I think that the meaning of art. XII. is that the record is to be made when the car is being used with the general identification mark for the purposes mentioned in sub-s. 4, and that it does not apply at all to a case where a car, belonging to a manufacturer who has obtained a general identification mark, is used in an unauthorized manner by an unauthorized person who ought himself to be prosecuted for an offence.

ROWLATT J. I agree. Under s. 2, sub-s. 4, of the Motor Car Act, 1903, if a motor car is used on a public highway without being registered and without having fixed on it the mark indicating the registered number, an offence is committed by the person using the car. Then clause (*b*) of sub-s. 4 provides for an exception in the case of manufacturers of or dealers in motor cars, the scheme of which is that a manufacturer or dealer instead of having a particular identification mark for each of his motor cars or motor cycles may obtain a general identification mark which can be used to cover all his stock, subject to two qualifications, namely, first, under clause (*b*) the general identification mark is only to be used for a car on trial after completion or on trial by an intending purchaser; and, secondly, under art. XII. of the Regulations, on every occasion on which the

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general identification mark is used, a record is to be kept of the distinguishing number placed on the identification plate and of the name and address of the person using the car on the particular occasion. That being the scheme of the exemption contained in sub-s. 4 (*b*), the question which we have to decide in this case is, what construction ought to be placed on the word "used" in art. XII.? Does it mean used by anybody in any circumstances, or used by some one on behalf of and with the express or implied authority of the manufacturer or dealer? It seems to me quite clear that the latter meaning must be the correct one. Clause (*b*) of sub-s. 4 provides that the general identification mark which may be assigned to a manufacturer or dealer "may be used for any car" on the occasions specified. The word "used" there clearly means used in the business of, and on behalf of, the manufacturer; and in art. XII. the word "used" also points to user by the person to whom the general identification mark has been assigned. But the matter does not stop there, for the word "used" in art. XII. occurs in conjunction with the sentence as to keeping a record. It is clear, therefore, to my mind that art. XII. is throughout dealing only with occasions when the general identification mark is used by the manufacturer himself or by his authorized agent. It follows from this that in the circumstances of the present case the appellants did not commit a breach of art. XII.

It is said that the decision of this Court in *Strutt* v. *Clift* (1) is opposed to this construction. It is true that the word "used" occurred in the Act of Parliament which the Court had to construe in that case, and it is true also that it was contended, unsuccessfully, that the word "used" meant "used by the owner or with his knowledge or authority," but the circumstances of that case and the subject-matter of the Act were very different from those of the present case. The appellants there had to prove in order to be exempted from the requirements of a carriage licence that their cart was used solely in a particular manner. In the present case the question is not whether the appellants' motor cycle was used on a particular occasion or for a particular purpose, but whether it was used by the appellants in such

(1) [1911] 1 K. B. 1.

circumstances as to impose upon them the obligation to make a record.

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Appeal allowed.

Solicitors for appellants: *Jaques & Co., for Moore & Shepherd, Bradford.*

Solicitors for respondent: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

F. O. R.

MARCUS *v.* CROOK.

1914

May 12.

Adulteration — Warranty — Notice to Warrantor of Intention to rely on Warranty—Time within which Notice must be sent—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), *s.* 25—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict.* c. 51), *s.* 20.

Sect. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, provides as follows: "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person":—

Held, that the words "within seven days after service of the summons" do not apply to the notice to be sent to the warrantor, but merely apply to the notice to be sent to the purchaser, and that as regards the notice to the warrantor it is sufficient if it has been sent before the magistrate comes to determine whether the warranty is a good defence.

CASE stated by a metropolitan police magistrate.

The appellant, Marcus, was summoned at the instance of the respondent, an inspector under the Sale of Food and Drugs Acts, for having unlawfully sold to him, the respondent, on September 5, 1913, a quantity of milk which was not of the nature, substance, and quality demanded, but was adulterated with at least 5 per cent. of added water.

At the hearing the following facts were proved or admitted:—

1. On September 5, 1913, at 6.30 A.M., the respondent purchased from the appellant a certain quantity of milk which, after notification to the seller, was divided into three parts and dealt with by the respondent for the purposes of analysis in accordance

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with the requirements of s. 14 of the Sale of Food and Drugs Act, 1875. The milk so purchased was taken from a hand can from which the appellant was supplying his customers with milk. The hand can was half full and contained about six quarts of milk.

2. One of the three parts was analysed on September 6, 1913, by the Stepney public analyst, who certified that the sample had been adulterated to the extent of at least 5 per cent. of added water.

3. The appellant had received at 6 A.M. on September 5 a consignment of milk in churns from the Great Western and Metropolitan Dairies, Limited, for the purpose of supplying his customers on that day. That consignment was purchased by the appellant under an agreement dated September 28, 1912, containing the following provisions:—"All milk to be delivered by the vendors at the purchaser's address in a sweet, pure, and saleable condition, and each and every consignment is hereby warranted by them pure with all its cream as received from the cow, but no responsibility will be taken by the vendors after delivery. This warranty is given upon the understanding that samples, when taken by inspectors under the Sale of Food and Drugs Acts, shall immediately be sent to the head offices of the company with particulars of which delivery it formed a part (see note on back)." On the back was the following:—"Note respecting samples. Immediately a sample is taken by an inspector under the Sale of Food and Drugs Acts particulars should be obtained at once from the person from whom the sample was taken or purchased. The particulars should be as follows: 1. Time when sample was taken. 2. Place or street where taken. 3. Whether from hand kettle, delivery churn, counter pan or pail. Estimated quantity of milk in the vessel at the time. 4. Particulars of the time the company's carman delivered the milk to you. 5. Quantity of milk so delivered. Printed forms may be had from the company for giving these particulars which please send together with sample to 9, Harrow Road, Paddington; also your name and address."

4. The appellant sent to the dairy company on September 5 particulars together with part of the sample from the hand can taken by the respondent. The particulars so sent stated the time when and place where the sample was taken, the time when the

consignment of milk was received from the company, and the quantity so received.

5. The sample sent by the appellant to the dairy company was analysed by their analyst and his analysis shewed that the milk was adulterated with 5 per cent. of added water.

6. The summons was issued on September 26, was returnable on October 17, and was served personally on the appellant on September 27.

7. Within seven days of the service of the summons on him the appellant left the original agreement containing the said warranty with the respondent, who accepted it as the notice required to be given to him under s. 20 of the Sale of Food and Drugs Act, 1899.

8. On October 17 the hearing of the summons was adjourned sine die at the request of the appellant in order that the third part of the sample of the milk from the hand can might be analysed at Somerset House. No evidence was then taken.

9. On October 26 the appellant sent to the dairy company a notice stating that he proposed to raise the defence of warranty on the adjourned hearing of the summons.

10. The case was heard on November 11 and subsequent dates. The dairy company were not represented at the hearing on any of the dates except that an official of the company attended on subpœna and was called as a witness for the defence to produce the notices sent to the company by the appellant on September 5 and October 26.

11. The appellant endeavoured to raise the defence of warranty under s. 25 of the Sale of Food and Drugs Act, 1875 (1), and s. 20 of the Sale of Food and Drugs Act, 1899. (2)

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence."

(2) Sale of Food and Drugs Act,

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On behalf of the respondent it was contended that the appellant was excluded from raising the defence of warranty as he had not given notice to the dairy company, the warrantors, as required by s. 20 of the Act of 1899 within seven days after the service of the summons on the appellant nor within a reasonable time.

On behalf of the appellant it was contended, first, that the sending of the sample and particulars to the dairy company on September 5, coupled with the fact that their analyst found that the sample contained 5 per cent. of added water, amounted to a sufficient notice within the meaning of s. 20 of the Act of 1899, and was a sufficient and reasonable notice; and, secondly, that even if the above contention was wrong, the notice of October 26 was by itself or in combination with the particulars of September 5 a sufficient and reasonable notice within s. 20 of the Act of 1899, because that Act only required a notice sufficient to enable the warrantors to be promptly acquainted with the facts and to be represented upon the hearing of the summons.

The magistrate was doubtful whether s. 20 of the Act of 1899 meant that the notice required to be given by that section to the warrantors should be sent within seven days after service of the summons, but he was of opinion that the notice must be given at least within a reasonable time after the service of the summons, and that in this case it was not given within a reasonable time; that the particulars sent to the dairy company on September 5 before either the appellant or the company knew the result of the public analyst's analysis, and before they knew whether a summons was going to be issued, did not constitute a valid notice within s. 20; that the notice given on October 26,

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1899 (62 & 63 Vict. c. 51), s. 20:

"(1.) A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person.

"(2.) The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and to give evidence, and the Court may, if it thinks fit, adjourn the hearing to enable him to do so."

twenty-nine days after the service of the summons and nine days after the day originally fixed for the hearing, was not a reasonable notice and was not converted into a reasonable notice by the mere fact that the appellant had in the meantime obtained an adjournment; that the said particulars and the notice of October 26 either together or separately did not constitute a valid notice within s. 20; and that the appellant was not entitled to rely upon the defence of warranty under the said sections of the Acts. The magistrate accordingly convicted the appellant.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

G. R. Blanco White, for the appellant. The question turns upon the true construction of s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899. It was contended for the respondent that the words in that sub-section "within seven days after service of the summons" apply equally to the notice sent to the purchaser and to the notice sent to the warrantor. That is not the grammatical construction of the sub-section, and the magistrate doubted whether that view could be supported, but he held that the notice to the warrantor must be given within a reasonable time after the service of the summons. This provision must be construed strictly, and there is nothing to warrant the reading in of words requiring the notice to be sent to the warrantor within a reasonable time. The notice is good if it is given at any time before the magistrate hears the case. If the notice is given unreasonably late the magistrate can adjourn the hearing under sub-s. 2 of s. 20, and in such a case the defendant might have to pay the costs of the adjournment. In this case two notices were given and each of them was in time. The first notice was given in compliance with the requirement of the agreement with the dairy company, and although it was sent before the summons was served on the appellant the company must have inferred that, being accompanied by the sample, it was sent in view of probable proceedings, and that the appellant intended to rely upon the warranty. In any view the second notice was in time, as it was sent before the magistrate adjudicated upon

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the case. On the question of the form of the notice the sub-section requires a "like" notice to be sent to the warrantor. A "like" notice only means a written notice. Each of the two notices was sufficient by itself to comply with the sub-section.

E. J. Naldrett, for the respondent. It is conceded that the second notice sent by the appellant to the dairy company was sufficient in point of form, but the question is, was it given in time? It is submitted that it was not. The intention of sub-s. 1 of s. 20 of the Act of 1899 is that the words "within seven days" should apply not only to the notice to the purchaser but also to the notice to the warrantor. This is borne out by the use of the words "like notice." If the notice to the warrantor is not sent within seven days after service of the summons, it must at least be sent before the return day. The language used—"has also sent a like notice of his intention to such person"—points to something which has already been done by the return day. It is not open to a defendant to wait till the return day and then obtain an adjournment in order that he may send notice to the warrantor. Sub-s. 2 of the section does not alter the position in any way.

AVORY J. The question in this case is whether the appellant has complied with the condition of s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, so as to entitle him to raise before the magistrate the defence open to him under s. 25 of the Sale of Food and Drugs Act, 1875, namely, that he purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect. The magistrate has held that the appellant was not entitled to raise that defence because he had not, in the magistrate's opinion, complied with the latter part of sub-s. 1 of s. 20 of the Sale of Food and Drugs Act, 1899. That sub-section provides that "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and

address of the person from whom he received it, and has also sent a like notice of his intention to such person," i.e., to his vendor or warrantor. The magistrate, after expressing a doubt whether the words "within seven days" govern the words "a like notice" at the end of the sub-section, has held that the defendant must, to be entitled to rely on the defence of a warranty, have sent a like notice of his intention to the vendor or warrantor within a reasonable time after the service of the summons. In my opinion any construction which is open to the Court other than that ought to be adopted, for if the magistrate's view is correct it will be open to every magistrate before whom this question is raised to take a different view of what is a reasonable time. Such a construction of a penal statute and especially of that part of a penal statute which makes a particular defence available to a defendant is most undesirable. There ought to be certainty in the construction of this sub-section so that magistrates should have no doubt about its application in any case coming before them. There is undoubtedly something to be said in favour of the construction which the magistrate entertained, although he did not adopt it, namely, that the words "within seven days" govern the whole of the sub-section; but, as was pointed out during the argument, that construction is clearly ungrammatical, and in my view the words "within seven days after service of the summons" only apply to the notice which has to be sent to the purchaser. We have now to construe the words "and has also sent a like notice of his intention to such person." In my opinion the proper reading of this sub-section is that the warranty or invoice, which has been spoken of in s. 25 of the Act of 1875, shall not be available as a defence unless, in addition to the notice given to the purchaser within seven days after service of the summons, the accused has also by the time when the magistrate has to consider that defence of warranty sent a like notice of his intention to the warrantor, that is to say, a notice that he intends to rely on the warranty as a defence. In other words, all that the magistrate has to determine, at the time when he is called upon to decide whether the warranty is a good defence, is, whether a notice has been given by the accused to his vendor or warrantor of his intention

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to rely upon that warranty as a defence. I do not say that the magistrate is bound in any case to grant an adjournment for the purpose of such a notice being given when by mere neglect it has not already been given. Whether an adjournment shall be allowed or not, for such a purpose or for any other purpose, is always in the discretion of the magistrate, and I do not intend by anything I say to encourage a practice of the person proceeded against under this Act waiting till the matter comes before the magistrate for hearing and then applying for an adjournment in order to give notice. Normally the notice will be given before the hearing, but in my opinion the magistrate has no right to shut out the accused from this defence if in fact a notice has been given before the actual hearing and determination of this question is proceeded with. For the reasons I have given I think the magistrate was wrong in the view he took. The case must be remitted to him to be heard and determined upon the merits of this defence.

ROWLATT J. I am of the same opinion. The statute which has imposed a limit of time within which the notice to the purchaser must be given has not imposed a limit of time within which a notice must be given to the alleged warrantor. We cannot read in any time limit in the second instance so as to add a condition not found in the statute which allows this defence. We cannot impose a seven days' limit to the second notice, since by clear grammatical construction and their position in the sub-section the "seven days" have been limited to the notice to be sent to the purchaser and cannot govern or apply to the notice to be sent to the warrantor. We cannot imply that the latter notice must be sent within a reasonable time, inasmuch as it is an unheard-of thing to make a defence to a criminal charge depend upon the taking of a step within anything so vague and so liable to different interpretation as a reasonable time. The notice to the warrantor need not in my opinion be given within any specified time, but the defence of a warranty is not available until that notice has in fact been given, and an adjournment, if it is thought fit, may be granted to enable the notice to be given. If at the time that defence is raised a

reasonable time has not elapsed since the notice was given the effect is not to make the notice bad, but merely to make it advisable to extend the time by postponing the case and so giving sufficient time to the warrantor to appear and defend.

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SHEARMAN J. I agree.

Appeal allowed; case remitted.

Solicitors for appellant: *Palmer & Robinson.*
Solicitors for respondent: *C. V. Young & Son.*

J. S. H.

[IN THE COURT OF APPEAL.]

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BESTERMAN *v.* BRITISH MOTOR CAB COMPANY, LIMITED.

Practice—Costs—Two Defendants—Costs of Successful Defendant payable by Unsuccessful Defendant.

A plaintiff who was injured in a collision between a motor cab and an omnibus joined the owners of both vehicles as defendants in an action to recover damages for injuries sustained. He obtained a verdict with damages against the motor cab company, but the omnibus company obtained a verdict in their favour. The judge made an order for payment to the plaintiff by the motor cab company of the plaintiff's costs against the omnibus company and of the costs which the omnibus company recovered against the plaintiff:—

Held, that the judge had a discretion to make the order, although before the issue of the writ the motor cab company had not intimated to the plaintiff their intention to throw the responsibility for the accident on the other defendants.

There is no rule to the effect that, in order to justify an order on an unsuccessful defendant to pay a successful co-defendant's costs, the unsuccessful defendant must, before the issue of the writ, have given notice to the plaintiff that he is going to throw the blame on the other defendant; it is a question in all cases whether it was a reasonable and proper course for the plaintiff to join both the defendants in the action.

APPEAL of the defendants, the British Motor Cab Company, from an order as to costs made by Lord Coleridge J. at the trial of the action.

The plaintiff sued the British Motor Cab Company and the London General Omnibus Company jointly, severally, and in the

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alternative to recover damages for personal injuries received by him in a collision between a motor cab and an omnibus belonging to the respective defendants. Before the issue of the writ the British Motor Cab Company had said nothing to the plaintiff to lead him to believe that they intended to throw the blame for the collision on the London General Omnibus Company, but in a correspondence between the solicitors for the two defendants each tried to throw the blame on the other defendant. At the trial of the action, at which each defendant tried to place the whole responsibility for the accident upon the other defendant, the jury found a verdict for the plaintiff against the British Motor Cab Company with 750*l.* damages, but found a verdict in favour of the London General Omnibus Company, and judgment was entered in favour of the plaintiff for 750*l.* and costs against the former defendants, and judgment in favour of the second defendants with costs against the plaintiff. Lord Coleridge J. made an order that the costs to be received from the defendants the British Motor Cab Company by the plaintiff should include all costs incurred against the defendants the London General Omnibus Company, by reason of there being two defendants, and further the costs which the plaintiff would have to pay the London General Omnibus Company. The defendants the British Motor Cab Company appealed.

McCall, K.C. (*J. B. Matthews, K.C.*, with him), for the defendants. At the time when the writ was issued the defendants had said and done nothing which would justify such an order as that made by the learned judge. No allegation had been made by the defendants that they were going to throw the blame on their co-defendants, the London General Omnibus Company, and there was no allegation to that effect in the defendants' pleading. Before the Judicature Act judges in Chancery made orders that one defendant should pay the costs of the other defendant if he had been guilty of misconduct which had increased the costs. When the Judicature Act authorized plaintiffs to bring an action against two defendants jointly or alternatively, questions as to costs arose. In *Bullock* v. *London General Omnibus Co.* (1)

(1) [1907] 1 K. B. 264.

the basis of the decision was that each defendant charged the other with having caused the accident, and this was followed in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers.* (1) The jurisdiction over costs in a case like the present is derived from Order LXV., r. 1. There was no good cause for joining the second defendant. It must be the conduct of the unsuccessful defendant leading to the joinder of the successful defendant that justifies such an order.

Sanderson, K.C. (*Martin O'Connor* with him), for the plaintiff. The test to apply is whether on all the facts it was reasonable for the plaintiff to join the second defendant. Judges have held that the first defendant should tell the plaintiff at the earliest moment that he is not going to throw the blame on the other vehicle, and that if at the trial the case is fought on the ground that the other vehicle is liable, there are circumstances on which the judge may reasonably hold the first defendant liable to pay the other defendant's costs. See *Mulhern* v. *National Motor Cab Co.* (2), per Bankes J., and *Vine* v. *National Motor Cab Co.* (3), per Bucknill J. It is not suggested that there is a binding rule applicable to all cases; the question must always be whether there is good cause for the judge's order. Here there was material upon which he could properly exercise his discretion in the way in which he did exercise it.

McCall, K.C., in reply. The learned judge acted on the assumed rule as to the duty of one defendant to say when applied to that he is not going to throw the blame on the other. But there is no such duty. The basis of the rule, if it existed, would be "Predict now the course that the case will take at the trial." [He also cited *Honduras Co.* v. *Tucker* (4); *Sanderson* v. *Blyth Theatre Co.* (5)]

VAUGHAN WILLIAMS L.J. We have had cited to us to-day two recently reported cases, in one of which, *Mulhern* v. *National Motor Cab Co.* (2), there is a judgment of Bankes J.; it deals with the question of costs payable to a successful defendant from

(1) [1910] 2 K. B. 354, 368.
(2) (1913) 29 Times L. R. 677.
(3) (1913) 29 Times L. R. 311.
(4) (1877) 2 Ex. D. 301.
(5) [1903] 2 K. B. 533.

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an unsuccessful defendant, and is thus reported, "After the accident the plaintiff first complained to the London General Omnibus Company, and his solicitor applied for compensation from them, but they denied liability and said that the accident had been caused solely by the negligence of the taxicab driver. That being so, if in the end the jury found that it was attributable to the negligence of the omnibus company, that company would have been within the recent authorities as to costs where there were co-defendants, because they had in effect invited the plaintiff to join the motor cab company as co-defendants. On the refusal of the omnibus company to admit liability the plaintiff applied to the cab company, and they, while denying any liability on their own part, abstained from throwing the responsibility on the omnibus company. Was that mere abstention enough to take them out of the recent rule as to costs? In his Lordship's opinion it was not. He thought that for a defendant to escape the obligation to pay the plaintiff's costs against a co-defendant he must do something more than merely deny negligence on his own part; he must go so far as to say that he does not intend to throw any responsibility on the other defendant. If he made it clear that he did not intend to throw responsibility on the other defendant, he could not be said to have invited the plaintiff to go on against the other defendant, but in the absence of a clear disclaimer the plaintiff was left in the same position as if the one defendant had contended that the other was to blame. The plaintiff therefore was entitled here to add to the costs which he recovered against the motor cab company the costs which he had to pay to the successful defendant." Now, I say of that judgment the same that I say of Mr. Sanderson's argument this morning; they are based really, both of them, upon the old obligation to declare whether or not the defendant means to throw the blame on the other person. So far as that is concerned, I do not think there is any such rule, and I do not believe that any such rule could be supported. Then I looked at the other recent case of *Vine* v. *National Motor Cab Co.* (1), a decision of Bucknill J. "The question he had to consider was whether the proper order to make was that the plaintiff should recover from the

(1) 29 Times L. R. 311.

unsuccessful defendants the costs which he would be compelled to pay to the London General Omnibus Company, who had been successful in the action as against him. In order to determine this question he must consider what was the attitude taken up by the unsuccessful defendants. His Lordship reviewed the circumstances of the case, and said that when the plaintiff's solicitors wrote before action to the National Motor Cab Company, the latter in replying should have said something which would have been a guide to the plaintiff as to whether he ought to join the London General Omnibus Company as defendants or not. The plaintiff, with his limited knowledge of the facts, was entitled to bring an action against both the defendants, but the first defendants, when they were applied to by the plaintiff, ought to have said whether they alleged negligence against the omnibus company or not." Again I say I cannot recognize any such duty as is put upon them there. This is based, as was Mr. Sanderson's argument, upon a hypothesis that you are entitled to ask a question and have information as to what the view of and the course to be taken in respect of the other defendant's liability is. I recognize no such duty of any sort or kind. Now, I gave, in the course of the argument this morning, an instance to shew that it would be utterly unreasonable. I do not think my instance was quite as good as the instance which was given by Mr. McCall, who took the instance of a company who could have only hearsay knowledge as to what took place and necessarily must wait until the trial came on in order to know whether there was any ground for throwing liability upon the other defendant or not. I entirely reject the idea that there is the right to ask the question or the obligation to answer it. That being so, I have to deal with this matter upon the basis of the judgment of the Court of Appeal in the case of *Bullock* v. *London General Omnibus Co.* (1) I am going to read the judgment of Cozens-Hardy L.J. in that case, because I think that puts—I will not call it a rule, because there is no positive rule—the test as to whether the unsuccessful defendant should have to bear the costs payable to the successful defendant by the plaintiff or not upon what I understand to be proper grounds. Now, what Cozens-Hardy L.J. says is this: in

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the first part he only deals with the rules; I will begin with the words: "The facts of the case are that there was a judgment for the plaintiff against the General Omnibus Company and a judgment in favour of the other defendants. Costs followed in each case, but the question is what is the meaning that the learned judge was entitled to give to the term 'costs' in s. 5 of the Judicature Act, 1890. The Master of the Rolls has referred to the opinion of Stirling L.J. in giving judgment in *Sanderson* v. *Blyth Theatre Co.* (1), that it includes costs which a particular party may be ordered to pay in the first instance and then to have over against another; but I may refer also to the judgment of Romer L.J. in the same case (2), in which he said, 'This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant.' That was the principle adopted by the learned judge in this case, and, in my opinion, he had ample jurisdiction to make the order and good ground for the exercise of his discretion in making it." I have not a word to say against that. It seems to be perfectly right, but it has nothing to do with this fancied obligation—nothing of the sort. There had been a collision, and it took place under such circumstances that the injured person would, naturally, not have full information as to whose fault it was, but it took place under such circumstances that it might have well been the fault of one or other or of both of these people. Those being the circumstances of the case, it turns out after the trial that there is only one wrong-doer, but that wrong-doer was sued and successfully sued. Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add

(1) [1903] 2 K. B. 533, at p. 543. (2) Ibid. at p. 539.

as part of the costs in bringing this reasonable action in which he reasonably joined this other person the costs of that other person who is found not to be at fault. Of course, the fact that there were two people who upon the face of the transaction might, either of them, have been guilty is what made it reasonable in the plaintiff, when he brought this action, to join both of these defendants, and, as it was part of the reasonable course of the action that he properly brought his action against a man who, as it turned out, was a wrong defendant, I agree that, under the circumstances, he ought to get the reasonable costs in that action in which both defendants were reasonably joined, although only one turned out to be the real defendant. I would wish in most emphatic terms to protest against this idea of the right to ask the question, "Are you going to blame your co-defendant?" It cannot be done. The proper way is—do not join any defendant unreasonably; if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame. There is no rule in the matter; each case must turn upon its own circumstances, and if it is said to me, "This is a discretion exercised by the judge in chambers and we must not interfere with his discretion," I do not agree at all. It turns on the facts of each case; and, in my judgment, if the facts of the case do not shew any reasonable ground for suing both, then, even though the rule had been cited to him in chambers, and the learned judge made the order that has been made in this case, adding those costs in this way, it seems to me that, without interfering with his discretion at all in the facts of the case, I should have to overrule that order. In this particular case we really have pretty ample evidence from both defendants that it was reasonable to join them both because each blamed the other. I do not say that they gave notice of their blaming; but in fact each, when the trial came off, tried to put the blame on the other.

Now, under these circumstances, I think it was a reasonable

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order, and I do not base this judgment on the ground of any rule referring to the costs.

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KENNEDY L.J. I am of the same opinion that this appeal fails on the question of costs. I think that really the matter is simple and without any great difficulty. The question is, was the discretion, which the judge has in dealing with these costs, rightly exercised? When I say "rightly exercised," it has been now settled law for years that the Court of Appeal will not interfere where there is a discretionary power which is committed to the judge of first instance if there is material upon which that discretion may be judicially exercised and he has judicially exercised the discretion in the matter upon such material. Here it is unquestionable, to my mind, that the question how these costs should be borne was a matter with which Lord Coleridge J. had to deal and in respect of which he had to exercise a discretion. They were costs as to which he had a right to say: "Good cause has been shewn to me why the plaintiff is entitled to add the costs which he would be liable to pay to the successful defendant to the costs that he will recover against the unsuccessful defendant." Was there material upon which he could come to the conclusion which he did come to, using his discretion judicially? I think there was. I think, as my Lord has said—and as I think the facts shew quite plainly—in a case of this kind of a night collision, with a man who is rendered insensible, as I understand, by the collision at the time, it is reasonable to join both defendants. I entirely agree that there is no rule. To my mind, directly you use the word "discretion," there cannot be a rule properly so called. There is no rule as to what in all cases all defendants should do. At the same time, I can quite conceive a case in which a not unimportant element in considering how the judge should have acted when his decision is reviewed as to whether he has rightly exercised his discretion is as to whether or not one of the defendants has or has not made a particular statement with regard to liability. Take the case, for example, which is the easiest and the commonest case, of a man who has represented himself to be an authorized agent when in fact he is not. To my mind, business

reasons as well as fairness would require in that case, if the matter was repudiated by the principal, that the agent should be asked by the person with whom he has made a contract in the name of the principal, "Do you or do you not say that your principal gave you authority? Am I to be quite sure, if I go to trial against your principal in this case, that you are prepared to say that you are liable or that he is liable?" But it is impossible to say that there is a rule according to which you can say what will constitute reasonableness, as the result will vary in every case, and I strongly suspect that both my brethren in these cases, who gave careful consideration to the case, were really meaning to say on the facts in each particular case that it was a reasonable thing to do. Whether they were right or wrong, we are not considering, because happily neither of those cases is under appeal; but one must not press dicta quoted in that way beyond a reasonable limit, if I may say so, and I am quite willing to believe that that was the view, really, in the language quoted to us; but, in my view, to lay down a rule in a matter of discretion is not right, and I do not think myself that the learned judge intended to put forward that proposition. In this particular case, as I have said, there was a night collision, and, in fact, when the judge had to deal with this question of costs, we find that each of the parties had been contesting the case before him upon the basis that their success depended upon their proving the other side to have been to blame and not on any question of inevitable accident, or anything of that kind. He also found that long before that they had intended to do that which they carried out. One word only with regard to *Bullock* v. *London General Omnibus Co.* (1) It is quite true that in that case Collins M.R. said in terms: "The common sense underlying this order is clear, because the learned judge when he made it had before him evidence that, owing to the attitude taken up by the General Omnibus Company, it was reasonable for the plaintiff to join the other defendants."

The contention of Mr. McCall, if I do justice to him (as I certainly ought to after his very clear argument), is that, unless you can find something on the part of the defendant who is sought to be

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saddled with the costs that he has done or written or said to mislead the other side, he cannot be reasonably called upon to pay the costs which he has incurred in his defence. *Bullock* v. *London General Omnibus Co.* (1) does not apply, with great respect. I do not agree that it was a strong instance in the view of the Master of the Rolls. He nowhere says that that is an artificial condition upon which the exercise of discretion in this way can alone be justified, and I should point out, having had an opportunity of looking at the case, that really in *Bullock* v. *London General Omnibus Co.* (1), according to the judgments, the main question was as to whether there was or was not jurisdiction. That is expressly stated at p. 270 by the same learned judge who was then Master of the Rolls: "In my opinion the objection taken upon the ground of want of jurisdiction to the order of the learned judge fails. Upon the merits the order seems to me to be clearly right, and no argument has been brought before us to shew that it was not so." So that it was not really a case which depended upon the merits, or, in other words, on good grounds for the exercise of the discretion.

In my opinion this appeal fails.

SWINFEN EADY L.J. I am entirely of the same opinion. Under the Judicature Act and Rules the Court has full discretion over the costs of such an action as the present, and it has jurisdiction to order the plaintiff to pay the costs of a defendant against whom the action fails and to recover the costs so paid from the defendant against whom the action has succeeded and whose conduct has necessitated the action. That was a jurisdiction which was exercised in Chancery, and the old method of exercising it was by ordering the plaintiff to pay the costs of the successful defendant and then recover the costs so paid, together with his own, from the unsuccessful defendant. Subsequently, to avoid circuity, orders were made whereby one defendant was directly ordered to pay the costs of a co-defendant. But there were difficulties in the way of so doing, where the action was tried with a jury, and therefore it was open to a judge to follow the old practice—which has been done in the present case—to order the

(1) [1907] 1 K. B. 264.

plaintiff to pay the costs of the defendant who succeeded, and then direct him to recover them over as his own costs against the defendant who has failed. The ground upon which it was put by Romer L.J. in *Sanderson* v. *Blyth Theatre Co.* (1) was that the costs were in no true sense damages. The costs are ordered to be paid by the unsuccessful defendant on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant. It was pointed out by the present Master of the Rolls that that was really the ground upon which *Bullock* v. *London General Omnibus Co.* (2) proceeded, because in that case at p. 272 the present Master of the Rolls quotes with approval the passage I have just read from *Sanderson* v. *Blyth Theatre Co.* (1) and says this: "That was the principle adopted by the learned judge in this case, and in my opinion he had ample jurisdiction to make the order and good ground for the exercise of his discretion in making it." Applying that to the facts of this particular case, it is a case in which there was a collision between a motor cab and an omnibus and the plaintiff was injured. Each, that is to say the motor cab company and the omnibus company, blamed the other for the collision. They wrote letters the same day, which have been read to us, each blaming the other for the collision, and, after certain repairs had been done to the cab, the cab company sent in a formal claim against the omnibus company to repay the expenses so incurred. At the trial, when the matter was tried out, each side threw the blame on the other and alleged that it was the negligence of the servants of the other company which had caused the accident.

Under these circumstances, the learned judge had the facts before him and said that the costs were to be paid by the defendant whose conduct had necessitated the action. In substance that is what his order was—the unsuccessful defendant was to pay the costs of the plaintiff and of the successful defendant. It does seem to me that that was essentially a just and proper order to make. There was a collision, the plaintiff said; in his claim he alleged injury to him so caused by the negligence of the defendants or one of them. It is obviously convenient that those

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two claims should be combined in one action arising out of the same set of circumstances and be tried together; and, in my opinion, it is in the interests of justice that the person who fails in an action brought under these circumstances should pay the costs occasioned by his negligence, including the costs reasonably and properly incurred by bringing the other defendant before the Court.

In my opinion this appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *Arthur Clarke.*

Solicitor for defendants: *D. H. Pettitt.*

W. J. B.

1914 *May* 9.

MATTHEWS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Land Values—Provisional Valuation—Appeal from Referee—Order to pay Costs—Rule of Court—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 3.

By s. 33, sub-s. 1, of the Finance (1909-10) Act, 1910, any person aggrieved may appeal against a determination by the Commissioners of Inland Revenue of the total value or site value of any land. By sub-s. 2 the appeal is to be referred to a referee. By sub-s. 3 the referee is to determine any matter referred to him in consultation with the Commissioners and the appellant, and may order that any expenses incurred by the appellant be paid by the Commissioners; and "any order of a referee as to expenses may be made a rule of Court."

On the hearing of an appeal under this enactment the referee made an order "that the costs of the appellant incidental to this appeal be borne by the Commissioners."

On a motion to make this order a rule of Court:—

Held, that the order was good and could be made a rule of Court.

Simpson v. *Inland Revenue Commissioners* [1914] 2 K. B. 842 distinguished.

MOTION on behalf of the appellant Marian E. Matthews that an order of a referee under the Finance (1909-10) Act, 1910, as to costs should be made a rule of Court under s. 33, sub-s. 3, of the Act. The referee by his decision on an appeal against the provisional valuation of a certain hereditament owned by the appellant assessed the gross value, total value, and site value

thereof at 23,690*l.*, and ordered that "the costs of the appellant incidental to this appeal be borne by the Commissioners." He did not assess the amount of the costs, and the object of the present motion, to which the Commissioners of Inland Revenue were made respondents, was to enable the costs to be ascertained by taxation.

W. Allen, for the motion. The Commissioners of Inland Revenue do not oppose the motion. Under s. 33 of the Finance (1909-10) Act, 1910 (1), the Court has power to make the order of the referee as to costs a rule of Court. It would be very convenient if the Court could give a direction that in future in similar cases the order should be filed in the office indorsed with the consent of the other party and made a rule without it being necessary for counsel to appear.

W. Finlay, for the respondents. The Commissioners consent to the order asked for on the motion being made. In *Simpson* v. *Inland Revenue Commissioners* (2) the Court intimated that probably costs could validly be awarded by the referee. The Commissioners think the costs ought to be taxed before payment, and the only way that can be done is by their consenting to the motion. They join in asking the Court to give some direction which could be carried out in future so as to avoid the necessity of counsel appearing before the Court on these motions.

(1) Finance (1909-10) Act, 1910, s. 33, sub-s. 1: "Except as expressly provided in this Part of this Act, any person aggrieved may appeal within such time and in such manner as may be provided by rules made under this section against the first or any subsequent determination by the Commissioners of the total value or site value of any land; . . . ."

Sub-s. 2: "An appeal under this section shall be referred to such one of the panel of referees appointed under this Part of this Act as may be selected in manner provided by rules under this section, ..."

Sub-s. 3: "The referee shall determine any matter referred to him in consultation with the Commissioners and the appellant, or any persons nominated by the Commissioners and the appellant respectively for this purpose, and may, if he thinks fit, order that any expenses incurred by the appellant be paid by the Commissioners, and that any such expenses incurred by the Commissioners be paid by the appellant.

"Any order of the referee as to expenses may be made a rule of the High Court."

(2) [1914] 2 K. B. 842.

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[SCRUTTON J. It would have to be done by the Rule Committee.] Yes. Possibly the Court might draw the attention of the Committee to the matter. It would be a great convenience if something analogous to the practice before the Arbitration Act, 1889, were to be adopted. The practice was that the notice of motion was handed in to the proper officer indorsed with the consent of the other side. If the Court makes the order asked for on the present motion, this case and *Simpson's Case* (1) will settle the practice, and the effect will be that the costs, on the order of the referee being made a rule of Court, can be taxed.

SCRUTTON J. Sect. 33, sub-s. 3, of the Finance (1909-10) Act, 1910, contains a provision that a referee who determines matters by virtue of the power given by that section "may, if he thinks fit, order that any expenses incurred by the appellant be paid by the Commissioners, and that any such expenses incurred by the Commissioners be paid by the appellant," and in *Simpson's Case* (1) I decided that the word "expenses,"—which is not known as a term in English law—if used by the referee in his order, made it necessary that he should fix the amount of expenses, there being no means by which a taxing Master can settle what are expenses. I hinted in that judgment—and I now have to give my decision on the matter—that, supposing the referee does not fix the amount of expenses but makes an order for costs, the order would be valid although he does not fix the amount of the costs which he awards. Costs can, under a rule of Court, be taxed by the taxing officer of the Court, and a person who is authorized to give costs may delegate the ministerial function of taxing them to an officer of the Court. While I think that a referee, if he gives "expenses," must settle the amount of those expenses, I am of opinion that he may, if he gives "costs," make a valid award, although he does not fix the amount of the costs, and when his order as to costs has been made a rule of Court the taxing Master of the Court will assess the amount of costs, not as a judicial but as a ministerial officer. I therefore think that the order

(1) [1914] 2 K. B. 842.

asked for by Mr. Allen on behalf of the appellant and assented to on behalf of the respondents is in accordance with the Finance (1909-10) Act, 1910, and I direct that the order of the referee as to costs shall be made a rule of Court though it does not fix the amount of the costs, and I further order the taxing Master of the Court to tax the amount of the costs which the referee has awarded.

I will consider whether it is possible to make a rule dispensing with the appearance of counsel in these cases in future.

Motion granted. (1)

Solicitors for appellant: *Nunn, Popham & Starkie, for B. S. Matthews, Croydon.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

(1) The following is the form of the order made upon the motion as drawn up (omitting formal parts):— "Upon reading the notice of motion on behalf of the appellant for an order that the decision of the . . . . appeal of . . . . the referee duly appointed in that behalf whereby he decided (inter alia) that the costs of the appellant incidental to this appeal be borne by the . . . . Commissioners be made a rule of this Court . . . . It is ordered that the said decision as to costs be and the same is hereby made a rule of Court And it is further ordered that the said costs including the costs of this application be taxed by the taxing Master."

J. E. A.

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May 5, 6, 27.

[IN THE COURT OF APPEAL.]

WAITE'S EXECUTORS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Duties on Land Values—Valuation—Assessable Value—Divestment—Buildings—Structures—Embankment—Improvement of Value of Land as Building Land or for Purposes other than Agriculture—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25, *sub-ss.* 1, 2, 4 (*a*), (*b*), (*e*).

Land was protected from the sea by two embankments or sea walls, the one dating from the time of the Romans, the other constructed by the owners of the land in question and adjoining lands under private Acts of Parliament early in the nineteenth century. If the embankments had not been there the land would have been flooded at every spring tide, and of little or no value:—

Held, that the embankments were not buildings or structures used in connection with such buildings within the meaning of s. 25, sub-s. 2, and that the owner was not entitled to have the land valued for the purposes of duties as if divested of the embankments; nor was he entitled to any deductions in respect of the embankments as being works executed for the purpose of improving the value of the land as building land or for purposes other than agriculture, or as works executed for improving the value of the land for agriculture which had actually improved its value as building land or for other purposes under sub-s. 4.

Meaning of the expression "building land" discussed.

Decision of Scrutton J. affirmed.

This was an appeal from Scrutton J., who had affirmed the decision of the referee under the Finance (1909-10) Act, 1910, as to the valuation of a farm called Toft Farm at Wrangle in Lincolnshire. The farm contained 153 a. 3 r. 13 p. and had a farmhouse and farm buildings upon it. The referee had found that the gross value was 6015*l.*, the total value 6000*l.*, and the full site value and also the assessable site value 5280*l.* All these sums were less than the provisional valuation. In arriving at them the referee had made deductions in respect of the farm buildings, but had made no deductions either for divestment under s. 25, sub-s. 2, or under s. 25, sub-s. 4 (*b*) and (*e*), of the Act in respect of the two sea walls or banks which protected the farm and the adjoining lands from the sea, or in respect of

certain dykes constructed in connection with the walls for the drainage and irrigation of the land. These walls or banks were constructed of earth rammed hard and covered with grass. One of them was very ancient, it was believed to have been constructed by the Romans and was known as the Roman Wall. It extended for about fifty miles along the coast of the Wash. The other, called the Adventurers Wall, was constructed about 100 years before the date of this action by the then owners of the farm and the adjoining lands under two private Acts of Parliament passed in 1809 and 1810 (49 Geo. 3, c. cxx., and 50 Geo. 3, c. cxxvii.). It lay outside the Roman Wall, to which it was joined at both ends, and enclosed from the sea about thirty-three acres lying between it and the Roman Wall. The dykes drained the land and passed the water through the Roman Wall by culverts, and through the Adventurers Wall by sluices. They also to some extent provided for the irrigation of the land. There was no sluice upon the farm itself. If the walls had not been there, almost the whole of the farm would have been flooded at every spring tide, and the whole at any extraordinary tide.

The owner contended that these walls were buildings or structures within the meaning of s. 25, sub-s. 2, of the Act, and that the land ought to be valued as if divested of them both; and that the walls and dykes were works which improved the value of the land as building land within the meaning of s. 25, sub-s. 4 (*a*), (*b*), and (*e*), and deductions ought to be made in respect of them under that sub-section. (1)

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 25:

"(1.) For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

"(2.) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon."

"(4.) The assessable site value of

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Sir R. Finlay, K.C., and *W. Allen*, for the appellants. It appears from the Act of Parliament itself that the idea of site value is the value of the land as it came from the hand of nature; and the Act provides for the deduction of the value of any structure which is necessary for preserving the land from the encroachments of the sea. This land derives its whole value from the walls; it is not building land; it can be built upon owing to the protection of the walls, but there is no present intention to build. It has been held that the assessable site value of land may be shewn as a minus quantity: *Inland Revenue Commissioners* v. *Herbert* (1), where s. 25, sub-s. 2, is discussed. It is submitted that both these walls are "buildings" or "other structures . . . . appurtenant to or used in connection with any such buildings" within that sub-section, and if not they must be deducted under sub-s. 4 (*b*). The erection of a railway embankment is a breach of a covenant not to erect any building other than private dwelling-houses: *Long Eaton Recreation Grounds*

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land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

"(*b*) Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; and

"(*c*) Any sums which, in the opinion of the Commissioners, it would be necessary to expend in order to divest the land of buildings, timber, trees, or other things of which it is to be taken to be divested for the purpose of arriving at the full site value from the gross value of the land and of which it would be necessary to divest the land for the purpose of realising the full site value.

"Where any works executed or expenditure incurred for the purpose of improving the value of the land for agriculture have actually improved the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture, the works or expenditure shall, for the purpose of this provision, be treated as having been executed or incurred also for the latter purposes."

(1) [1913] A. C. 326.

Co. v. *Midland Railway.* (1) The history of the Roman Wall is given so far as it is known in Wheeler's History of the Fens of Lincolnshire, 2nd ed., p. 5. It is certainly a building and also a structure. There have been many cases in which the meaning of the word "buildings" in the Metropolitan Building Acts has been construed, e.g., *Ellis* v. *Plumstead Board of Works* (2); *Bowes* v. *Law* (3); *Child* v. *Douglas* (4); *Lavy* v. *London County Council.* (5) Both these walls are structures, and the ditches and sluices are structures used with the farm buildings. The walls will be treated as being on all the lands which are protected by them and which contribute to their support. Sect. 25, sub-s. 4 (*e*), shews that the word "buildings" includes walls. So the land must be treated as divested of these walls just as in the case of agricultural land it has admittedly to be taken as divested of growing fences and stone walls between fields.

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the respondents. These walls are not buildings within s. 25, sub-s. 2. They are only heaps of earth. The word "building" means an ordinary building, "an inclosure of brick or stonework covered in by a roof": *Moir* v. *Williams.* (6) That may not be a universal definition, but it shews that "building" has a restricted meaning. In these circumstances it means a farmhouse and farm buildings. If these walls are structures they are not "appurtenant to or used in connection with any such buildings" within s. 25, sub-s. 2. *Long Eaton Recreation Grounds Co.* v. *Midland Railway* (1) was only a question on a restrictive covenant in a deed, and does not affect the construction of this Act of Parliament. Authorities are of no use on such a question as this. The ditches are not structures but holes. What has to be deducted is the cost of the walls, and the test of that is what it would cost to replace them, assuming that the wall has been kept up on the land which does not belong to the appellants.

It is sought to bring these embankments within s. 25, sub-s. 4 (*b*), as "works executed, or expenditure . . . . incurred

(1) [1902] 2 K. B. 574.
(2) (1893) 68 L. T. 291.
(3) (1870) L. R. 9 Eq. 636.
(4) (1854) Kay, 560.
(5) [1895] 2 Q. B. 577.
(6) [1892] 1 Q. B. 264, 270.

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. . . . by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land." Nothing whatever is known about the building of the embankment known as the Roman Wall, or the purpose for which it was constructed. There has been no attempt to make out any foundation of a case on which evidence could be given that it was constructed by or in the interest of persons interested in the land.

The Adventurers Wall stands on a rather different footing, for it was constructed by persons interested in the land; but the section requires that the works should be constructed "for the purpose of improving the value of the land as building land." This clearly is not building land; building land does not mean any land on which, from its consistency, a house may be built, but land in the value of which the prospect of its being built on forms an element. A light is thrown on that point by s. 7, which enacts that increment value duty shall not be charged on agricultural land "while that land has no higher value than its market value at the time for agricultural purposes only." Sect. 41 defines agricultural land and the definition includes this land. It is contended that the object of the Act was to get at the value of the land if untouched by the hand of man. But there is nothing in the Act to indicate any such intention.

Sir Robert Finlay, K.C., in reply. Much has been said about the object of the Romans in building the wall. Their object was to keep out the sea, and if that were not done the land would be valueless. The Solicitor-General relied on *Moir* v. *Williams* (1), but that case merely decided that a large building divided into flats was, for the purposes of the London Building Acts, one building and not many. It never decided that you must have four walls and a roof to make a building. A bank made of rammed earth and covered with turf is a building.

Cur. adv. vult.

May 27. COZENS-HARDY M.R. This appeal relates to land in the parish of Wrangle in the county of Lincoln consisting of

(1) [1892] 1 Q. B. 264.

upwards of 150 acres. Practically all this land is below the level of the highest recorded tides and the greater part of it is below the level of ordinary spring tides. It may be divided into two parts. The westernmost part is protected from the incursions of the sea by what is called the Roman Bank or Wall. The origin of this bank or wall is not known, but it seems reasonably clear that it owes its origin to the Romans. The bank itself extends for many miles and it protects a vast space of land which was formerly a mere swamp but is now valuable for agricultural purposes. There is a farmhouse with suitable farm buildings on a slightly elevated spot which but for the sea wall or bank would be inaccessible. The other part of the land lies to the east of the Roman Bank or Wall, and was reclaimed about the year 1808; a bank known as the "Adventurers Bank" protects it from the incursions of the sea. There are sluices through both banks, but no sluice exists on any part of the farm in question. There are also dykes which convey the water to the sluices. In ascertaining the full site value under s. 25, sub-s. 2, it is contended that the land ought to be treated as "divested" of the Roman Bank and also of the Adventurers Bank, each of these being a "building" within the meaning of sub-s. 2, or, alternatively, being a structure used in connection with the farmhouse and buildings.

The substantial question is whether, according to the fair use of language, either of these banks can be called a "building." In my opinion it cannot. I do not doubt that there may be a building constructed of wood as well as of brick or stone, and that it is not necessary that there should be a roof or cover in order to construct a building. But a bank composed of consolidated earth and covered with grass, although it may have been constructed so successfully as to have kept out the sea for nearly 2000 years, is not a "building" for the purposes of this Act. I am not sure that illustrations really are of any value, and I abstain from giving any.

It was contended that the policy of the Act is to get at what has sometimes been called the "prairie" value of the land without regard to any improvement made by man. But the language of the Act does not admit of this. Millions of money

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have been spent by landowners in drainage which has enormously improved their land for agricultural purposes, but no deduction or allowance for this expenditure can be claimed in respect of drainage.

If it is not a building it may possibly be deemed a "structure," but it cannot be a structure used in connection with the farm buildings.

It is sought to derive assistance from sub-s. 4 (*b*), which says, in substance, that capital expenditure, incurred for the purpose of improving land as building land, or for the purpose of any business, trade, or industry other than agriculture, must be deducted in order to ascertain the assessable site value. What then is the meaning of the words "land as building land"? It cannot mean land on which it is physically possible to erect buildings, for buildings are erected on the top of Snowdon and other mountains. It must mean that there is at the given time a reasonable and approximate chance of the land being laid out and developed for building purposes. Land which to-day is building land had no value as building land five or ten years ago. In my opinion, although the sea banks by turning a marsh into arable land have rendered it possible to erect buildings, that does not suffice to bring the case within sub-s. 4 (*b*). The exclusion of agriculture in sub-s. 4 (*b*) is again fatal to the claim. But it is urged that the words at the end of the section, which provide that expenditure incurred for the purpose of improving the land for agriculture may also to some extent be allowed as deductions, if the expenditure has at the same time improved the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture, are applicable. There is nothing, in my opinion, which makes these words applicable to the present case. It is ridiculous to suggest that at the present moment there is any business, trade, or industry other than agriculture to which this land can reasonably be applied. In my opinion the decision of the referee, which was approved by Scrutton J., was correct, and the present appeal must be dismissed with costs.

SWINFEN EADY L.J. The question raised by this appeal is whether, in order to arrive at the full site value of certain lands

in Lincolnshire, any deductions from gross value ought to be made in respect of two sea walls or banks, which have been constructed to keep out the sea, and in respect of certain dykes, which communicate with sluices, and which are necessary for drainage and irrigation purposes. The referee stated that he had not made any deduction, either under s. 25, sub-s. 2, or s. 25, sub-s. 4 (*b*) and (*e*), of the Finance Act, 1910, and Scrutton J. affirmed this decision. The appellants are Waite's executors, and they contend that the sea walls and dykes should be treated as divested, and the proper deductions made, in arriving at full site value. The lands are reclaimed marshes over which the sea used to flow, and are now substantially below the level of high water spring tides, and, but for these artificial banks, would be overflowed by the tide twice a month. One of the banks in question, called the Roman Bank, is a part of an artificial embankment some fifty miles long, extending round the shores of the Wash, from Wainfleet to King's Lynn. It is of great age and is generally attributed to the Romans. The other bank in question, called the Adventurers Bank, was constructed about the year 1808 and has served to reclaim land gained by accretion outside the Roman Bank. It is of the same character as the Roman Bank, but about a foot higher, and at each end it joins the old Roman Bank. The two banks—the Roman and the Adventurers—were constructed at widely different dates, but obviously for the same purpose, namely, to keep out the sea, and protect the marsh land from being inundated, and for the purpose of deduction under s. 25, sub-s. 2, they cannot be distinguished from each other, but the result must be the same in each case.

The question turns upon the construction to be placed upon the words which occur in s. 25, sub-s. 2: "If the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings."

It was contended on behalf of the appellants that the full site value of land, as defined by sub-s. 2, means the full value of the site, not as improved or altered by man, but as it came from the

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hand of nature, and that as the Roman Bank was the work of men's hands, the land was to be considered as divested of it for the purpose of determining full site value. This contention cannot be supported. It is plain from the language of sub-s. 2 that the land is not to be considered as divested of *all* structures on, in, or under the surface, but only those "which are appurtenant to or used in connection with any such buildings." The increased value attributable to any other structures cannot be deducted.

It was next contended that the banks were "buildings" within sub-s. 2. "Building" is a word of different meanings in different contexts. It may include a railway embankment, as was decided in *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (1) But in ordinary language this would not be spoken of as a building. Here the context shews that the word "buildings" is used in a narrow or restricted sense, rather than in a wide sense. It is used as meaning not *all* structures, but certain structures only; other structures of a particular kind—i.e., "appurtenant to or used in connection with any such buildings"—are included in the sub-section by a separate description; any remaining structures are not included. The language of sub-s. 2 is not apt to include buildings and all other structures; it includes only (1.) "buildings," meaning thereby certain structures, and (2.) certain "other structures." Then what structures are included under the term "buildings"? The Solicitor-General contended that the word was restricted to erections of brick or stone covered by a roof: see *Moir* v. *Williams*. (2) In my opinion such a construction is too narrow. "A building is not necessarily limited to a structure of bricks and mortar" (per Collins M.R. in *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (3)). Cottages built of wood would certainly be included as "buildings," so also would the barn and stables of a farm though built only of wood and thatched with straw. But wherever the line defining "buildings" is to be drawn, I am of opinion that these embankments must be outside it. Any one visiting the land, and seeing only these embankments, would

(1) [1902] 2 K. B. 574. (2) [1892] 1 Q. B. 264, 270.
(3) [1902] 2 K. B. 581.

say there were not any buildings on the land. These artificial mounds are covered with herbage, and except for being at a different level are indistinguishable from the rest of the land. They are grazed by cattle, and in parts are mown for hay. I have come to the conclusion that they are not "buildings" within sub-s. 2. Nor are they structures "used in connection with buildings." Their only purpose is to protect the land from being inundated by the sea. Again with regard to the dykes and sluices their use is to drain the land, and perhaps also to assist in irrigating it, but they are not buildings nor structures used in connection with buildings.

It was then contended that the banks came within sub-s. 4, (*b*) and (*e*). With regard to the Roman banks, it has not and cannot be shewn that any expenditure incurred in their construction was "on behalf of or solely in the interests of any person interested in the land."

It has been suggested that the banks were probably made by forced labour, and to keep the land dry, so that at a time when Roman soldiers were being harassed by native Britons they could follow the enemy, who previously had escaped by wading and swimming, thus passing over the flooded territory where the Roman legions could not pursue them.

With regard to both banks, any expenditure incurred in making them was not for the purpose of improving the value of the land as building land, nor has the expenditure actually improved the value of the land as building land. The banks have certainly improved the value of the land for agriculture, which includes the use of land as meadow or pasture. It was urged that the land had in fact been actually improved as building land, as there was now a farmhouse and farm buildings upon it, which would not have been possible when it was subject twice a month to tidal inundations. But the fact that a house or buildings can be built on land for the use of an agricultural tenant does not make the land "building land" within the meaning of sub-s. 4. Land remote from towns or villages and railways, and very inaccessible, may be excellent arable or pasture land, and have farmhouses and buildings on it, but such land would not be properly described as "building land" merely

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because it had such buildings upon it. For land to be "building land" within the section, it must have a greater value for building than as agricultural land, by reason of its suitability or adaptability for building purposes—i.e., for the building of houses to be inhabited by persons not compelled to live on or near that spot, for the purpose of tilling that ground, or for other specific reason.

Swinfen Eady L.J.

In my opinion, the conclusion at which Scrutton J. arrived was the right one, and this appeal fails.

PICKFORD L.J. The question in this case is whether in assessing the total site value of the appellants' land proper deductions from the total value have been made. I do not think it necessary to state the facts at any great length, as they are stated with great clearness in the judgment of Scrutton J. It is enough to say that the land in question is protected from the sea by two large banks, and but for this protection the greater part of it would be under water at spring tides.

The inner and older bank is called the Roman Bank. It was made a long time ago in the time of the Romans, and extends from Wainfleet to King's Lynn, a distance of about fifty miles. Its object was no doubt to keep the sea back from the land, but the reasons which induced the Romans to make it are doubtful.

The outer and shorter bank called the Adventurers Bank was made in 1808 for the purpose of protecting from the sea accretions of land which had been formed outside the Roman Bank.

A very large tract of land is protected by these banks, divided into farms. Most of these farms have houses and farm buildings upon them, but some are worked from other farms and have no such houses or buildings. Both banks are made of earth rammed down hard and covered with grass. These farms, including that of the appellants, are drained by an elaborate system of open dykes discharging into the sea through culverts in the Roman Bank and a sluice or sluices in the Adventurers Bank, not on the appellants' land.

The question is whether these banks or dykes are to be treated as divested in arriving at the divested value of the land under s. 25, sub-s. 2 or sub-s. 4 (*b*) and (*e*), and the sequel to (*e*) of the

Finance Act, 1910. Sub-s. 2 provides that the land is to be taken as divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon.

The first question is whether these banks are buildings. I think they are not. I do not think any comprehensive definition can be given of "building" which will apply to it whenever it is used irrespective of the subject-matter or context of the Act of Parliament or other document in which it occurs. I think it may be fairly said that it should not be construed to mean something which no one in ordinary language would call a building unless such subject-matter or context requires it.

A good instance of this is, I think, the case of *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (1) I doubt if any one in ordinary language would call a railway embankment a building, but looking at the subject-matter and the context of the restrictive covenant in that case, I think that it was quite right to hold the embankment in that case to be included in the word "building."

In this case I think that it is clear that in ordinary language no one would call these banks buildings, and I also think that there is nothing in the subject-matter or context of the Act to call for an extended meaning.

Looking at the subject-matter here it would point to something in the nature of farm buildings, and looking at the context the word "buildings" is followed by the words "other structures," which would be quite unnecessary if the wider meaning be given to the former word.

I think, therefore, that these banks are not buildings.

But then it is argued that they and the dykes are structures used in connection with buildings. I do not think they are. I will assume that they are structures, though in the case of the dykes I do not think they are, but I think that they are not used in connection with any buildings on the land. They are used, if used be the correct word, for the purpose of protecting and

(1) [1902] 2 K. B. 574.

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draining the land, irrespective of the question whether there are buildings on it or not, and this is shewn by the fact that they may and do protect lands and farms on which there are no buildings at all. By protecting and draining the whole of the land their effect may be incidentally to be of service to the buildings on that land, but that does not, in my opinion, make them structures used in connection with the buildings.

I think, therefore, that the argument based on s. 25, sub-s. 2, fails.

I agree with the Master of the Rolls and Swinfen Eady L.J. that this section does not require the land to be divested of everything added by human means.

There remains the question whether the value of the banks and dykes is to be deducted under sub-s. 4 (*b*), which provides: "Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture" should be deducted. I think the value should not be deducted. Whatever may have been the motives of the Romans in erecting the Roman Bank, it is not proved that the bank was erected for the purpose of any business, trade, or industry other than agriculture.

The Adventurers Bank has not been proved to have been erected for any such purpose. Its object was to protect the accretions of land from the sea, and since it was erected more than one hundred years ago no attempt to use the land for anything but agriculture has ever been made.

Lastly, it was argued that the value of these banks and dykes should be deducted under the clause following sub-s. 4 (*e*), because the value of the land has been increased as building land by reason of its being less liable to be flooded.

This argument seems to me to be based on an entire misconception of the expression "value as building land," and assumes that every piece of land on which it is possible to build has a building value. If this be true, almost every piece of land

which is not a quicksand or a bog or something of that sort has a building value.

The expression "value of land as building land" is perfectly well known. In my opinion it means that the land has a value above that of mere agricultural land by reason of its having capabilities which may probably bring it into the market for building within some not too distant future. It need not be what is called ripe for building, i.e., in immediate demand, but there must be a probability of its use as building land within some reasonable time. It is often expressed by surveyors by saying that there is a building element in the land.

In this case there is no evidence, and I do not think that any one has seriously argued, that the land has anything but a purely agricultural value, and I have been from the beginning at a loss to understand how land that has no value as building land can have had that value improved by any expenditure upon it.

I think the judgment of Scrutton J. was quite right on all points, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lewin, Gregory & Anderson; Solicitor to the Treasury.*

J. R. B.

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June 10, 15.

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED AND GLYN, MILLS, CURRIE & CO. *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Bond, Covenant, or Instrument — Money payable on Contingency—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By a deed executed by them the appellants agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Company would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at 4 per cent. on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Company were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Company made no profits in any year, the appellants would be liable to pay 120,000*l.* in that year, being 4 per cent. on 3,000,000*l.* stock:—

Held, (1.) that the deed was chargeable with ad valorem stamp duty under the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for . . . . [an] indefinite period," on the maximum sum which might become payable under the deed; and (2.) that the amount on which the duty was chargeable was the yearly sum that might be payable, namely, 120,000*l.*, notwithstanding that it was payable at half-yearly periods.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

1. On January 9, 1913, an instrument was presented on behalf of the Underground Electric Railways Company of London, Limited, and Glyn, Mills, Currie & Co. (hereinafter called the appellants) to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument was duly executed by the parties thereto under their respective seals on December 13, 1912.

3. The question of stamp duty, which was in dispute, arose mainly on clauses 2, 5, and 6 of the instrument, and the gist of

the arrangement of which that formed a part was, shortly, as stated in the following paragraph.

4. The Central London Railway Company had issued 3,000,000*l.* ordinary stock of which 1,707,586*l.* was undivided ordinary stock, 646,207*l.* was preferred ordinary stock, and 646,207*l.* was deferred ordinary stock. These stocks are together referred to as the "railway stocks." By clause 2 of the instrument in question, as and when from time to time before a date thereby fixed any railway stock should have been transferred to and registered in the names of Messrs. Glyn, Mills, Currie & Co., parties to the instrument (therein and hereinafter called "the trustees"), the trustees were to enter in the register to be kept by them under such instrument the names of the transferors of such railway stock as the holders of stocks issued under such instrument, which stocks for the time being issued under the instrument and outstanding are referred to as "the guaranteed stocks," but unless before the fixed date the holders of at least a certain percentage referred to in the instrument of the railway stocks had deposited with the trustees their undertakings in writing to the Underground Company to transfer their holdings of the railway stocks, accompanied by the stock certificates therefor, the Underground Company could declare that the trust created by the instrument had failed.

Clause 5 was as follows: "The trustees shall apply the income of the railway stocks received by them in respect of each half year from January 1, 1913, in manner following, that is to say:—

"(i.) First in or towards payment to the guaranteed stockholders (pari passu and in proportion to the respective nominal amounts of the guaranteed ordinary stock, the guaranteed preferred stock and/or the guaranteed deferred stock held by them respectively) without distinction between the stocks of the said several classes of dividends for such half year on such guaranteed ordinary stock, guaranteed preferred stock and guaranteed deferred stock at the rate of 4 per cent. per annum.

"(ii.) Secondly, the surplus (if any) of the income of the railway stocks received by the trustees in respect of each half

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year remaining after payment of the dividends payable thereout for such half year under the last preceding sub-clause shall be paid to the Underground Company subject nevertheless to the provisions of the next following sub-clause.

"(iii.) If and when the dividend received by the trustees on the railway stocks (taken together) for three successive years (all being subsequent to the year ending December 31, 1912) shall on the average of such three years have exceeded 4 per cent. per annum on the nominal amount of such stocks (taken together) then whenever the dividend received by the trustees on the railway stocks for any year subsequent to the happening of such event shall exceed 4 per cent. on the nominal amount of such stocks (taken together) 40 per cent. of such last-mentioned excess shall be applied by the trustees in paying a further dividend for such year on the guaranteed ordinary stock, the guaranteed preferred stock and the guaranteed deferred stock pari passu and in proportion to the respective nominal amounts thereof.

"The dividends at the rate of 4 per cent. per annum for the time being payable under this deed on the guaranteed stocks shall be payable half yearly on the last day of February or August (as the case may be) next after the end of each half year. Any additional dividend under sub-clause (iii.) of this clause shall be payable on the last day of February next after the end of the year in respect of which it is payable."

Clause 6 was as follows:—"Subject to the provisions of this deed the Underground Company hereby guarantees that the dividends paid on the guaranteed stocks in respect of each half year under the last preceding clause hereof shall be at the rate (hereinafter called 'the guaranteed rate') of 4 per cent. per annum and accordingly if and so often as the income of the railway stocks received by the trustees within seven weeks next after the expiration of any half year in respect of such half year shall not be sufficient for the payment of dividends on the guaranteed stocks for such half year at the guaranteed rate the Underground Company will forthwith pay to the trustees such a sum as with the income (if any) of the railway stocks for such half year will enable the trustees to pay on the dates hereby appointed for the payment

thereof the dividend for such half year on the whole of the guaranteed stocks at the guaranteed rate. The Underground Company shall be entitled to be refunded any payment made by it under this clause out of the income (if any) of the railway stock which subsequently to such payment being made is received by the trustees in respect of the half year to which such payment relates."

A circular dated December 14, 1912, was on or shortly after that date sent out by the Central London Railway Company to all its stockholders. This circular outlined the instrument of December 13, 1912, and stated that if the stockholders wished to make the exchange they should sign the form enclosed in the circular and deposit same with their stock certificates not later than December 31, 1912, with Messrs. Glyn, Mills, Currie & Co. At the date of the instrument it could not be stated whether a sufficient number of holders of railway stocks would accede to the arrangement within clause 2 of the instrument, or whether all would so accede, and in fact at that date none had acceded. It was admitted that if they all acceded (which the Underground Company stated they had not done) 3,000,000*l.* of railway stocks would be so transferred and 3,000,000*l.* of guaranteed stocks would be issuable to the transferors of the railway stocks, and that in this event and if the Central London Railway Company paid no dividends, sums (amounting as a maximum to 120,000*l.* a year, namely, 4 per cent. on 3,000,000*l.* guaranteed stock) would become payable under clause 6 by the Underground Electric Railways Company of London, Limited, for an indefinite period.

5. The Commissioners assessed the instrument to a duty of 10*s.*, to which no objection was taken, and also to a duty of 3000*l.* The former duty was assessed by reference to the heading in Sched. I. of the Stamp Act, 1891, "Deed of any kind whatsoever not described in this Schedule," and the latter duty was assessed by reference to the heading in Sched. I. of the Stamp Act, 1891, "Bond, Covenant, or Instrument of any kind whatsoever being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for [an] indefinite period."

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6. The appellants being dissatisfied with the assessment required this case to be stated.

7. The questions for the opinion of the Court were whether the instrument, in addition to the duty of 10*s.*, (1.) was chargeable with the duty of 3000*l.*, or, if not, (2.) was chargeable with any and what additional duty.

Roskill, K.C. (*Austen-Cartmell* with him), for the appellants. This instrument does not come within the words of the schedule to the Stamp Act, 1891, "Bond, Covenant, or Instrument of any kind whatsoever—1. Being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for the term of life or any other indefinite period . . . . " because at its date there was no definite ascertained sum that might become payable thereunder. There has been no decision that these words apply to an instrument under which money is only payable on a contingency, although there have been such decisions on other sections. Thus on s. 56, sub-s. 2, of the Stamp Act, 1891, which relates to conveyances on sale, it was held in *Underground Electric Railways Co. of London* v. *Commissioners of Inland Revenue* (1) that money though payable on a contingency or more than one contingency was money payable periodically, and therefore was chargeable with ad valorem duty. But in that case, as was pointed out by Collins M.R. in the Court of Appeal, a definite sum was ascertained at the date of the instrument there in question which might become payable thereunder. The Crown there claimed stamp duty on the minimum amount that might be payable, whereas, if they are right in their present contention, they ought to have claimed duty on the maximum amount that might become payable. In the section relating to mortgages—s. 86—"mortgage" is defined as a security by way of mortgage for the payment of any "definite and certain sum of money," those words referring to certainty of the sum secured by the instrument and not to certainty of payment, and on that section, or the corresponding section of the previous Stamp Acts, it was held in *Canning* (*Lord*) v. *Raper* (2) that an assignment of chattels

(1) [1905] 1 K. B. 174; [1906] A. C. 21. (2) (1852) 1 E. & B. 164.

to secure to the assignee an indemnity against a payment the necessity for which might not arise was liable to ad valorem duty. But in that case there was a definite sum that might become payable. In *Mortimore* v. *Commissioners of Inland Revenue* (1) the words "mortgage, debt or sum of money" were held to include contingent as well as absolute debts, but there, too, a definite sum was secured by the instrument in question although it was only payable on a contingency. The same observation applies to the Scottish case of *Maxwell* v. *Commissioners of Inland Revenue* (2), where a party bound himself and his representatives in a marriage settlement to pay to trustees in favour of his children, according to the number that might be born, the sums of 15,000*l.*, 20,000*l.*, or 30,000*l.*, and it was held that this provision was a bond for a definite and certain sum of 30,000*l.* and was chargeable accordingly. In the present case there is no debt existing at the date of the instrument which for this purpose is the material date: see per A. L. Smith L.J. in *West London Syndicate* v. *Commissioners of Inland Revenue*. (3)

[SCRUTTON J. In *Underground Electric Railways Co. of London* v. *Commissioners of Inland Revenue* (4), in the House of Lords, Lord Lindley said: "The words of s. 56 appear to me to be wide enough to cover all moneys which may become payable, and the latter part of clause 2 certainly favours this construction."]

The contingency there referred to applies only to payment. In that case as in the others a definite sum was secured at the date of the instrument, and the only contingency was whether that sum would be payable.

Even assuming that this instrument is liable to ad valorem duty it is not liable to the amount claimed by the Commissioners, who have taken the periodical payment as an annual payment, whereas it is in fact a half-yearly payment. Duty is therefore payable only upon the sum to be paid half-yearly, i.e., on 60,000*l.*, and not on 120,000*l.*: see *Clifford* v. *Commissioners of Inland Revenue* (5) and *Jackson* v. *Commissioners of Inland Revenue*. (6)

(1) (1864) 2 H. & C. 838.
(2) (1866) 4 M. 1121.
(3) [1898] 2 Q. B. 507, at p. 513.
(4) [1906] A. C. 21, at p. 23.
(5) [1896] 2 Q. B. 187.
(6) (1902) 50 W. R. 666.

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Sir John Simon, A.-G., and *W. Finlay*, for the Commissioners. The instrument in question is a security for the payment of money, and on the authority of *Maxwell* v. *Commissioners of Inland Revenue* (1) it is a security for the payment of an annuity, namely, 120,000*l.* on a contingency. That case is precisely in point. The cases of *Canning* (*Lord*) v. *Raper* (2), *Mortimore* v. *Commissioners of Inland Revenue* (3), and *Onslow* v. *Commissioners of Inland Revenue* (4), although not directly in point, are useful as shewing that for this purpose contingencies must be neglected where a sum is stated which may become payable; see also per Collins M.R. in *Underground Electric Railways Co. of London* v. *Commissioners of Inland Revenue.* (5)

On the second point: this instrument is a security for the payment of a yearly sum of 120,000*l.* and not for a sum of 60,000*l.* payable half-yearly: see *Lewis* v. *Commissioners of Inland Revenue.* (6) If the instrument is chargeable on either view as to the amount payable thereunder, the Crown is entitled to charge on the higher sum: *Speyer Brothers* v. *Commissioners of Inland Revenue.* (7)

Roskill, K.C., replied.

[*City of London Brewery Co.* v. *Commissioners of Inland Revenue* (8) and *County of Durham Electrical Power Distribution Co.* v. *Commissioners of Inland Revenue* (9) were also cited.]

Cur. adv. vult.

June 15. SCRUTTON J. read the following judgment:—This is a case stated by the Commissioners of Inland Revenue to determine the stamp duty payable on an indenture dated December 13, 1912, made between the Underground Electric Railways Company of London, called the Underground Company, and Glyn, Mills, Currie & Co., called the trustees. The Central London Railway Company had issued 3,000,000*l.* of ordinary stock. The Underground Company were desirous of obtaining

(1) 4 M. 1121.
(2) 1 E. & B. 164.
(3) 2 H. & C. 838.
(4) [1891] 1 Q. B. 239.
(5) [1905] 1 K. B. at p. 182.
(6) [1898] 2 Q. B. 290.
(7) [1908] A. C. 92.
(8) [1899] 1 Q. B. 121.
(9) [1909] 2 K. B. 604.

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control, and were willing, if a sufficient proportion of the holders of the ordinary stock of the Central London Railway Company would take guaranteed stock in exchange, to guarantee interest at 4 per cent. per annum on the latter if and to the extent that the profits of the railway were not enough to pay that amount of interest. The applications of these holders would not be received until December 31, 1912. Consequently, on the date of the indenture, December 13, 1912, it was not known whether sufficient holders would exchange to enable the transaction to go through or, if a sufficient number did exchange, how many holders and what value of stock would exchange. Nor was it known on January 9, 1913, the date of adjudication, what excess over profits, if any, would be necessary to pay 4 per cent. per annum on the guaranteed stocks. It was known that the Underground Company, if all the holders exchanged, and if the railway made no profits in any year, would be liable to pay 120,000*l.* in that year, being 4 per cent. on 3,000,000*l.* But when the stockholders exchanging, and the profits in any year, were known, the amount which was to be paid by the Underground Company was fixed by the instrument.

Under these circumstances the Commissioners assessed the instrument in a 10*s.* duty as a deed of any kind whatsoever not described in Sched. I. of the Stamp Act, 1891, which was not objected to, and in 3000*l.*, being 2*s.* 6*d.* for each 5*l.* value on 120,000*l.*, as an "instrument . . . . being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for . . . . [an] . . . . indefinite period." Against this latter assessment the Underground Company appealed. They contended that the document did not come within the schedule because, first, at the time of the execution of the instrument there was no fixed ascertained sum of money for which it was a security. They admitted that if there were such a fixed sum the fact that it was only payable on a contingency was immaterial, but they alleged that there must be a fixed sum, and not a sum whose amount, or existence, would not be ascertained till future events defined it. This, if correct, would free them from the 3000*l.* stamp altogether. Secondly, they said that in any event the

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duty should be assessed not on the annual possible liability of 120,000*l.* but on the half-yearly possible payment of 60,000*l.*, which would reduce their liability to 1500*l.*

It has been determined in *National Telephone Co.* v. *Commissioners of Inland Revenue* (1) that a "security" means an original obligation, not an obligation auxiliary to a primary obligation. The question then is: Is this indenture an obligation to pay any sum or sums of money at stated periods? If certain events happen, it clearly will be; if a sufficient number of holders exchange, and if the railway profits are insufficient to pay 4 per cent. per annum on their stocks, this document creates an obligation to pay the deficiency. The obligation is contingent on the happening of certain events; to what extent does this render it free from tax? Under the heading "Bond" the words of the schedule are "security for any annuity, ... or for any sum or sums of money at stated periods." Under the heading "Mortgage"—s. 86 of the Act of 1891—the words of the section are "security . . . . for the payment of any definite and certain sum of money." Under the heading "Settlement" the words of the schedule are "any instrument . . . . whereby any definite and certain principal sum of money . . . . is settled."

In *Onslow* v. *Commissioners of Inland Revenue* (2) a settlement of stock expectant on a reversion, liable to diminution in case of the birth of children and to change of investment by trustees, was held within the head "Settlement," Bowen L.J. saying, "the amount of the stock does not become uncertain because the chance of getting the stock may be uncertain."

In *Maxwell* v. *Commissioners of Inland Revenue* (3) the heading "Bond . . . . given as a security for the payment of any definite and certain sum of money" was held to cover an obligation to pay 15,000*l.* if one child was born of an intended marriage, 20,000*l.* if two children were born, and 30,000*l.* if three or more children were born. The Court said that the words would cover a bond to pay three sums on three respective contingencies none of which might happen.

(1) [1899] 1 Q. B. 250; [1900] A. C. 1. (2) [1891] 1 Q. B. 239.
(3) 4 M. 1121.

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In *Underground Electric Railways Co. of London* v. *Commissioners of Inland Revenue* (1) company A. agreed to pay out of profits, first, 5 per cent. on certain amounts, and, secondly, 3 per cent. on "the amount for the time being paid up on such . . . . capital . . . . as shall for the time being have been issued." Here nothing was payable under the latter obligation unless the profits exceeded 5 per cent., and the amount payable would vary with the amount of those excess profits from nothing to 3 per cent. But the Court of Appeal decided that the deed must be stamped on an amount equal to 3 per cent. on the capital paid up at the date of the deed. Collins M.R. said on p. 182 that the principle of all the decisions, whether on settlements, mortgages, or deeds, was that the word "debt" applied to money payable whether on a contingency or an absolute or unconditional certainty; and he added: "It seems to me, therefore, that the words 'money payable for an indefinite period' include money which may never become payable unless the particular event happens—that is, in this case, unless the amount of profits is sufficiently large to make all the preliminary payments before the obligation to pay a sum equivalent to a 3 per cent. dividend arises. Unless and until that condition is fulfilled the money will not be paid: still it is money which will become payable if that event happens, and therefore it is covered in my judgment by the wording of the section, and the duty is payable." It is true that in that case, though, when further capital was paid up, a larger sum would be due, the Crown did not ask for stamp duty on the value of 3 per cent. on the fully-paid capital. The point was not argued, but I can see no difference between an obligation to pay 1 per cent., 2 per cent., or 3 per cent. according to the excess of profits over 5 per cent., it being possible there might be no excess, and an obligation to pay that sum on the amount of capital issued from time to time, unless in cases where the maximum liability cannot be fixed.

In *City of London Brewery Co.* v. *Commissioners of Inland Revenue* (2), where there was a power to issue 540,000*l.* debenture stock in exchange for an existing stock, and a trust deed

(1) [1905] 1 K. B. 174. (2) [1899] 1 Q. B. 121.

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securing payment of the stock if issued, stamp duty was held payable on the whole amount, though all or part of it might never be issued.

These and other cases seem to me to establish that there may be a sum, or a definite and certain sum, though it is payable on a contingency and may never become payable, and though the amount payable may depend on contingencies. It is said, however, that in all these cases there was a specified sum or sums at the date of the deed, and that if there is no sum specified at the date of the deed, no stamp duty is payable. I do not think this is true of the first *Underground Railway Case* (1), where any sum up to 3 per cent. might be payable depending on amount of profits, and the deed was assessed on the maximum payment which might be required. This is what the Commissioners have done in this case in assessing on the maximum payment which the deed may secure, though it depends on contingencies whether that payment may have to be made.

I put to counsel for the appellants two cases, first, A. promises for ten years to make B.'s income up to 1000*l.*; and secondly, A. guarantees B.'s overdraft for a year to the extent of 1000*l.* He replied that neither would be stampable ad valorem, for in neither case was there an ascertained sum at the date of the deed. The Attorney-General said that each would be taxable ad valorem, the first ad valorem on 10,000*l.*, the second on 1000*l.*, the maximum which the instrument could secure; though it depended on contingencies whether either amount was payable.

I can understand that if you cannot ascertain from the instrument a fixed sum which may become payable, though on contingencies, you cannot stamp ad valorem. This is probably the reason why in *County of Durham Electrical Power Distribution Co.* v. *Commissioners of Inland Revenue* (2) an agreement to supply electrical power for a term of years at a quarterly payment of 58*l.* and 1*d.* per unit consumed was held liable to an ad valorem stamp on 58*l.* a quarter for the term of years, but not on the 1*d.* per unit, which had no maximum limit. The same remark may explain the measure of taxation in the first *Underground Railway Case.* (1)

(1) [1905] 1 K. B. 174. (2) [1909] 2 K. B. 604.

For these reasons I am of opinion that under the heading "Bond" where the maximum sum which can be secured by the instrument is ascertainable from the instrument itself, the ad valorem stamp must be estimated with reference to that sum, though it never may become payable, and it cannot be told at the date of the instrument whether that sum, or any less sum, or any sum at all will in fact be payable.

Secondly, if ad valorem duty is due on the maximum sum which can be ascertained from the deed to be secured by it, it is payable, the term of payment being for an indefinite period, as an ad valorem duty on the annuity or sum periodically payable. In *Clifford* v. *Commissioners of Inland Revenue* (1) the agreement by a manager of an hotel to pay a fixed weekly sum for an undefined period was treated as a security for weekly payments, and not for a yearly sum payable by weekly instalments, and stamp duty was assessed on one weekly payment. On the other hand in *Jones* v. *Commissioners of Inland Revenue*, *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* (2), quarterly payments were treated as annuities payable quarterly, and in *Lewis* v. *Commissioners of Inland Revenue* (3) an agreement to pay 625*l.* every three months by quarterly payments on the usual quarter days was treated as an annuity of 2500*l.* payable quarterly.

In the case before me the guarantee is of a dividend of 4 per cent. per annum payable half-yearly. In clause 5 the year is taken as the period to be considered, and I do not think the provision for half-yearly payments prevents the sum secured, which on the assumption is the maximum liability, being treated as a yearly sum, payable in half-yearly instalments.

I think, therefore, both points taken by the appellants fail, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Bircham & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1896] 2 Q. B. 187. (2) [1895] 1 Q. B. 484.
(3) [1898] 2 Q. B. 290.

J. S. H

1914
May 14.

THE KING *v.* AMENDT.

Crown Office—Certiorari—Time Limit—Fiat of Attorney-General—Practice—Licensing Acts—Order of Confirming Authority—Crown Office Rules, 1906, *rr.* 20, 21.

Rule 21 of the Crown Office Rules, 1906, provides, among other things, that no writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justices of the peace, unless the writ be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made:—

Held, that this provision applies to the issue of a writ of certiorari at the instance of the Attorney-General on behalf of the Crown.

On January 21, 1914, an order nisi was obtained against the defendant to shew cause why there should not be quashed a certain order made by the justices of Essex acting as the confirming authority under the Licensing (Consolidation) Act, 1910, on April 16, 1913, confirming a licence granted to the defendant at a general annual licensing meeting on March 11, 1913, for the sale by retail of intoxicating liquor at licensed premises on the platform of the Great Eastern Railway Station at Witham.

From the evidence it appeared that at a general annual licensing meeting in the year 1906 the licensing justices for Witham granted to the defendant a justices' licence authorizing him to hold an excise licence to sell by retail at the railway refreshment rooms at Witham any intoxicating liquor which may be sold under a spirit retailer's licence for consumption either on or off the premises, subject to a monopoly value payment of 30*l.* per annum to be raised after five years to 40*l.* per annum, the licence being granted to expire on April 5, 1907. The grant of this licence was duly confirmed by the confirming authority, and the licence was renewed at each subsequent general annual licensing meeting up to and including the meeting in the year 1913. The sums on account of monopoly value had been duly paid, and the defendant had continuously carried on at the said premises the business of a public-house keeper.

On February 11, 1913, at the general annual licensing meeting an application was made on behalf of the defendant for the grant

of a new licence in respect of the same premises. This grant was opposed on behalf of the Commissioners of Customs and Excise on the ground that it amounted to an application to revise the amount of the monopoly value.

On March 11, 1913, the justices granted to the defendant a new licence for a term of five years at a monopoly value of 15*l.* per annum, renewing at the same time the existing licence. The new licence was made subject to the following conditions:—"For a term of five years at a monopoly value of 15*l.* subject to confirmation and on condition that the existing licence (which was renewed) is surrendered immediately on the new licence becoming effectual."

On April 16, 1913, at a meeting of the confirming authority application was made by the defendant for the confirmation of the licence so granted. The confirmation was opposed on the ground that the licensing justices had no power to grant a licence as a new justices' licence at a lower monopoly value, inasmuch as there was a similar licence in force in respect of the same premises at the date of the application. The confirming authority confirmed the licence subject to the conditions attached to the grant by the justices.

At the instance of the Attorney-General a writ of certiorari was on January 3, 1914, issued and on January 5, 1914, served to bring up the order of the confirming authority, and on January 21, 1914, the order nisi to quash the order of confirmation was obtained as aforesaid.

Ryde, K.C., and *C. E. Jones*, for the defendant. There is a preliminary objection to the issue of this order nisi. The order to be quashed was made on April 16, 1913. The certiorari was not applied for till January, 1914. By r. 21 of the Crown Office Rules, 1906 (1), no writ of certiorari to remove any order of

(1) Crown Office Rules, 1906, r. 20: "Every application for a writ of certiorari to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof into the King's Bench Division at the instance of any person other than the Attorney-General on behalf of the Crown, for the purpose of quashing the

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justices shall be granted, issued, or allowed unless applied for within six calendar months next after the order to be removed has been made. It is true that the Judicature Act, 1875, which gave power to a rule committee to make rules of Court, did not name the Crown, and if the matter had rested there these Crown Office Rules might have had no application to a writ of certiorari issued on behalf of the Crown. But the matter does not rest there; by s. 6 of the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), the enactments relating to the making of rules of Court contained in the Supreme Court of Judicature Act, 1875, and the Acts amending it shall extend to all proceedings by or against the Crown.

Sir S. O. Buckmaster, *S.-G.*, and *Daldy*, for the Crown. There are two answers to this objection: First, the order of the confirming authority is now in this Court, and its validity therefore can be questioned on motion.

Secondly, r. 21 of the Crown Office Rules has no application to a certiorari issued at the instance of the Attorney-General. That rule is only an appendage to r. 20, which clearly applies to writs of certiorari issuing otherwise than at the instance of the Attorney-General. It speaks of a motion for an order nisi, which has no

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same, shall during the sittings be made to a Divisional Court by motion for an order nisi to shew cause, and in vacation or when there is no sitting of a Divisional Court, to a judge at chambers, for a summons to shew cause, and no such writ of certiorari shall be granted or awarded unless an order nisi or summons as aforesaid shall have first been obtained and served in accordance with the following rule."

Rule 21. "No writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such writ of certiorari be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing forth the same has served the order nisi or summons six days before the return day of the order nisi or summons for the writ on the justice or justices, or on two of them, if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the granting, issuing, or allowing such writ of certiorari."

application to the Attorney-General. So also is r. 21 inapplicable, because it speaks of proof by affidavit that the party suing forth the writ has served the order nisi. This bears no resemblance to the practice when the writ is applied for at the instance of the Attorney-General, who simply gives his fiat upon which a judge issues the writ. Rule 21 is framed on the model of s. 5 of the statute 13 Geo. 2, c. 18, which was held not to apply to a certiorari at the instance of the Attorney-General. See Corner's Crown Office Practice, pp. 67, 69; *Rex* v. *Clace or Lewis.* (1)

Ryde, K.C., in reply. No doubt r. 20 does not apply to a writ of certiorari issued at the instance of the Attorney-General, because it expressly provides that "every application for a writ of certiorari . . . . at the instance of any person other than the Attorney-General on behalf of the Crown . . . . shall . . . . be made to a Divisional Court by motion for an order nisi," &c. But r. 21 contains no such exception; it is absolute in its terms, "No writ of certiorari shall be granted, issued or allowed . . . . unless . . . . applied for within six calendar months." It may be that the latter part of that rule is inapplicable to a writ at the instance of the Attorney-General, but to infer from that the irrelevance of the earlier part is merely to beg the question. The earlier part is applicable to all writs of certiorari; the latter part to some writs only.

AVORY J. This is a difficult question to decide. On the one hand no invasion must be made on the well-established principle that the Crown is not bound by a statute unless named therein; on the other hand we are faced with the conclusion that the Crown may after any length of time quash a licence by means of a certiorari.

The Court has to decide whether r. 21 of the Crown Office Rules applies so as to bind the Crown. I have no doubt that the Court has often acted upon and adopted the rule laid down in Corner's Crown Office Practice, p. 65, that provisions in statutes restricting the issuing of writs of certiorari in express terms, without naming the Crown or prosecutor, have always been held not to restrict or prevent the issuing of the writ at

(1) (1769) 4 Burr. 2456.

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the instance of the Crown, or of any private person prosecuting in the name of the Crown, upon the principle that the right of the Crown to demand the writ cannot be taken away unless it appear by express words to be the manifest intention of a statute that it should operate to that extent. Now r. 21 is founded on the statute 13 Geo. 2, c. 18, s. 5, which enacted that "no writ of certiorari shall be granted, issued forth, or allowed to remove any conviction, judgment, order, or other proceedings had or made by or before any justice or justices of the peace for any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such certiorari be moved or applied for within six calendar months next after such conviction, judgment, order, or other proceedings shall be so had or made" &c. Under that statute, not only was it held that the Crown was not bound, it was also held that the prosecutor prosecuting in the name of the Crown was not bound by it, and that in either case the Court might dispense with the time limit. The first part of r. 21 is almost in the same words as that statute. But the state of things which formed the basis of that decision has since been changed and the law laid down on that former basis is no longer applicable, because s. 6 of the Statute Law Revision and Civil Procedure Act, 1881, provides that "the enactments relating to the making of rules of Court contained in the Supreme Court of Judicature Act, 1875, and the Acts amending it, shall extend and apply . . . . to all proceedings by or against the Crown." That Act gave power to the Rule Committee to make rules applying to proceedings by the Crown. Has the Committee in r. 21 made a rule which relates to proceedings by the Crown and which binds the Crown? That question presents no difficulty if one stops short at the first part of r. 21. "No writ of certiorari shall be granted, issued or allowed . . . . unless such writ of certiorari be applied for within six calendar months," &c. Those words are quite general and applicable to a writ issued on behalf of the Crown as well as of a private person. It is contended, however, that, looking at the latter part of r. 21 and at r. 20, the whole of r. 21 applies only to writs of certiorari granted on the application of some one other than the Attorney-General. Rule 20 is

undoubtedly limited in its application to persons other than the Attorney-General. It is said that r. 21 only carries out the procedure instituted by persons other than the Attorney-General. It is clear that the last part of r. 21 has no application to a case where the Attorney-General issues a fiat; but it is equally plain that even when issued on the fiat of the Attorney-General the writ is a writ which has been "applied for." In form the fiat says "Let application be made to the King's Bench Division of His Majesty's High Court of Justice for a writ of certiorari." . . . . It is a writ which has been applied for, and even though the last part of r. 21 be not applicable to a writ issued on the fiat of the Attorney-General, yet the earlier words must have been framed for the purpose of directing the Crown Office that no writ is to issue, whoever may be the applicant, unless within six calendar months next after the judgment, order, conviction, or other proceedings had or made. In my view the first part of r. 21 cannot be limited to the cases dealt with in the foregoing rule. Rule 20 speaks of "no such writ of certiorari" referring to "a writ of certiorari to remove a judgment" &c. "into the King's Bench Division at the instance of any person other than the Attorney-General on behalf of the Crown." It provides that "no such writ of certiorari shall be granted or awarded unless an order nisi shall have first been obtained and served in accordance with the following rule." If the contention for the Crown were right, r. 21 might be expected to commence with the same words "no such writ of certiorari," limiting its operation to writs dealt with by r. 20. But r. 21 does no such thing. It begins with the general words "No writ of certiorari." Furthermore, instead of using the words "shall be granted or awarded," as in r. 20, it uses the words "shall be granted, issued, or allowed." The word "issued" is important. It conveys a direction that no writ of certiorari shall be issued except within the time limited. The latter part of r. 21 applies to the case of a person suing forth the same, i.e., the person of the class already dealt with in r. 20, but the earlier part of r. 21 is quite general in its terms. For these reasons I think the objection must prevail, and we must give effect to it by issuing a writ of supersedeas quia improvide

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emanavit and so discharging the writ of certiorari, and with it the rule nisi which has been obtained.

ROWLATT J. The difficulty in this case is caused by the exception from r. 20 of writs at the instance of the Attorney-General, and the absence of any such exception from r. 21. The Solicitor-General contends that r. 21 by its terms shews that its subject-matter is not that with which we have to deal. As to the latter part of the rule it is plain that this is so. It speaks of the party suing forth the writ, of his serving an order nisi on the justices so that they may shew cause against the granting, issuing, or allowing of the writ, all of which is inapplicable to a writ at the instance of the Attorney-General. On the other hand it is said that the argument that a certain subject-matter is not within the purview of a rule because the rule is not applicable to it must fail when the rule contains several provisions some of which are applicable to it. What is there to prevent the application of those provisions which are applicable? The limitation of time may be applied to a writ at the instance of the Attorney-General, and the other restrictions may affect the issue of the writ by persons other than the Attorney-General. I feel the force of that contention and accede to it, but I have a certain misgiving whether it was ever intended by these rules to alter the practice of issuing writs of certiorari on the fiat of the Attorney-General. As to the variation between the phrases "granted or awarded" in r. 20 and "granted, issued, or allowed" in r. 21, I expect that the pedigree of the phrases would explain the variation between them; each phrase probably derives its origin from an independent source.

SHEARMAN J. I have felt the difficulty in this case; but I agree fully with the judgment of Avory J. and do not propose to add anything.

Writ of supersedeas issued and rule nisi discharged.

Solicitor for the justices: *E. Moore.*

Solicitor for Crown: *The Solicitor for the Customs and Excise.*

W. H. G.

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Justices—Apprehended Breach of Peace—Recognizances to be of Good Behaviour —Jurisdiction of Justices to order—Conditions of Jurisdiction—34 Edw. 3, *c.* 1.

Where a Court of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement the Court may order him to enter into recognizances and to find sureties for his good behaviour or to be imprisoned in default of so doing.

Whatever the origin of that jurisdiction may be, whether it be derived from the common law, from the commission of conservators of the peace, or from the statute 34 Edw. 3, c. 1, or otherwise, the practice of making such orders for the purpose of preventing apprehended breaches of the peace has been too well established for a long period of years to allow of its propriety being questioned at the present day.

It is not essential to the exercise of that jurisdiction that the conduct of the defendant should have caused any individual person to go in bodily fear.

Case stated by a metropolitan police magistrate.

The appellant was summoned on an information charging that he was a disturber of the peace and an inciter of others to commit breaches of the peace and that he was likely to persevere in such unlawful conduct, and asking that he be ordered to enter into his own recognizances and find sufficient sureties for his future good behaviour.

Upon the hearing of the information the following facts were proved:—

The appellant was a supporter, though not a member, of the Women's Social and Political Union, an organization having for its object the securing of votes for women by means including that called "militancy," which consisted in the commission of crimes against property by women so as to coerce men possessing the franchise to put political pressure upon His Majesty's Government to introduce legislation extending the franchise to women. Of late a large number of offences of the following kinds,—destruction and defacement of letters posted in various post office letter boxes, breaking of plate-glass windows by hammers and stones, damage to grass on golf links, and

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destruction of buildings by fire and explosives—had been committed in the metropolitan police district by members of the Women's Social and Political Union. From January 28, 1913, to April 18, 1913, 592 cases of damage to property of the kinds above mentioned were reported to the metropolitan police. On February 5, 1913, at the Caxton Hall, Westminster, and on February 23 at the Bow Baths, Bow, the appellant delivered speeches at meetings of the said union in which he advocated militancy and urged women to continue breaking the law. Reports of the said speeches were produced before the magistrate.

On behalf of the appellant it was contended that the magistrate had no jurisdiction whether under his commission or under the statute of 34 Edw. 3, c. 1, or otherwise, to order him to enter into recognizances and find sureties for his good behaviour. The magistrate overruled the objection, and being of opinion that in view of the serious menace to the public peace of the metropolis caused by the series of crimes against property committed therein by women members of or sympathisers with the objects of the said Women's Social and Political Union the said speeches of the appellant were of a nature directly calculated to incite and to encourage the said persons to continue to commit such and similar offences in violation of the law and in disturbance of the peace, and that as he was likely to continue to make similar speeches and persevere in his conduct it was necessary to provide for the public security by requiring him to find sureties, he ordered him to enter into his own recognizances in the sum of 1000*l.* and further find two sureties for his good behaviour, each to be bound in the sum of 500*l.*, or that in default of his finding such sureties and being himself so bound he should be imprisoned for a period of three months.

Montague Shearman, K.C., *Theobald Mathew*, and *E. Atherley-Jones*, for the appellant. The magistrate had no jurisdiction under the statute of Edward III. to make the order appealed from. It is quite true that there has been a usage established over a long period of years for justices to make this order, but that usage has been founded on a mistranslation of the statute, and the Court is not bound by any decisions which assume the

correctness of the practice, for the objection now raised does not appear to have ever before been taken. The statute 34 Edw. 3, c. 1, provides in the first section that the newly created justices of the peace "shall have power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take, and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past; and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish; to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished." In the sentence "take of them that be not of good fame" the word "not" is introduced by a mistake, the words of the original Statute Roll being "prendre de touz ceux qi (1) sont de bone fame." The meaning of the passage was this, that there being a number of returned soldiers who had been engaged in the French war, who are there termed "pillors and robbers," and who were going about the country armed, the justices were to inquire into all such persons, and if there was nothing against them, which is the meaning of the words "be of good fame," they were to content themselves with taking surety for their good behaviour, but they were to duly punish "the other," that is to say, those who were found to have committed any crimes. The power, therefore, to take sureties for good behaviour is confined to persons who had been pillors and robbers in the parts beyond the sea, in other words returned soldiers, and it has clearly no application to the case of the appellant. The power of a justice of the peace arising from his commission independently of the statute to require a person to give

(1) There is MS. authority for reading "ne sont"; and as to the occurrence of errors in the Roll see the Introduction to the Statutes of the Realm.—F. P.

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sureties is confined to giving sureties to keep the peace as distinguished from sureties for good behaviour; and for that purpose it is necessary to shew that the person invoking the assistance of the justice goes in bodily fear, which is not the case here.

The following authorities were referred to:—Dalton's Country Justice, ch. 5; Lambard's Eirenarcha, book 2; *Reg.* v. *Cork Justices* (1); *Reg.* v. *Justices of Queen's County* (2); *Ex parte Seymour* v. *Davitt* (3); *Wise* v. *Dunning* (4); *Willes* v. *Bridger* (5); *Rex* v. *Wilkins.* (6)

Sir Rufus Isaacs, A.-G., Bodkin, and *Branson,* for the respondent, were not called upon.

BRAY J. The question which we have to decide in this case is whether the magistrate had jurisdiction to make the order which he did. It has been contended by Mr. Shearman that he had no jurisdiction to make such an order in any case, and secondly that in this case there was no evidence of apprehended injury to any particular person, nobody had been put in bodily fear.

Now there have been a series of cases and a number of statements of the law in text-books dealing with this question, and the opinion that I have formed is that it is much too late to go behind those decisions and the law there laid down. Mr. Shearman has indeed argued that those decisions profess to be founded upon the supposition that conservators of the peace had by the common law power to make these orders, and that if they had not the statute of 34 Edw. 3, c. 1, gave justices that power. Both those points have been considered in the authorities and decided against his argument, but he says that notwithstanding that he asks the Court to reconsider the question and claims that he can shew that the statute has been misconstrued. In my opinion it is too late to do that. There no doubt is an argument to be founded on the somewhat obscure words of the statute, but I do not think it necessary for me to express any opinion as to the true construction of it or whether the Courts have been right in inserting the word "not" before the words "of good fame,"

(1) (1882) 10 L. R. Ir. 1.
(2) (1882) 10 L. R. Ir. 294.
(3) (1883) 15 Cox, C. C. 242.
(4) [1902] 1 K. B. 167.
(5) (1819) 2 B. & Ald. 278.
(6) [1907] 2 K. B. 380.

and I do not propose to go into that question at all. Nor do I propose to go into the historical question whether a conservator of the peace had before the statute jurisdiction to make these orders, because many authorities have laid it down that he had, and it is too late now, when it cannot be demonstrated one way or the other whether he had or not, to consider whether the law was correctly laid down. One of the earliest authorities is Dalton's Country Justice, and in chapter 5, at p. 15, of the 1742 edition it is stated, "By this first clause in the commission"—he is dealing with the first assignavimus—"the justices of the peace have as well all the ancient power touching the peace which the conservators of the peace had by the common law, as also that whole authority which the statutes have since added thereto. The means which the justice of the peace must use for the keeping of the peace and for the execution of these statutes are as followeth. To prevent the breach of the peace he may send his warrant for the party and may take sufficient sureties of him (by recognizance) for keeping the peace, or for the good behaviour (as the case shall require) and may send the party to gaol for not finding such sureties." There is also a passage in Lambard's Eirenarcha, book 2, to the same effect. Then there have been decisions in the Courts, one of the earliest of which is *Willes* v. *Bridger*. (1) That was a case where a justice had made an order requiring the plaintiff to keep the peace for two years, and in default the plaintiff was committed to prison for two years unless he should in the meantime find sureties. In answer to an action of trespass the justice claimed that he had authority to make the order. Abbott C.J., in delivering the judgment of the Court, said: "The authority of a justice of the peace to require, upon due complaint made to him in his judicial character, sureties for the keeping of the peace, and to commit a person to prison for want of such sureties, is not nor could be denied; but it is contended on the part of the plaintiff that the surety can only be required for appearance at the next sessions and for keeping the peace in the meantime, and consequently that the commitment for want of surety can only be until such surety can be given as the justice might in the first instance require and take, that is for appearance

(1) 2 B. & Ald. 278.

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at the next sessions." In the argument in that case all the older authorities were cited, including Hawkins' Pleas of the Crown, and it was obviously with reference to those authorities that he said that the jurisdiction to make an order for sureties of the peace "is not nor could be denied." Then there are several decisions in the Irish Courts. The first is *Reg.* v. *Cork Justices.* (1) There there was an execution of a habere to enforce payment of rent, and a Miss Reynolds being present urged the tenant to pay no rent to the landlord. She was accordingly summoned and ordered to find bail to be of good behaviour for six months or to be imprisoned for one month. On a motion to shew cause against a conditional order for a certiorari it was held that the justice had jurisdiction to make the order. May C.J., in giving the considered judgment of the Court, said: "Now with respect to the legal aspect of the case, and the jurisdiction of magistrates to make orders to give security for good behaviour. I do not think it necessary to refer at length to the comments of Hawkins, Dalton, Bacon's Abridgment, Burn's Justice of the Peace, and other books on the subject; upon an elementary matter of this nature it is, I think, abundantly sufficient to refer to Blackstone, who discusses the subject in the 4th book and 18th chapter of the old editions. 'Preventive justice' he there tells us 'consists in obliging those persons whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace or for their good behaviour'; this requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment unless, perhaps, for a man's imprudence in giving just ground for apprehension. By the statute of Edward III. justices are empowered to bind over to good behaviour all that be 'not of good fame'; and the legal authorities show that a very wide and liberal

(1) 10 L. R. Ir. 1.

interpretation has been given to this language, various instances of which are given in the books." In *Ex parte Seymour* v. *Davitt* (1) it was held that the judges of the Queen's Bench Division as conservators of the peace had original jurisdiction independently of the statute of Edward III. to require sureties for good behaviour from persons whose acts or language are shewn to be likely to endanger the public peace. In addition there is the judgment of Palles C.B. in *Ex parte Tanner* (2) and the recent case of *Rex* v. *Wilkins*. (3) I do not think it necessary to refer in detail to those cases. It has been laid down in these Courts as well as in the Irish Courts that a magistrate has the jurisdiction which the magistrate exercised in this case. That disposes of the first point.

The second point is that it is not alleged in this case that any one was put in bodily fear; all that is alleged is that there was an incitement to the members of the Women's Social and Political Union to commit breaches of the peace generally, not to commit them against any particular person. In my opinion that point has been equally decided by authority. In *Haylock* v. *Sparke* (4) it was held that sureties for good behaviour may be required of one who is shewn to have published a libel calculated to produce a breach of the peace; in such a case it is the party libelled who is likely to commit the breach of the peace, and there is no question of his being put in bodily fear. Moreover it seems to me that if the statute of Edward III. has been rightly construed as giving jurisdiction at all, it equally gives jurisdiction whether any particular person is threatened or not, because the justices are to take sureties for good behaviour "towards the king and his people." The words of the statute are not confined to a case where a particular person is threatened. Therefore the second point also fails, and the decision of the magistrate must be affirmed.

AVORY J. I am of the same opinion. It would be sufficient to say that we are bound by the authorities, but I wish for myself to add that if there were no previous authority on the subject at all I should be prepared to-day to decide the question in the same

(1) 15 Cox, C. C. 242.
(2) August 8, 1889, unreported.
(3) [1907] 2 K. B. 380.
(4) (1853) 1 E. & B. 471.

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way as I believe it was decided about 220 years ago. First of all the argument which has been presented to us depends upon the question whether the statute of 34 Edw. 3, c. 1, which contains a power to bind over persons to be of good behaviour, is limited to those who are there called pillors and robbers. I am clearly of opinion that the statute is not so limited. The first part of it gives jurisdiction to the justices to restrain "the offenders, rioters, and all other barrators"; it gives them power to deal with all such persons, and concludes with these words, "and to take of all them that be" (or "be not"—I pass over that point for the moment) "of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour . . . . to the intent that the people be not by such rioters or rebels troubled nor endamaged nor the peace blemished." Those last words clearly include all the persons who are mentioned in the first part of the section. I think, therefore, that the power to bind over applies to all persons who come within the description of "offenders rioters and all other barrators." If that be the right construction of the statute it becomes immaterial to consider whether the proper reading of the section is "be of good fame" or "be not of good fame," because the magistrate would have the power to bind over an offender even though he be of good fame, which may mean nothing more than that he has not been frequently convicted before. Whichever way the statute is read, I think it would give the magistrate jurisdiction to bind over the appellant in this case.

But I wish to add further that in my opinion the statute is not exhaustive of the magistrate's jurisdiction under such circumstances, but that they had long before that statute, whether they were called justices of the peace or conservators of the peace, power to bind over persons to be of good behaviour. I should be content for this purpose to rely on the judgment of Fitzgerald J. in *Reg.* v. *Justices of Queen's County.*(1) He there said: "The foundation of the jurisdiction is very remote, and probably existed prior to the statute of 1360-61"—the 34 Edw. 3—"but whatever its foundation may be, or by whatever language conveyed, we are bound to regard and expound it by the light of

(1) 10 L. R. Ir. 294, at p. 301.

immemorial practice and of decision, and especially of direct modern decisions. It may be described as a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers for the maintenance of order and the preservation of the public peace. Whether it existed at common law, or flows from the commission, or has been conferred by statute, it rests on the maxim or principle 'salus populi suprema lex,' in pursuance of which it sometimes happens that individual liberty may be sacrificed or abridged for the public good." That statement of the law, even if not in itself binding on this Court, has been made binding by the express approval and adoption of it which was given in this Court by Lord Alverstone C.J. in *Wise* v. *Dunning*. (1) In that case the judgments both of May C.J. and Fitzgerald J. were adopted and acted upon as correctly stating the law of England upon the subject. I will add one word more upon a more ancient authority. Reference has already been made to Dalton's Country Justice, a book which has been accepted as long as any of us can remember as an authority on such questions as these. He has a separate chapter dealing with the power of justices to bind over for good behaviour as distinct from taking surety for the peace, and in that chapter (chapter 124), dealing with surety for the good behaviour, he says that, amongst many others, "Libellers also may be bound to their good behaviour, as disturbers of the peace, whether they be the contrivers, the procurers, or the publishers of the libel; for such libelling and defamation tendeth to the raising quarrels and effusion of blood, and are especial means and occasions tending and inciting greatly to the breach of the peace." Upon that passage in Dalton was founded, among many other authorities, a decision of the Court of Common Pleas in 1820 in the case of *Butt* v. *Conant* (2), where the question arose whether a person who had published a libel could be bound over and, in default of sureties, committed by the magistrate to prison. I refer to it because we have been pressed with the argument that this practice is a mere custom which has been improperly followed for a long time past, and that no one has thought it worth while to correct it. Dallas C.J. in giving judgment, after having

(1) [1902] 1 K. B. 167. (2) (1820) 1 Brod. & Bing. 548.

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examined all the authorities on both sides, said: "How then is it in point of law; and first, what has been the usage? Not that I mean to say that mere usage in every case will constitute law; but it is a primary and fundamental principle that usage is of great weight in showing what the law is, or in expounding the law if it be doubtful; and therefore, in every case, in the natural and simple order and progress of enquiry, we first turn to the books or the precedents to see whether, in point of fact, the power which is in controversy has been exercised or not. Now upon this we have a bulk of evidence, such as I will venture to state was never produced in a Court of justice upon any occasion before, for the purpose of being applied to cases of this description, or of any description whatever; a series of instances, brought forward in consequence of a solemn enquiry (the result of a search of the files of the records of the Courts of justice in this country), presenting no fewer than 128 cases of persons actually bailed on a commitment similar to that in question, extending from time to time, and scattered over a period of nearly 120 years, as far back as the enquiry has gone, from the first year of the reign of Queen Anne, down to the 57th of His late Majesty." So that the Chief Justice there had satisfied himself that as far back at all events as 1702 this jurisdiction had been exercised which is now called in question. Therefore even if we were disposed to take a different view, it is I think obvious, having regard to all the authorities, that it would not be open to us to do so.

Lush J. I agree. I think, speaking for myself, that there was great force in Mr. Shearman's contention as to the true meaning of this obscure statute, though no doubt we have not heard what the Attorney-General had to say in answer. But when we find that there have been authoritative decisions, both in England and in Ireland, as to what the scope of the Act is, and when we find that for the best part of 100 years certainly justice has been administered all over the country upon the basis that justices had jurisdiction to make orders of this kind in cases like this, it seems to me impossible to ask us to disturb the law as it has been laid down and to reconsider the question because

there are new arguments addressed to the Court as to what the proper construction of the statute is. It is too late for us to reopen the question. With regard to the second point as to whether there should be evidence that some particular individual went in bodily fear, I think that is concluded by the authority of *Haylock* v. *Sparke*. (1) Therefore on both grounds I think Mr. Shearman's contention fails and that the magistrate had jurisdiction to make the order which he did.

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Appeal dismissed.

Solicitors for appellant: *E. C. Rawlings & Butt.*
Solicitor for respondent: *Director of Public Prosecutions.*

J. F. C.

MACPHAIL, APPELLANT *v.* JONES AND WIFE, RESPONDENTS.

1914

May 14.

Justices—Information—Old Age Pension—Married Couple—Means—False Representation—Two Persons charged with same Offence—Old Age Pensions Act, 1908 (8 *Edw.* 7, *c.* 40), *s.* 9, *sub-s.* 1.

One information may be preferred against husband and wife charging them with knowingly making a false representation contrary to the provisions of s. 9, sub-s. 1, of the Old Age Pensions Act, 1908.

CASE stated by the justices of Carmarthen.

An information was preferred by John Macphail, the appellant, against John Jones and Elizabeth Jones, the respondents, charging that the respondents for the purpose of obtaining an old age pension knowingly made a false representation to the appellant, a pension officer, contrary to s. 9, sub-s. 1, of the Old Age Pensions Act, 1908 (2); the representation being that they

(1) 1 E. & B. 471.

(2) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 9, sub-s. 1: "If for the purpose of obtaining or continuing an old age pension under this Act, either for himself or for any other person, or for the purpose of obtaining or continuing an old age pension under this Act for himself or for any other person at a higher rate than that appropriate to the case, any person knowingly makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months, with hard labour."

Old Age Pensions Act, 1911 (1 & 2 Geo. 5, c. 16), s. 2, sub-s. 2: "In calculating the means of a person being one of a married couple living together in the same house, the means shall be taken to be half the total means of the couple."

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had disclosed all their means to the appellant, and being alleged to be false in that they had not disclosed that the respondent John Jones received the interest on the sum of 200*l.*, amounting to 8*l.* a year, under a certain will.

When the information was called on for hearing an objection was taken on behalf of the respondents, namely, that two persons could not be charged jointly with making a false representation and that the information was therefore bad in law; and it was argued that the principles applicable to a charge of perjury, for which (it was said) no joint indictment could be framed, ought to be applied to the offence in question. The appellant contended that the information was good and sufficient in law.

The justices were of opinion—

(1.) That the charge was not one in which several persons ought to be joined or accused of participating; and that any representation by either of the respondents was a separate and distinct offence, otherwise s. 9, sub-s. 1, of the Act would have provided that "any person or persons" knowingly making any false representation should be liable, &c.

(2.) That the practice is that no two separate offences can be charged in the same information.

(3.) That whether the respondent John Jones was in receipt of 8*l.* a year or not was a matter for his knowledge only and one for which the said respondent's wife should not be called upon to answer.

They therefore invited the appellant's solicitor to consent to the information being amended by striking out the name of one of the respondents. The appellant's solicitor refused, and the justices thereupon dismissed the information. The question for the Court was whether they were right in so doing.

Sir S. O. Buckmaster, S.-G., and *Daldy*, for the appellant.

The respondents were not represented.

AVORY J. This appeal must be allowed. The justices have been misled by treating this charge as if it were a charge of perjury. They say it was not one in which several persons ought to be joined or accused of participating; and that any

representation by either of the respondents was a separate and distinct offence, otherwise s. 9, sub-s. 1, of the Act would have provided that "any person or persons" knowingly making any false representation should be liable, &c. That argument overlooks the provisions of s. 1, sub-s. 1 (*b*), of the Interpretation Act, 1889. Secondly, they say that the practice is that no two separate offences can be charged in the same information; but this information did not charge one person with two separate offences, it charged two persons with the same offence. Thirdly, they say that whether the respondent John Jones was in receipt of 8*l.* a year or not was a matter for his knowledge only and one for which the said respondent's wife should not be called upon to answer. The answer to that is that if there is no evidence that the respondent Elizabeth Jones made a representation which she knew to be false she will be acquitted. There is nothing to prevent one of the respondents being convicted and the other acquitted. The offence is one which can be committed jointly by two persons.

ROWLATT and SHEARMAN JJ. concurred.

Appeal allowed.

Solicitor for appellant: *The Solicitor for the Customs and Excise.*

W. H. G.

1914
April 29.

BATCHELOUR, Appellant *v.* GEE, Respondent.

Adulteration—Sale to Prejudice of Purchaser—Cream mixed with Boric Acid—Notice by Label—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 8.

Sect. 8 of the Sale of Food and Drugs Act, 1875, provides that in respect of certain sales a person shall not be guilty of an offence under s. 6 of selling to the prejudice of the purchaser an article of food which is not of the nature, substance, and quality of the article demanded, if at the time of delivering the article he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article, to the effect that the same is mixed.

A purchaser having asked for cream was supplied with a mixture of cream and boric acid. The mixture was poured from a can into an earthenware pot. Affixed to the pot was a label on which were legibly printed the words "Preserved cream containing boric acid not exceeding 0·5 per cent." The pot having been filled was placed on the counter and at once covered with a plain paper bag. The purchaser could not and did not see that the pot bore any label. The pot was placed in the bag for the convenience of the purchaser, and there was no intention of concealing the label from him:—

Held, that the vendor, having failed to bring to the mind of the purchaser the fact that there was a label upon the pot, had not supplied to the person receiving the article a notice to the effect that the same was mixed within the meaning of s. 8.

Pearks, Gunston & Tee v. *Houghton* [1902] 1 K. B. 889 approved.

Jones v. *Jones* (1894) 58 J. P. 653 dissented from.

Case stated by a metropolitan magistrate.

An information was preferred by Charles Gee (hereinafter called the respondent) against John Batchelour (hereinafter called the appellant), under s. 6 of the Sale of Food and Drugs Act, 1875 (1),

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say,

"(1.) where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof; . . ."

Sect. 8: "Provided that no person

charging him with unlawfully selling to the prejudice of the purchaser, the respondent, an article of food, to wit a shillingsworth of cream, which was not of the nature, substance, and quality of the article of food demanded by the purchaser by reason of the fact that it contained a preparation or proportion of boric acid, equivalent to 0·214 per cent., or 15 grains per lb., of crystallized boric acid.

The magistrate convicted the appellant, imposing a penalty of 5*s.* with three guineas costs, but stated a special case, from which the following facts appeared:—

The appellant was a dairyman. On July 21, 1913, a representative of the respondent asked to be supplied from the appellant's shop with a shillingsworth of cream. He was served by the appellant's wife, who sold and delivered to him a mixture consisting of cream in which there was boric acid in an amount equivalent to 15 grains per lb. The article so sold was poured from a four-quart can into an earthenware pot in which it was delivered to the purchaser. Upon the four-quart can was a label $\frac{3}{4}$ in. by $1\frac{3}{4}$ in., on which was printed "Preserved cream containing boric acid not exceeding 0·5 per cent.," and upon the earthenware pot in which the cream was delivered to the purchaser a label of the same size was affixed bearing the same words. The labelled pot was placed upon the counter of the shop, and was at once covered by the appellant's wife with a plain paper bag which bore no inscription. The pot had no cover other than the paper bag. In pouring the mixture from the can into the earthenware pot the appellant's wife stood in such a position that the purchaser could not see the pot, and when it was placed upon the counter, and for the few seconds that it was there before the paper bag was placed upon it, the pot was in such a position that the purchaser could not, and did not, see that it had a label upon it; but this was in consequence of the situation of the respective parties to the

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shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

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transaction and was not because the appellant's wife deliberately or intentionally prevented the purchaser from seeing the label.

After placing the bag over the pot the appellant's wife handed the pot in the bag to the purchaser. The label was completely hidden by the bag and could not be seen through it. At no time before or at the time of the sale and delivery did, or could, the purchaser see the label on the pot or know that it bore a label. At no time did or could he see the label on the can. No verbal statement was made at the time of the sale, nor was any notice exhibited in the shop with reference to the composition of the article. The putting on of the paper bag was done solely for the convenience of the purchaser in taking the cream away and to keep dust or dirt from the pot, and the bag was not used to conceal the presence of the label. The form of the label upon the pot was in accordance with the provisions of the Public Health Act Milk and Cream Regulations, 1912, and the size of the label and of the printed letters upon it was in accordance with those regulations.

Immediately after the completion of the sale and delivery of the cream the respondent entered the shop and divided the sample into three parts in accordance with the provisions of the Sale of Food and Drugs Act, 1875. On removing the bag from the pot he immediately saw the label upon it.

The appellant contended that the label on the pot was a sufficient notice to the purchaser that the article sold was not of the nature of the article demanded, and that it was a mixture of cream and boric acid and not cream for which the purchaser asked, and that the defendant was protected by the provisions of s. 8 of the Sale of Food and Drugs Act, 1875.

The respondent contended that a notice to protect the seller must be a notice which in fact brings or is sufficient to bring to the knowledge of an ordinary purchaser at the time of delivery to him of an article the fact that the article sold is not the article demanded, and that a label which the purchaser could not and did not see before the completion of the transaction was not a notice within the meaning of s. 8.

The magistrate held that the label on the pot was not such a notice to the purchaser as was required by s. 8 and did not

protect the seller. He therefore convicted the appellant as stated above.

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The question for the Court was whether the magistrate had come to a correct decision in point of law.

Macmorran, K.C., and *Bodkin*, for the appellant. The magistrate, having found that the bag was not used to conceal the notice on the pot, ought to have dismissed the information. Fraud is the element which distinguishes *Jones* v. *Jones* (1) from *Pearks, Gunston & Tee* v. *Houghton* (2); *Liddiard* v. *Reece*. (3)

The present case falls within the decision of *Jones* v. *Jones*. (1) The vendor is excused under s. 8 if he "shall supply a notice by a label." Those words do not mean that the vendor is to bring to the mind of the person receiving the article the fact that it is a mixture. If he does that, he commits no offence under s. 6, and so does not require any assistance from s. 8: *Sandys* v. *Small*. (4) Sect. 8 was intended to give additional protection to the vendor. If he supplies with the article a label containing a notice to the effect that the article is mixed, he is protected: *Hayes* v. *Rule*. (5)

Stuart Bevan, for the respondent. The appellant would read s. 8 as if the word "notice" did not occur there. The section does not protect the vendor if he supplies a label, he must supply a notice by a label. It is said that to give the section its full effect is to make it nugatory. This is not so. But for s. 8 the vendor would be bound to state the constituent parts of the mixture. Sect. 8 relieves him from that obligation. The decision in *Jones* v. *Jones* (1) is inconsistent with the judgment of Lord Alverstone C.J. in the later case of *Pearks, Gunston & Tee* v. *Houghton* (2), and ought to be overruled; but it is not necessary for the respondent to go that length; for if those two cases are distinguishable the present case more closely resembles the later of the two in its facts. Moreover, the point that the existence of a notice must be brought to the mind of the purchaser was not taken in *Jones* v. *Jones*. (1)

(1) 58 J. P. 653.
(2) [1902] 1 K. B. 889.
(3) (1878) 44 J. P. 233.
(4) (1878) 3 Q. B. D. 449.
(5) (1902) 87 L. T. 133.

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Macmorran, K.C., in reply. The present case is not to be distinguished from *Jones* v. *Jones*. (1) There the notice was not brought to the mind of the purchaser. The Court had before it the provisions of s. 8 and must have decided that it is not necessary that the notice should come to his mind. [*Platt* v. *Tyler* (2) was also cited.]

AVORY J. We have to decide whether on the facts stated the magistrate could convict the appellant of an offence under s. 6 of the Act. There can be no doubt that, if the case depended solely on a consideration of s. 6, the appellant would have been liable to be convicted. The purchaser asked for cream; he was understood to mean pure cream; he was supplied with preserved cream. If the seller relied solely on s. 6 he must have been convicted, as there was no notice which might have protected him on the authority of *Sandys* v. *Small*. (3) He relies on s. 8, which we must therefore consider. That section in certain cases provides a defence to a person charged under s. 6 if at the time of delivering the article "he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article . . . . , to the effect that the same is mixed." The argument for the appellant comes to this, that a person charged under s. 6 is protected if he delivers with the article sold a label to the effect that the article is mixed. In other words he contends that s. 8 of this Act has the same effect as s. 6 of the Margarine Act, 1887. If that contention is sound the appellant is not liable because there was in fact upon this pot a label distinctly and legibly printed to the effect that the cream was mixed with boric acid. But this construction gives no effect to the words "shall supply to the person receiving the same"—i.e., the article sold—"a notice." Those words import that there must be brought to the mind of the purchaser the fact that there is a label on the article. The label must be a label distinctly and legibly written or printed to the effect that the article is mixed. In the present case it was never brought to the mind of the purchaser that there was a label on the pot.

(1) 58 J. P. 653. (2) (1894) 58 J. P. 71.
(3) 3 Q. B. D. 449.

If the fact that there was a label had been brought to his mind, I agree that the seller would not be bound to go further and prove that the person receiving the article actually read the label; but the seller must supply a notice to him that there is a label. In my view that is the main provision of s. 8. Several cases have been cited which we must consider. First there is *Jones* v. *Jones*. (1) We have been asked to say that there is a distinction between that case and the present in that the point in the present case was never brought to the notice of the Court in that case. Even assuming that to be true, I am not satisfied that it would afford a good ground of distinction between that case and this. It may be that the full force of the words "supply . . . . a notice by a label" was not pointedly brought to the notice of the Court; still we cannot assume that the judges did not read the section and see the words. The fact that a point is not argued does not alter the effect of a decision, and if the matter stood there we might be compelled to say that *Jones* v. *Jones* (1) being a decision of a Divisional Court was binding on us. But in the same Court there is another decision which is inconsistent with *Jones* v. *Jones* (1); that is the case of *Pearks, Gunston & Tee* v. *Houghton* (2), in which Lord Alverstone said (3): "Speaking for myself, I am not satisfied that, if an offence under s. 6 is made out, the appellants are right in their contention that the inner label protected them." Then after reading s. 8 the Lord Chief Justice proceeded: "If we were dealing with that section only, I should have to consider at greater length than now seems necessary the meaning of the words 'not intended fraudulently to increase its bulk, weight, or measure,' and I should also have to see whether at the time of delivery the purchaser was supplied with a notice to the effect that the article was mixed. In my opinion the delivery of the article with a notice printed on an inner label covered with an opaque wrapper would not be sufficient." Those are the facts in the present case. The article was delivered in a pot covered with an opaque wrapper. I cannot read those words as consistent with *Jones* v. *Jones*. (1) It is true that

(1) 58 J. P. 653. (2) [1902] 1 K. B. 889.

(3) [1902] 1 K. B. at p. 896.

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Darling J. distinguished *Jones* v. *Jones* (1) upon the facts. But the judgment of Lord Alverstone C.J. is inconsistent with *Jones* v. *Jones* (1), and moreover it was followed in *Hayes* v. *Rule* (2), where the Lord Chief Justice said (3): "But the magistrates have found also that there was a defence under s. 8 by reason of the printed notices exposed in the shop, and by reason of the fact that the butter sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture . . . . Unless that notice was so put round the butter that it could not be seen, or was covered with another paper, as in the case of *Pearks, Gunston & Tee* v. *Houghton* (4), I think the magistrates were perfectly right in coming to the conclusion that it was a sufficient notice under s. 8. Counsel for the appellant raised one point directly and another point indirectly. He says that there ought to have been a specific finding that the blue label when it was round the butter was so handed over to the purchaser that it could be seen. I must say that if that point were going to be raised, or if there were any evidence at all before the magistrates, who certainly seem to have understood the case, that the condition of matters was that the blue label could not be seen by the purchaser, the magistrates would not have said that the butter when sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture." I cannot read those words in any other sense than as reaffirming the view already expressed in *Pearks, Gunston & Tee* v. *Houghton* (4) that if the notice is so applied to the article or is so obscured by other coverings that it cannot be seen, it is not a sufficient notice to protect a vendor under s. 8. Of the two views I prefer that expressed in the later cases to that indicated in *Jones* v. *Jones* (1), and fortified by the expression of opinion in *Pearks, Gunston & Tee* v. *Houghton* (4) and *Hayes* v. *Rule* (2) I do not hesitate to say that in my view *Jones* v. *Jones* (1) was wrongly decided. I think the magistrate took a correct view of the law and properly applied it; there was evidence on which he could properly come to the conclusion that the purchaser was not supplied with a notice by a label to the

(1) 58 J. P. 653.
(2) 87 L. T. 133.
(3) Ibid. at p. 135.
(4) [1902] 1 K. B. 889.

effect that the article sold was mixed, and therefore this appeal must be dismissed.

ROWLATT J. I agree though with some doubt because I think that in *Jones* v. *Jones* (1) the Court must have meant to decide the point now raised. The words of s. 8 are "supply a notice by a label"; no doubt these words are not well chosen to convey the meaning "supply a label the purport of which is to give notice," but they are very ill chosen to express the bringing of a state of facts to the mind of a person. I think they mean giving the person a piece of paper containing the necessary statements, and I think that was the view taken by the Court in *Jones* v. *Jones*. (1) Further there is the serious argument of Mr. Macmorran that s. 8, except upon his construction, does not add anything to the protection which the vendor gets under s. 6. If it is brought to the mind of the person that the article is mixed, there is no offence under s. 6. If it is brought to his mind that there is a notice affecting the article he cannot say that its contents were not brought to his mind merely because he did not read it. This seems to me a formidable argument against holding that it is necessary under s. 8 to bring to the mind of the person that there is a notice. If the notice is brought to his mind then s. 8 carries the vendor's protection no further than s. 6. The cases since *Jones* v. *Jones* (1) create a great difficulty. They do not proceed by way of attack upon that case; they have not said that the word "notice" implies that the mind of the purchaser must be directed to the mixture. The undermining of *Jones* v. *Jones* (1) has proceeded by way of criticism of the label and the method of its affixture. In *Pearks, Gunston & Tee* v. *Houghton* (2) Lord Alverstone C.J. in a part of his judgment which is really obiter deals with *Jones* v. *Jones* (1), pointedly distinguishing that case, but not overruling it as it has been overruled to-day. He said: "*Jones* v. *Jones* (1) is not a sufficient authority on the facts of the present case. There the article sold was a tin (3) of cocoa, and it was assumed to be a matter of common knowledge that tins had labels on them, and, therefore, the fact that they

(1) 58 J. P. 653. (2) [1902] 1 K. B. 889.

(3) The report in 58 J. P. 653 says "a packet."

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were wrapped up when delivered to the purchaser could not prevent the label having the effect of a notice to the purchaser. The question of the sufficiency of the notice is one to be decided on the particular facts of each case; but I doubt whether a purchaser of a pound of butter, on being handed such a packet, could be taken to have notice that there was another label inside the outer wrapper." I do not understand why the Chief Justice spoke of "another label"; probably "another wrapper" was meant with a label upon it, or a label inside the outer wrapper. The point is that in *Jones* v. *Jones* (1) the article was in a labelled in, well known to commerce, delivered with its labels upon it inside a wrapper to the purchaser; while in *Pearks, Gunston & Tee* v. *Houghton* (2) the article was butter severed from the bulk and wrapped up in two pieces of paper, the label being on the inside paper. That is the distinction which Lord Alverstone C.J. had in mind—the mere fact that there were two surrounding substances, the tin and the paper in one case and the two pieces of paper in the other case, would be no distinction at all—and he expressed a doubt whether in the case before him the purchaser could be taken to have notice that there was a label inside the outer wrapper. When the facts of the present case are considered they come within those dicta of Lord Alverstone C.J., and *Jones* v. *Jones* (1), whatever be its fate, cannot be treated as extending to cover this case. Here cream was taken from a jar. The jar had a label upon it, but that did not affect the defence under s. 8; it would afford a defence under s. 6 or not at all. The case turns upon the label on the small jar or pot. The cream is poured into this small jar—it cannot be delivered in paper—and practically at the same moment enclosed in a piece of paper so that the label upon the small jar was never exposed so far as the purchaser was concerned. Mr. Stuart Bevan has satisfied me that the present case is not the same as *Jones* v. *Jones* (1) but is the same as *Pearks, Gunston & Tee* v. *Houghton* (2), and therefore in any view I think this appeal must be dismissed. Very likely these questions are questions of fact, but if this is so it is clear that there were grounds on which the magistrate could convict the appellant.

(1) 58 J. P. 653. (2) [1902] 1 K. B. 889.

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SHEARMAN J. As this case involves a matter of principle I wish to add a few words. By s. 8 of the Act an innocent seller is protected if at the time he sells the article he supplies to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article, to the effect that the same is mixed. But for the decision in *Jones* v. *Jones* (1) I do not think it could have been successfully argued that a seller could supply a notice by a label when the label was not visible to the person receiving the article. But that case seems to have decided that a notice can be supplied by a label in those circumstances. The authority of that case has, however, been seriously impaired by *Pearks, Gunston & Tee* v. *Houghton* (2), where the judgment of Lord Alverstone C.J. contains passages inconsistent with *Jones* v. *Jones*. (1) I am disposed to follow the reasoning of Lord Alverstone C.J. rather than the reasoning of the Court in *Jones* v. *Jones* (1), and in that view I am prepared to hold that if the so-called notice is so affixed that it cannot be seen before sale the conditions of s. 8 are not complied with. Such a decision is in line with the scheme of the Act which is designed to ensure that the buyer shall get what he asks for and that if the seller wishes to supply something different he must inform the purchaser of his intention before the goods are delivered.

Appeal dismissed.

Solicitors for appellant: *Neve, Beck & Kirby.*
Solicitors for respondent: *Watson, Sons & Room.*

(1) 58 J. P. 653. (2) [1902] 1 K. B. 889.

W. H. G.

1914
May 7.

BOOTH, Appellant *v.* HELLIWELL, Respondent.

Adulteration—Sale to Prejudice of Purchaser—Person selling—Limited Company—Principal Shareholder—Managing Director—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

A shop assistant sold to and to the prejudice of a purchaser an article of food which was not of the nature, substance, and quality of the article demanded. The occupier of the shop and proprietor of the business carried on there was a limited company trading in its registered name. The general manager, who was a director and also the secretary of the company, resided on the premises and occasionally conducted the business of the shop in person. In his absence his wife took charge, assisted by the shop assistant. The business was carried on under the exclusive and unrestricted control of the general manager, who was practically the only shareholder in the company. He was not in the shop at the time of the sale in question.

The general manager having been convicted of an offence under s. 6 of the Sale of Food and Drugs Act, 1875:—

Held, that the facts shewed the shop assistant to be the servant of the company and not of the general manager, and that the conviction was wrong.

Salomon v. *Salomon & Co.* [1897] A. C. 22 followed.

Case stated by justices of Middlesex.

An information was preferred by James Samuel Helliwell, the respondent, under s. 6 of the Sale of Food and Drugs Act, 1875, against Edwin Booth, the appellant, charging him with unlawfully selling to and to the prejudice of the respondent, the purchaser, a certain article of food which was not of the nature, substance, and quality of the article, to wit, butter, demanded by the purchaser, but was butter containing 90 per cent. of margarine.

The justices convicted the appellant, but stated a case in which the following facts appeared.

On October 29, 1913, the respondent's representative entered the shop No. 276, Philip Lane, Tottenham, and asked to be served with butter. She was served by Arthur Macdonald, an assistant in the shop. The necessary formalities prescribed by the Act were complied with. The substance supplied to the respondent's representative as butter was in fact a mixture containing 90 per cent. of margarine.

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The proprietor of the business carried on at the shop was A. Booth & Co., Limited (hereinafter called the company), and not the appellant. The company carried on business at the shop and also at four other premises, under its registered name. Handbills and other advertising matter used in connection with the business described it as being carried on by the company. The company was assessed to the poor rate in respect of the premises and the name of the company was entered in the rate-book as the occupier of the premises. The facia and shop front of the premises bore the words " Booth's Stores " in large letters over the shop, and in smaller letters at the side the words " A. Booth & Company, Limited." The appellant resided on the premises and occasionally conducted the business of the shop in person. In his absence his wife took charge of the shop, assisted by Macdonald. The appellant was a director of the company and was practically the only shareholder therein. He was also the secretary of the company and the general manager of its business, which was carried on under his exclusive and unrestricted control. He did not himself effect the sale and was not in the shop nor on the premises at the time of the sale.

The appellant contended that he was not the person selling the article so as to be liable under s. 6 of the Act, inasmuch as he was not the proprietor of the business on whose behalf the sale was made nor the person who actually sold the goods; that the company was the owner of the business and of the goods sold in connection therewith; that the fact that one shareholder has a preponderating interest in a company does not affect the separate entity of the company: *Salomon* v. *Salomon & Co.* (1); and that the information was therefore wrongly laid against the appellant, who was not responsible for the sale, but ought to have been laid against the company or against Macdonald, the actual vendor of the article.

The respondent contended that the appellant was the real owner of the business notwithstanding that it was carried on under the style of a company, and that he was responsible as the master of the actual seller for the act of his servant.

The justices held that the sale was to the prejudice of the

(1) [1897] A. C. 22.

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purchaser, the article being not of the nature, substance, and quality demanded by the purchaser; that Macdonald was a person employed by the appellant as a salesman, and that he effected the sale in the scope of his employment. They therefore convicted the appellant as aforesaid and imposed a penalty.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

A. S. Comyns Carr, for the appellant.

The respondent was not represented.

AVORY J. This appeal must be allowed. There are no facts stated which would warrant the justices in finding that Macdonald was the servant of the appellant. The facts found shew that he was the servant of the company.

ROWLATT J. I agree.

SHEARMAN J. I agree. This case is covered by *Salomon* v. *Salomon & Co.* (1) Since that case a company must be regarded as a separate entity from any one of its shareholders, no matter how many shares he may hold.

Appeal allowed.

Solicitors for appellant: *Neve, Beck & Kirby.*

(1) [1897] A. C. 22.

W. H. G.

LONDON COUNTY COUNCIL *v.* LEE.

1914
May 5.

Highway—Locomotive — Licence — Exemption — Agricultural Locomotive — Locomotive employed solely for Purposes of Farm—Carrying Produce to Market—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 9, *sub-ss.* 1, 9, 10; *s.* 17.

By s. 9, sub-s. 1, of the Locomotives Act, 1898, every locomotive shall be licensed by a county council, provided that this enactment is not to apply to (among other things) any agricultural locomotive. By s. 17 the expression "agricultural locomotive" includes any locomotive the property of one or more owners or occupiers of agricultural land employed solely "for the purposes of their farms," and not let out on hire:—

Held, that a locomotive drawing to market trollies laden with farm produce intended for sale was employed for the purpose of a farm within the meaning of s. 17.

Case stated by a metropolitan magistrate.

An information was preferred by Kenneth Edward Newman on behalf of the London County Council, hereinafter called the appellants, under the Locomotives Act, 1898, s. 9 (1),

(1) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 9, sub-s. 1: "Every locomotive shall be licensed by a county council, provided that this enactment shall not apply to any agricultural locomotive . . . ."

Sub-s. 9: "A locomotive shall not be used on any highway in a county in which it is not licensed, except on payment to the council of the county of a fee not exceeding two shillings and six pence for each day on which it is so used."

Sub-s. 10: "If any person— . . . .

"(*b*) uses a locomotive on any highway in a county in which the locomotive is not licensed without payment of the fee required by this section . . . .

that person shall be liable for each offence, on summary conviction, to a fine not exceeding ten pounds."

Sect. 10, sub-s. 1.: "All locomotives not required to be licensed under this Act shall be registered in the county in which they are ordinarily used or to be used in such manner as the county council may direct."

Sect. 17, sub-s. 1: "In this Act, unless the context otherwise requires,— . . . . the expression 'agricultural locomotive' includes—

"(*a*) any locomotive used solely for threshing, ploughing, or any other agricultural purpose; and

"(*b*) any locomotive, the property of one or more owners or occupiers of agricultural land employed solely for the purposes of their farms, and not let out on hire."

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against the respondent for that he did on a day named unlawfully use a locomotive then in charge of one Reginald Shepard in the county of London (where the locomotive was not licensed) without payment of the fee required by s. 9 of the Act.

The magistrate dismissed the information but stated a case in which the following facts appeared.

(1.) On September 26, 1913, just before midnight a motor traction engine hauling three trollies laden with vegetables was being driven along Evelyn Street, Deptford, in the county of London, in the direction of Borough Market in the said county.

(2.) The motor traction engine and trollies were the property of Caleb Lee, the respondent, who was an occupier of agricultural lands and a partner in the firm of Caleb Lee & Sons, farmers, market gardeners, and fruit growers. The engine and trollies were in charge of Reginald Shepard, the servant of the respondent.

(3.) The engine was registered under the Heavy Motor Car Order, 1904, and also as an agricultural locomotive under s. 10 of the Locomotives Act, 1898, in the county of Kent.

(4.) The engine was not registered or licensed in the county of London, and no payment of any fee in respect of its use had been made to the appellants under s. 9, sub-s. 9, of the Locomotives Act, 1898.

(5.) The engine was on September 26, 1913, carrying market garden produce of and from the respondent's farm near Swanley in the county of Kent to the Borough Market in the county of London for the purpose of sale therein.

(6.) The engine was never let out on hire, but had been used for ploughing, threshing, and carting on and between the respondent's farms and also to carry produce of the farms to market for the purpose of sale. These were the only purposes for which the engine had been used.

(7.) The use of the engine for conveying produce to market was cheaper and more convenient than any other method.

The respondent contended that the engine was an agricultural locomotive within the meaning of s. 17, sub-s. 1 (*b*), of the Locomotives Act, 1898, namely, a "locomotive the property of one or more owners or occupiers of agricultural land employed solely

for the purposes of their farms and not let out on hire," inasmuch as carrying the produce of a farm to market is one of the purposes of the farm within the meaning of that sub-section, and that by reason of s. 9, sub-s. 1, of the Act the engine was exempt from the provisions of that section.

The appellants contended that the engine was not on September 26, 1913, being employed solely for the purposes of the respondent's farms and therefore was not an agricultural locomotive within the meaning of ss. 9 and 17 of the Locomotives Act, 1898. The case of *Hoddell* v. *Parker* (1) was cited in support of this contention.

The magistrate held that the engine was on September 26, 1913, an agricultural locomotive within the meaning of s. 9 and s. 17, sub-s. 1 (*b*), of the Act, and dismissed the information as above stated.

The question for the Court was whether the magistrate came to a right determination in point of law in dismissing the information.

Bodkin, for the appellants.

Hohler, *K.C.*, and *Engelbach*, for the respondent.

AVORY J. This case must be decided on the simple and well-known principle that when the Legislature uses two different expressions in close proximity it does not intend the same meaning. It cannot be that in framing the definition of "agricultural locomotive" the draftsman meant the same thing by the words "threshing, ploughing, or any other agricultural purpose" in s. 17, sub-s. 1 (*a*), and by the words "for the purposes of their farms" in s. 17, sub-s. 1 (*b*). If this case had to be decided solely on the construction of sub-s. 1 (*a*) the respondent might have been in some difficulty, because I do not think that carrying goods to market could be called an agricultural purpose ejusdem generis with threshing and ploughing. But s. 17, after including in the expression "agricultural locomotive" any locomotive used solely for threshing, ploughing, or any other agricultural purpose goes on in sub-s. 1 (*b*) to include "any locomotive the property

(1) [1910] 2 K. B. 323.

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of one or more owners or occupiers of agricultural land employed solely for the purposes of their farms, and not let out on hire." We have for the first time to construe the words "employed solely for the purposes of their farms." The case of *Hoddell* v. *Parker* (1) has no bearing on this question. The magistrate has found as a fact that this locomotive was used for conveying farm produce to market for sale. Is that one of the purposes of a farm? In enumerating the purposes of a farm there must surely be included the main object for which the business of the farm is carried on, namely, that of conveying the produce to market for sale. In my opinion the magistrate came to a correct decision and this appeal must be dismissed.

ROWLATT J. I am of the same opinion. The two limbs of the exception are framed on entirely different lines. Sect. 17, sub-s. 1 (*a*), mentions "any locomotive used solely for threshing, ploughing, or any other agricultural purpose." That exception depends on the use to which the machine is put and is not concerned with the ownership. The exception in sub-s. 1 (*b*) depends upon ownership. The owner gets exemption in certain cases. First he must be the owner or occupier of agricultural land; secondly the locomotive must be employed solely for the purposes of his farm. The purposes referred to in the phrase "employed solely for the purposes of their farms" must be wider than the "agricultural purpose" referred to in sub-s. 1 (*a*), because if the two phrases mean the same thing, then sub-s. 1 (*b*) would be unnecessary. In sub-s. 1 (*a*) the only condition of exemption is user in a certain way. In sub-s. 1 (*b*) there are two conditions, ownership and user. When the class of exempted locomotives is reduced by the first condition, it must be enlarged by the second, otherwise sub-s. 1 (*b*) has no effect. It follows that the phrase "employed solely for the purposes of their farms" must indicate a wider scope of user than the phrase "used solely for threshing, ploughing, or any other agricultural purpose." "The purposes of their farms" would in my opinion include the carriage of farm produce to market. The appeal must therefore be dismissed.

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SHEARMAN J. I am of the same opinion. In my view the exemption of agricultural locomotives was made with the object of favouring agriculture. Sect. 17, sub-s. 1 (*b*), shews an intention to consider the case of a farmer who can afford to own a locomotive, and also the case of a number of persons who combine to buy one, the use in either case being solely for the purposes of their farms. It seems hardly arguable that when they proceed to take their farm produce to market they must pay this tax from which it was the object of the Legislature to exempt them.

Appeal dismissed.

Solicitor for appellants: *Edward Tanner.*
Solicitor for respondent: *C. J. Parker.*

W. H. G.

THE KING *v.* CLERK OF THE PEACE FOR MIDDLESEX.

1914
May 13.

Lands Clauses Act—Mortgaged Land—Part compulsorily taken—Residue injuriously affected by Working of Undertaking—Claim of Compensation for—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 49, 108—114.

Mortgagees of land with a power of sale are entitled under the Lands Clauses Act, 1845, to the rights of owners, including the right, where part of their land is taken, to claim compensation for damage by reason of other land of theirs held therewith being injuriously affected by the exercise of the powers of the special Act. Their rights in that respect are not cut down by the special provisions relating to mortgagees in ss. 108—114.

RULE for a certiorari to bring up an inquisition under the Lands Clauses Act.

The London Electric Railway Company were empowered by a special Act passed in 1912 to acquire for the purposes of their undertaking the sites of certain houses known as Nos. 109 to 147 (odd numbers only), Brondesbury Villas, Willesden, and to construct thereon a railway to be worked by electric power. The houses in question had been mortgaged by one Moses

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Davis to the Temperance Permanent Building Society, the claimants, by four mortgages, of which two bore date April 7, 1904, and the other two December 23, 1910. Those houses were all on the south side of the road in which they were situate. The said Moses Davis had also mortgaged to the claimants under other deeds of mortgage certain other houses on the north side of the same road, being Nos. 114 to 144 (even numbers only), Brondesbury Villas. The company gave the claimants notice to treat for the purchase of the first mentioned houses, Nos. 109 to 147. The claimants as being mortgagees in possession with a power of sale claimed a sum of 13,411*l.* in respect of the value of their leasehold interest in the said houses. They also claimed the sum of 2953*l.* as compensation for the injurious affection of the houses on the other side of the road, Nos. 114 to 144, of which they were also mortgagees in possession with a power of sale. All the several mortgages had been consolidated. An inquiry for the assessment of the compensation payable to the claimants was held before the under-sheriff of the county of Middlesex and a jury.

Evidence was called by the claimants to prove that the removal by the company of the houses Nos. 109 to 147 would cause the houses Nos. 114 to 144 to be injuriously affected by the increase of the noise from the existing London and North Western Railway, and also that they would be injuriously affected by the noise from the working of the London Electric Railway when opened. The jury returned a verdict for 8258*l.* as the value of the claimants' interest in the houses Nos. 109 to 147, and 1680*l.* as compensation to be paid in respect of the damage to Nos. 114 to 144.

A rule nisi was obtained on behalf of the company for a certiorari directed to the clerk of the peace for the county to bring up the inquisition and verdict to be quashed upon the ground that the claimants being mortgagees could only claim compensation under ss. 108 to 114 of the Lands Clauses Act, 1845, and that under those sections they could only claim for the value of their interest in the houses taken and could not claim compensation for the damage to the houses Nos. 114 to 144.

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Sir Edward Clarke, K.C., Micklem, K.C., Courthope-Munroe, and *William Clarke,* for the claimants, shewed cause. Under s. 18 of the Lands Clauses Act, 1845, the promoters of the undertaking are to give notice of their intention to take lands "to all the parties interested in such lands"—which term, in cases where the land is mortgaged, includes the mortgagees; and the notice is to state that the promoters "are willing to treat for the purchase thereof and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." Under that section therefore mortgagees are like any other owners entitled to be paid for damage by injurious affection. In default of agreement between the parties an inquiry is to be held to assess the compensation. And by s. 49, "Where such inquiry shall relate to the value of lands to be purchased and also to compensation claimed for injury done or to be done to the lands held therewith" the jury are to separately assess the sums to be paid under those two heads. That course was followed here. The houses numbered 114 to 144 were "held with" the houses on the other side of the road which were taken within the meaning of the section. It is not necessary for that purpose that the land injuriously affected should immediately adjoin the land taken, it is enough that it is so near and so situated that the possession and control of each gives an enhanced value to the other: *Cowper Essex* v. *Acton Local Board.* (1) So far it is clear that the claimants were entitled to be paid for the damage done to the houses not taken. But it is said on behalf of the railway company that ss. 18 and 49 have no application to mortgagees, and that the rights of mortgagees are entirely regulated by ss. 108—114; and reliance is particularly placed on s. 112, which deals with the sum to be paid where part only of the mortgaged land is taken, and which says nothing about compensation for injury to the land not taken. But in truth those sections are supplementary only to the general provisions relating to the rights of parties interested, and do not exclude mortgagees from the benefit of those general provisions. Where land is mortgaged the party with whom the promoters have to deal is not the

(1) (1889) 14 App. Cas. 153.

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mortgagor but the mortgagee: *Hill* v. *Great Northern Ry. Co.* (1) If they deal with the mortgagor the mortgagee is not bound by any arrangement that they may have made, and they run the risk of having to pay over again: *Martin* v. *London, Chatham and Dover Ry. Co.* (2) If they deal with the mortgagee he takes the whole value and compensation subject to the liability to account to the mortgagor in respect of his interest if any.

Roskill, K.C., Lynden Macassey, K.C., Tyldesley Jones, and *F. K. Archer,* for the London Electric Railway Company, in support of the rule. The fact that a mortgagee is entitled to a notice to treat, as was laid down by Lord Cranworth in *Martin* v. *London, Chatham and Dover Ry. Co.* (2), does not deprive the undertakers of the benefit of ss. 108—114 of the Lands Clauses Act. Under s. 108 the maximum that a mortgagee whose land is taken can get is the principal money due on the mortgage with costs and six months' additional interest, and further compensation and costs of reinvestment under s. 114 if he is paid off before the time stipulated in the mortgage. The mortgagee, upon such money being paid or tendered, is bound to convey, even though he may have other land not taken and subject to a different mortgage which will be injuriously affected by the undertaking; and if he refuses to convey the undertakers can avail themselves of the procedure prescribed by s. 109 and obtain immediate possession. But the undertakers are not bound to pay this maximum sum in order to get rid of the mortgagee's interest; if, in their opinion, the mortgaged lands required are worth less than theprincipal money due, they can proceed under s. 110, as was done in the present case. Here the burden of proving that fact, which lies on the undertakers, has been satisfied, for the jury have awarded less than the amount advanced by the mortgagee. The mortgagee is then bound to convey under s. 111, just as much as under s. 109, and if he refuses the undertakers can enter into possession by adopting the procedure prescribed by s. 111. The word "compensation" in s. 110 only refers to the compensation required to be made to the mortgagee by s. 114. It has nothing to do with compensation for severance or injurious

(1) (1854) 24 L. J. (Ch.) 212. (2) (1866) L. R. 1 Ch. 501.

affection to other lands subject to a different mortgage and not taken. If it had, the mortgagee would be able to obtain more under s. 110 than under s. 108, which would be illogical and cannot have been intended. It is conceded that a mortgagor's rights are not affected by ss. 108—114, and that he can claim for injurious affection to other land not taken and subject to a different mortgage whether due to the execution of the works or to the working of the railway. But the mortgagee's position is different and he can only claim for injurious affection to other land not taken, subject to ss. 108—114, which enable him to be got rid of, and oblige him to convey without any compensation for injurious affection to such other lands. No doubt a mortgagee under s. 68 could claim compensation for such injurious affection due to the execution of the works, but in this case the jury have included in their award compensation for injurious affection due to the working of the railway, and as the amounts cannot be separated certiorari will lie as to the whole, there having been excess of jurisdiction: *Re Penny*. (1) It is conceded by the other side that s. 112 does not apply to the facts of this case. The consolidation of the mortgages is immaterial as s. 108 gives the undertakers a statutory right to redeem.

AVORY J. In my opinion this rule must be discharged. The ground upon which it was moved was that the group of sections of the Lands Clauses Act, 1845, beginning with s. 108 formed a complete and exhaustive code dealing with the rights of mortgagees in cases where land, the subject of the mortgage, is being taken compulsorily by undertakers acting under statutory powers. On the other hand it is said in answer to the rule that those sections are supplementary only to the general provisions of the Act dealing with the rights of owners, who are defined by s. 2 to mean any person who would under the provisions of this or the special Act be enabled to sell and convey lands to the promoters of the undertaking. It is said that these mortgagees are owners within the meaning of the Act and have the rights of owners conferred by ss. 18 and 49. Which of those two views is

(1) (1857) 7 E. & B. 660.

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right is the point that we have to determine. Now in this case it appears that the several mortgages of the land on both sides of the road have been consolidated, but I prefer to leave that fact out of consideration and to deal with the case on the footing that there has been no consolidation, and I come to the conclusion that the provisions in ss. 108 and 110 do not exclude the right of the mortgagees as owners to recover compensation for the injurious affection of that portion of their land which has not been taken. It appears to me that those sections merely enable the undertakers to deal in a convenient way with mortgagees if they choose to avail themselves of the provisions which they contain, and I cannot believe that the effect of s. 108 would be, as was suggested, that in such a case as the present, if the undertakers chose to pay off the mortgage upon the land which they proposed to take, they could thereby deprive the mortgagees of the right to compensation as owners which they had already acquired under ss. 18 and 49 as soon as the notice to treat was given.

ROWLATT J. I agree. The contention raised in support of the rule is one which would lead to very extraordinary results. We have here mortgagees who are in possession of a number of houses, some of which are taken and the others are injuriously affected. Under those circumstances if the houses were unmortgaged it is not disputed that the undertakers would have to pay the value of the houses taken and compensation for the injurious affection of the houses not taken; and it certainly is a startling proposition that the mortgagees who have precisely the same land in their hands as security should be in a worse position than their mortgagor, and should be unable to demand all the compensation which their mortgagor could have demanded in respect of the mortgaged property. To my mind there is nothing in the Act indicating any intention that the mortgagee should be in a worse position than the mortgagor in that respect.

It has been suggested that a difficulty arises under s. 108 because under that section the undertakers can pay off the mortgage on land taken. It is said that the effect of that is to deprive mortgagees of the whole benefit of the doctrine in the

Cowper Essex Case (1), because mortgagees who are paid off cease to be in the position of persons whose lands are compulsorily taken, and therefore cannot be damaged by the injurious affection of other lands held with the lands taken. But the answer is obvious. The lands the mortgage on which is paid off are none the less taken. I agree that the rule should be discharged.

SHEARMAN J. I am of the same opinion. I think this motion was launched by the railway company with the very natural object of protecting themselves from having to be asked to pay this compensation twice over. It appears that both the mortgagees in possession and the mortgagor have sent in claims for the injurious affection of the houses which were not taken, and the company are naturally desirous of not being harassed by the double claim. They say they are willing to pay the mortgagor but are not bound to pay the mortgagees. In support of that contention they argue that the only procedure under the Act to which mortgagees can resort for the purpose of claiming compensation is that which is to be found in ss. 108—114, and that those sections do not provide for compensation for injurious affection. But I do not think it is correct to say that those are the only sections in the Act applicable to claims by mortgagees. It seems to me that ss. 108—114 were designed to give the undertakers an optional power of which they are at liberty to avail themselves or not as they think fit, and not to deprive mortgagees who are the legal owners of the property of any rights which they might otherwise possess. One of the difficulties of undertakers under this Act lies in the fact that where the entire interest in a piece of land is divided amongst a number of different people there are no provisions enabling the undertakers to call for one assessment of compensation once and for all, leaving the various parties interested to divide the total sum between them. The result is that they are liable to be called upon to assess the value of different interests at different times. But I think that in the case of a mortgage where, as here, the amount of the mortgage debt for which the land stands as security is larger

(1) 14 App. Cas. 153.

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Shearman J.

than the value of the land is likely to prove to be, the difficulty of the undertakers is rather imaginary. When once the mortgagees who can give a perfectly good title have been compensated for the entire interest both in the lands taken and in those injuriously affected, although the mortgagor cannot be prevented from making a second claim, it is extremely improbable that such a claim would be made, as the interest remaining in him would be of no value.

Rule discharged.

Solicitors for the claimants: *Shaen, Roscoe & Massey.*
Solicitors for the railway company: *Bircham & Co.*

J. F. C.

1914
April 29.

THE KING *v.* THE REGISTRAR OF THE BOW COUNTY COURT.

Ex parte SCOTTISH SHIRE LINE, LIMITED.

Workmen's Compensation—Agreement to redeem Weekly Payments—County Court—Duty of Registrar to record—Genuineness of Agreement—Adequacy of Amount—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., s.* 9 (*d*)—*Consolidated Workmen's Compensation Rules, July*, 1913, *r.* 45; *Form* 38.

Where there has been an agreement between employer and workman that the employer shall redeem by a lump sum weekly payments of compensation payable to the workman under the Workmen's Compensation Act, 1906, it is prima facie the duty of the registrar of the county court under Sched. II., s. 9, of the Act to record a memorandum of the agreement on being satisfied of its genuineness. If the adequacy of the sum is called in question, it is the duty of the registrar, proceeding under proviso (*d*) to that section, to inquire whether the sum is adequate. This is so notwithstanding that Form 38 in the Appendix to the Consolidated Workmen's Compensation Rules, July, 1913, indicates that the registrar may refer the matter to the county court judge on the mere objection of the workman to the registration of the agreement on the ground of the inadequacy of the sum.

RULE NISI for a writ of mandamus to the registrar of the Bow County Court commanding him to enter upon the consideration of the matter of an agreement made between the Shipping

Federation, Limited, as agents for the Scottish Shire Line, Limited, of the one part, and Thomas Kennedy of the other part, pursuant to Sched. II., s. 9 (*d*), of the Workmen's Compensation Act, 1906. (1)

In April, 1909, Thomas Kennedy whilst serving on board the British steamship *Ayrshire* was injured by an accident arising out of and in the course of his employment by the Scottish Shire Line, Limited, the owners of the steamship. Liability was admitted under the Workmen's Compensation Act, 1906, and weekly payments were commenced.

On or about December 4, 1913, an agreement was entered into between the Shipping Federation, Limited, as agents for the owners of the steamship, and Thomas Kennedy whereby it was agreed that the weekly payments of compensation should be redeemed by the payment to Thomas Kennedy of the sum of 160*l.*

On December 9, 1913, a memorandum of this agreement was drawn up in accordance with the provisions of the Workmen's Compensation Act, 1906, and the schedules thereto. The memorandum was signed by the managers of the Scottish Shire Line, who were authorized to sign it on behalf of the company. On the same date the Shipping Federation, pursuant to the rules made under the Workmen's Compensation Act, 1906, sent to the registrar of the Bow County Court the memorandum together with two copies thereof and the original agreement of December 4, 1913.

On or about December 11, 1913, the Scottish Shire Line received from the registrar of the Bow County Court a notice that the memorandum had been received for registration pursuant to r. 45 of the Consolidated Workmen's Compensation Rules of July, 1913. On or about December 16, 1913, the Scottish Shire Line received from the registrar a notice, which omitting formal parts was as follows: "Take notice that Thomas Kennedy . . . . a party interested in the memorandum . . . . left with (or sent to) me for registration objects to the same being recorded on the following grounds: 'I consider that the amount is insufficient as I am permanently incapacitated.' The

(1) For note see p. 272, post.

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memorandum will therefore not be recorded except with the consent in writing of the said Thomas Kennedy, or by order of the judge of this Court. Dated" &c.

There followed a correspondence between the agents for the owners or their solicitors on the one part and the registrar of the county court on the other part, in which the former contended that if the registrar was satisfied with the genuineness of the memorandum and the adequacy of the amount named in it he was bound by Sched. II., paragraph 9, proviso (*d*), to register the memorandum without further question, and called upon him to consider those matters; while the registrar insisted that by rr. 45—48 of the Consolidated Workmen's Compensation Rules, July, 1913, he was precluded from further action, having received notice of objection to the memorandum. In these circumstances a rule nisi for a mandamus was obtained as above stated on the prosecution of the Scottish Shire Line.

Branson shewed cause. The registrar is in doubt and awaits the direction of this Court. By Sched. II., s. 9, of the Act the registrar shall "subject to such rules"—i.e., rules of Court—register the memorandum on being satisfied as to its genuineness. His action is therefore to be controlled by the rules. Rule 45 directs him to send a copy of the memorandum to each party interested with a notice according to the form in the Appendix, i.e., Form 38, asking the party, including the workman, whether he objects to the memorandum being recorded. Form 38 concludes with the words "If you"—including the workman—"object to its being recorded, it will not be recorded, except with your consent in writing, or by order of the judge of this Court." That is what has happened in this case. In the registrar's view the next step should be taken by the prosecutors under r. 48, sub-s. 2, which enables them to apply to the county court judge for an order that the memorandum be recorded.

A. Neilson (*W. H. Duckworth* with him), in support of the rule. The registrar must follow the plain directions of Sched. II., s. 9, the effect of which is this: (1.) Where the workman seeks to register the memorandum the employer may

object on certain grounds; he may dispute the genuineness of the agreement; or he may under proviso (*b*) shew that the man has returned to work and is earning full wages. In such a case, assuming the registrar is satisfied as to the genuineness, he must still submit the employer's objection under proviso (*b*) to the county court judge. That is not this case. (2.) Where the employer seeks to register an agreement as to the redemption of weekly payments by a lump sum the workman may dispute the genuineness of the agreement, but he cannot object on any other grounds. That is the present case. The employers present this memorandum for registration. The workman does not dispute the genuineness. If the registrar is satisfied of its genuineness, it is his duty to register it, unless it appears to him that the amount is inadequate. He must therefore say whether he considers it inadequate; if he does not think so, he must register the memorandum; if he does think so, he may refuse to record and may refer the matter to the county court judge. But the registrar declines to decide the question one way or the other, simply because the workman disputes the adequacy of the sum. This the workman has no power to do. The registrar relies on rr. 45—48. If those rules purport to give the workman any right of objection over and above that given by Sched. II., s. 9, of the Act, they are to that extent ultra vires and invalid. Rule 45 should be read as inviting the party (whether he be employer or workman) to say whether the memorandum is genuine or whether he disputes it, and, if so, in what particulars; and (if he be the employer) whether he objects to its being recorded, and, if so, on what grounds. The draftsman of Form 38 has attempted to make it applicable to both employer and workman. Where it is sent to the workman the words "or object to its being recorded" are inapplicable, and the last sentence without those words is misleading because the question of genuineness is for the registrar himself.

AVORY J. It is not to be wondered at that the registrar declined to proceed further without the decision of this Court. Form 38 which is appended to the Workmen's Compensation

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Rules is misleading in its terms. It is directed to all parties interested. That would include the workman. It says "If you dispute its genuineness"—i.e., the genuineness of the memorandum—"or object to its being recorded, it will not be recorded, except with your consent in writing, or by order of the judge of this Court." That clearly leads the workman to believe that he has the right to object to the recording of the memorandum on any ground, and that if he does object the memorandum will not be recorded. That form led the registrar to think that the workman was entitled to object to the recording of the memorandum either because the amount named in the agreement was inadequate or upon any other grounds, and that, whatever the objection might be, it was not his duty or within his power to record the memorandum or proceed further. In our opinion that was a mistaken view of his duty. By Sched. II., s. 9, it is the duty of the registrar on being satisfied of the genuineness of the memorandum to record it, subject to rules of Court applicable to that case. There follows a proviso affecting this prima facie duty of the registrar to record the memorandum on being satisfied of its genuineness. That proviso is contained in several paragraphs. Paragraph (*d*) is the material one:—"Where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, ... ought not to be registered by reason of the inadequacy of the sum . . . ., he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of Court, make such order . . . . as under the circumstances he may think just." The result is that when such a memorandum is sent to be recorded the registrar, on being satisfied of its genuineness, must either record it, or, proceeding under paragraph (*d*), he must proceed to ascertain whether the lump sum is adequate and determine that question upon any information which he considers sufficient. One course or the other he must take. In the present case the registrar has refused to take either course. Therefore this rule must be made absolute for a mandamus directed to the registrar commanding him to proceed to enter

upon the consideration of the agreement in question in the terms of Sched. II., s. 9 (*d*), of the Workmen's Compensation Act, 1906.

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ROWLATT J. I am of the same opinion. Sched. II., s. 9, to the Act imposes upon the registrar the duty to record the memorandum on being satisfied that it is genuine, subject to rules of Court. The expression "subject to such rules" does not authorize the Rule Committee to make rules imposing any conditions they may please; it only authorizes them to make rules for working out the scheme of the statute itself. The scheme of this Act requires that the registrar shall record the memorandum on being satisfied as to its genuineness. This is subject to two provisoes—(1.) where a workman seeks to record a memorandum the employer has the right in certain cases to lodge an objection to the registration, in which case the memorandum is only to be recorded (if at all) on such terms as the county court judge may think fit; (2.) in the case of agreements of a certain class the registrar is entitled to refer the matter to the judge on being satisfied as to certain matters affecting the interests of the workman. But the Act contains no provision enabling the workman of his own motion to bring the matter before the judge for consideration. The Consolidated Workmen's Compensation Rules carry out the same scheme. The confusion is caused by the condensed wording of Form 38 appended to r. 45. Rules 45—49 are intended to recognize the right of either party to object to the genuineness of the memorandum and the right of the employer to object under s. 9 (*b*); but they confer no right on the workman to object on the ground of inadequacy, except indirectly through the registrar himself under s. 9 (*d*). Form 38, which has caused the difficulty, is intended to have the same effect, and it is only because of the terseness of its drafting that confusion has arisen. Intending to offer to the employer the right to object on the ground of genuineness and on the ground that the man had gone back to work, and to offer to the workman the right to object on the ground of genuineness only, by referring to employer and workman indifferently as "you" it is made to appear to offer to each party the right to object on the same grounds.

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SHEARMAN J. The workman wished to oppose the recording of this memorandum on the ground of inadequacy of the amount. The only means by which this can be done is under Sched. II., s. 9 (*d*). The registrar made a natural mistake. He was misled by the statutory form No. 38 into thinking that there was an alternative means of raising the question of adequacy, namely, objection by the workman himself. But the statutory form is mere machinery and cannot alter the substantive provisions of the Act. These forms were only intended to work out the provisions of the Act, and whenever they conflict with the procedure laid down in Sched. II., s. 9 (*d*), they must be disregarded. I think myself that the form of notice of objection sent to the registrar cannot have been an accurate copy of Form No. 39 in the Appendix to the Rules. In that form the name of the party objecting, "the undersigned C. D. & Co.," and the signature "C. D. & Co., Limited, by . secretary" shew plainly that it is a form for use by employers and not by workmen. But apart from that there was enough in Form 38 to mislead the registrar. The rule must be made absolute.

Rule absolute.

Solicitors for the prosecutors: *Botterell & Roche.*
Solicitor for the registrar: *The Treasury Solicitor.*

NOTE.—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

By Sched. II., s. 9, "When the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

"(*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and

"(*b*) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act and the employer, in accordance with rules of Court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; and . . . .

"(*d*) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . . ought not to be registered by reason of the inadequacy of the sum . . . . or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of Court, make such order . . . . as under the circumstances he may think just . . . . "

Consolidated Workmen's Compensation Rules, July, 1913:

Rule 45. "On the receipt of the memorandum the registrar shall send one of the copies thereof to every party interested, with a notice according to the form in the Appendix" [Form 38] "requesting such party to inform him within seven days from the date of the notice whether the memorandum is genuine, or whether he disputes it, and, if so, in what particulars, or objects to its being recorded, and, if so, on what grounds."

Form 38. . . . . "Take notice, that a memorandum, copy of which is hereto annexed, has been sent to me for registration. Such memorandum appears to affect you. I have therefore to request you to inform me within seven days from this date whether you admit the genuineness of the memorandum, or whether you dispute it, and if so, in what particulars, or object to its being recorded, and if so, on what grounds. If you do not inform me in due course that you dispute the genuineness of the memorandum or object to its being recorded, it may be recorded without further inquiry, and will be enforceable accordingly. If you dispute its genuineness or object to its being recorded, it will not be recorded, except with your consent in writing or by order of the judge of this Court. Dated" &c.

"To (all parties interested)."

Rule 46. "If all the parties interested admit the genuineness of the memorandum, or do not within such period of seven days dispute it or object to its being recorded, the registrar shall, subject to proviso (*d*) to paragraph 9 of the Second Schedule to the Act, as extended by section 11, sub-section 1 (*c*), of the National Insurance Act, 1911, and to Rule 51, record it without further proof."

Rule 47. "If any party interested disputes the genuineness of the memorandum, or if, where a workman seeks to record a memorandum of agreement between his employer and himself, the employer alleges that

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the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of the memorandum, such party or employer shall within seven days from the date of the notice mentioned in Rule 45 file with the registrar a notice according to the form in the Appendix" [Form 39] "that he disputes the genuineness of the memorandum or that he objects to its being recorded, and shall with such notice file a copy thereof for each of the other parties interested."

Form 39. . . . . "Take notice that the undersigned C. D. & Co. of &c., dispute the genuineness of the memorandum sent to you for registration in the above-mentioned matter in the following particulars:—

[here state particulars.]

"[Or Take notice, that the undersigned C. D. & Co. of &c. object to the memorandum sent to you for registration in the above-mentioned matter being recorded, on the following grounds:—

[here state grounds—see particularly Schedule II., par. 9, proviso (*b*) (*sic*), as applied by 1 & 2 Geo. 5, c. 55, s. 2 (1.) (*c*).]]

"Dated this day of

"C. D. & Co., Limited,

"by Secretary.

"[or

"Solicitors for C. D. & Co., Limited.]

"To the Registrar."

Rule 48. "On the receipt of any such notice as in the last preceding rule mentioned, the registrar shall send a copy thereof to each of the other parties interested, together with a notice according to the form in the Appendix" [Form 40] "informing such party that the memorandum will not be recorded except with the consent in writing of the party or employer disputing the same or objecting to the same being recorded, or by order of the judge."

Form 40. . . . . "Take notice, that the genuineness of the memorandum n the above-mentioned matter left with [or sent to] me for registration is disputed by of , a party affected by such memorandum, in the following particulars

[here state particulars of dispute]

"[or that of , a party interested in the memorandum in the above-mentioned matter left with [or sent to] me for registration objects to the same being recorded, on the following grounds:

[here state grounds]]

"The memorandum will therefore not be recorded, except with the consent in writing of the said or by order of the judge of this Court. Dated" &c.

W. H. G.

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May 28;
June 16.

Defamation—Libel—Annual Meeting of Licensing Justices—Application for Renewal of Licence—Notice of Objection—Privileged Occasion—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, c. 24), *s.* 16.

Licensing justices when dealing with an objection to the renewal of an old on-licence are not a Court within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged.

The plaintiff, who was the holder of an old on-licence, was an applicant at the general annual licensing meeting for the renewal of his licence. The defendant, a private individual, gave notice of his intention to oppose the plaintiff's application on the ground that, as he alleged, the plaintiff was not a fit and proper person to hold such a licence. The defendant served a copy of his notice of objection on the plaintiff, on the clerk to the licensing justices, on the superintendent of police, and on the owners of the premises. In an action by the plaintiff claiming damages in respect of the alleged defamatory statements contained in the defendant's notice of objection, the defendant pleaded that, as he was taking a necessary and proper step in a judicial proceeding, the publication of the notice of objection was absolutely privileged :—

Held, (1.) that the licensing justices were not a Court in law; (2.) that, even if they were held to be a Court in law, the defendant, in objecting to the renewal of the licence, did not come within the category of persons on whose behalf privilege could be claimed; and (3.) that, even if the defendant came within the category of persons who could claim privilege, such privilege did not extend to the notices of objection served on the superintendent of police and on the owners of the premises.

Question of law raised on the pleadings set down for trial before Avory J.

The plaintiff, the licensee of the Castle Inn, Cold Ash, in the county of Berks, sued the defendant, who was a bookmaker, claiming damages for an alleged libel.

Paragraph 2 of the statement of claim was as follows :—

"The plaintiff has suffered damage from the defendant falsely and maliciously writing and publishing of the plaintiff in a document purporting to be a notice of objection to the renewal of the plaintiff's licence of the said inn the words following, that is to say :—

"To A. Attwood (meaning the plaintiff), the Castle Inn, Cold

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Ash, Berks, licensed victualler, to John Gamble, chief superintendent of police, Newbury, Berks, and to Francis Quekett Louch, clerk to the justices of the Newbury Division of Berks:

"'I, Charles Villiers Chapman, of numbers 24 and 26 Maddox Street, London, do hereby give you notice that it is my intention to appear by myself, my counsel or solicitor, at the general annual licensing meeting to be held for the Newbury Division of the county of Berks at the Municipal Buildings on Thursday, the 5th day of February next, at twelve noon, and to oppose the renewal of the justices' licence, which you, the said A. Attwood (the plaintiff), now hold for the sale of beer at the premises now occupied by you at Cold Ash, in the said licensing district, on one or more of the following grounds, that is to say:—

"'(i.) That you, the said A. Attwood (the plaintiff), have used the said inn and premises for the purpose of receiving bets upon races.

"'(ii.) That on behalf of the customers of the said inn you, the said A. Attwood (the plaintiff), have made bets with the said Charles Villiers Chapman, and have received from the said Charles Villiers Chapman certain moneys upon the event of horse races, and have distributed the money so received to customers of the said inn.

"'(iii.) That you, the said A. Attwood (the plaintiff), have retained the moneys paid to you by customers for the purpose of being remitted to the said Charles Villiers Chapman in your own hands, and have appropriated the same to your own use, and when sued by the said Charles Villiers Chapman you have pleaded the illegality of the transactions taking place upon your said licensed premises.

"'(iv.) That you, the said A. Attwood (the plaintiff), are not a fit and proper person to hold a licence.

"'(v.) That the said Castle Inn and premises have been ill-conducted and are of a disorderly character, and by reason thereof should not be licensed for the sale of intoxicating liquors.

"'Dated the 23rd day of January, 1914.

"'(Signed) Charles Villiers Chapman.'"

The plaintiff alleged that the defendant by the said notice meant that the plaintiff used the inn for an illegal purpose, that he had been guilty of fraudulent and criminal conduct, that he was not a fit and proper person to be entrusted with the control of licensed premises, and that he had permitted the inn to be frequented by persons of bad character.

The plaintiff further alleged that the defendant published the notice by sending the same to the said John Gamble, Francis Quekett Louch, and to Messrs. H. & G. Simonds, Limited, brewers, Reading, the owners of the said licensed premises.

The plaintiff also alleged that the defendant did not appear at the general annual licensing meeting to support the allegations contained in his notice, but by his solicitor withdrew the said notice.

The defendant, by his defence, denied the publication of the alleged defamatory words or that the words bore the meaning alleged or that the plaintiff had suffered any damage. Alternatively, he said that, if he published the words alleged, he did so on an occasion absolutely privileged and no action would lie in respect of the alleged publication, and he delivered the following particulars :—

"The Castle Inn, of which the plaintiff is the licensee, is situate in the licensing district known as the Newbury Division of Berks. The plaintiff was at all material times an applicant for the renewal of his said licence. The justices of the Newbury Division of Berks are the licensing justices by whom the plaintiff's application for renewal of his said licence would of necessity be heard, and the said Francis Quekett Louch is and was at all material times the clerk to the said justices. Messrs. H. & G. Simonds are the brewers owning the said Castle Inn, and are entitled to be heard on any objection to the renewal of the said licence. The said John Gamble is the chief superintendent of police for the said division and is also entitled to be heard on any such objection as aforesaid. The plaintiff's said application was heard by the said justices at the general annual licensing meeting for the said division on the 5th of February, 1914. The said justices, in entertaining and hearing the said application, exercised judicial functions authorised by law. The defendant, as he

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lawfully might, desired and intended to oppose the renewal of the said licence and to appear for that purpose at the said hearing and accordingly published the words complained of by giving the necessary notice of objection required by law and serving the same on the said Louch, Gamble, and H. & G. Simonds, Limited, and not otherwise. In so publishing the words alleged the defendant was taking a necessary and proper step in a judicial proceeding, namely, the hearing of the plaintiff's application for a renewal of his said licence, and any lawful objections thereto, and was taking a necessary preliminary step in such judicial proceeding in accordance with the recognised and usual procedure before the said justices, and such publication is absolutely privileged."

The question of law raised by the defence, namely, whether the occasion of the alleged libel was absolutely privileged, was directed to be tried first.

Clavell Salter, K.C., and *J. Bromley Eames*, for the defendant. The occasion was absolutely privileged. The licensing justices in hearing an application for the renewal of a licence exercise functions of a judicial or quasi-judicial character, and are in law a Court. When a charge of misconduct is made against the applicant for the renewal, the justices have to decide whether the charge is made out or not, and it is clear from the decision in *Royal Aquarium, &c. Society* v. *Parkinson* (1) that in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action, and as Lord Esher M.R. there pointed out (p. 442), "this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes." In *Pedley* v. *Morris* (2) Day J. said that proceedings before a Master on the taxation of a bill of costs were quasi-judicial and the occasion was absolutely privileged. In *Lilley* v. *Roney* (3) a complaint to the registrar of the Law Society was held to be so essentially a step in a judicial

(1) [1892] 1 Q. B. 431. (2) (1891) 61 L. J. (Q.B.) 21.
(3) (1892) 61 L. J. (Q.B.) 727.

proceeding that statements made in that complaint were absolutely privileged. In *Hodson* v. *Pare* (1) it was decided that an application to a justice of the peace for an order for the reception and detention of a lunatic was a judicial proceeding, and consequently that defamatory statements made in the course of that application were not actionable. In that case Chitty L.J. pointed out that such an application can be heard in private and an order can be made therein although evidence on oath has not been given. Here, on the other hand, the application for the renewal of a licence is heard in public and evidence by an objector must be given on oath: see s. 16, sub-s. 6, of the Licensing (Consolidation) Act, 1910. The case of *Boulter* v. *Kent Justices* (2) will no doubt be relied upon by the plaintiff as establishing that justices at a licensing meeting are not a Court; but it is to be observed that the actual decision there was that licensing justices were not governed by the Summary Jurisdiction Acts. It is true that Lord Halsbury expressed a doubt as to whether licensing justices were a Court at all, but that observation was purely obiter. *Reg.* v. *Sharman* (3) and *Rex* v. *Howard and Others* (*Farnham Justices*) (4) followed on the same lines as *Boulter* v. *Kent Justices.* (2) Further, it is to be remembered that since the decision in *Boulter* v. *Kent Justices* (2) the licensing law has been completely changed; and the licensing justices are now confined, in reference to applications for renewals, to deciding, on objection being taken by some individual, whether a particular licence shall be taken away on the ground of the licensee's misconduct. That is a purely judicial function: see per Lord Alverstone C.J. in *Rex* v. *Russell.* (5) It has been decided that the confirming authority sit as a Court: see *Reg.* v. *Manchester Justices* (6); *Rex* v. *Sunderland Justices* (7); and the same has been decided in reference to the compensation authority: see *Rex* v. *Southampton Justices* (8), where Lord Alverstone C.J. based his judgment, not on the nature of the tribunal, but on the nature of the work done by it, and

(1) [1899] 1 Q. B. 455.
(2) [1897] A. C. 556.
(3) [1898] 1 Q. B. 578.
(4) [1902] 2 K. B. 363.
(5) (1905) 69 J. P. 450, at p. 455.
(6) [1899] 1 Q. B. 571.
(7) [1901] 2 K. B. 357.
(8) [1906] 1 K. B. 446.

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Ecclesiastical Commissioners for England v. *Page* (1), where the power to require evidence to be given on oath was taken as one test of the judicial character of the tribunal. If in these various cases the tribunal has been held to be acting as a judicial body it is difficult to understand how it can be said that licensing justices in investigating a charge of alleged misconduct where the evidence is given upon oath are not exercising judicial functions. [*Rex* v. *Johnson* (2) and *Bottomley* v. *Brougham* (3) were also cited.]

The notice complained of was only sent to those persons to whom such notices are properly sent. Notice is always sent to the clerk to the licensing justices. If the notice had not been sent to the police by the defendant, it is quite clear that it would have been sent to them by the clerk to the justices, so in any event they would receive it. It is complained that the notice was also sent to the brewers, the owners of the licensed premises, but they have the best locus standi in such proceedings apart from the actual licensee. Sect. 19, sub-s. 2, of the Licensing (Consolidation) Act, 1910, shews that the interest of the owners of the house is recognized and protected.

Gordon Hewart, K.C., and *D. Owen Evans*, for the plaintiff. The plea of absolute privilege set up by the defendant fails for two reasons, first because the proceedings were not before a Court, and secondly because, even on the assumption that the licensing justices sit as a Court, the publication complained of was not a publication made in the ordinary course of a judicial proceeding before a Court.

As to the first point: the argument presented on behalf of the defendant invites the Court to overrule a long line of authorities. In *Boulter* v. *Kent Justices* (4) Lord Halsbury thought that licensing justices were not a Court at all, and Lord Herschell (at p. 569) explained, in language which is as applicable to-day as when that case was decided, why licensing justices cannot be considered to be a Court, the reason being that the question which comes before them is not one inter partes. The question in 1897, when *Boulter* v. *Kent Justices* (4) was decided, was, and still is, a public question, namely, whether a particular

(1) [1911] 2 K. B. 946.
(2) [1905] 2 K. B. 59.
(3) [1908] 1 K. B. 584.
(4) [1897] A. C. 556.

licence should be renewed. *Boulter* v. *Kent Justices* (1) has been referred to in many of the subsequent cases. In *Rex* v. *Howard and Others* (*Farnham Justices*) (2) Collins M.R., in considering the character in which justices are required to deal with questions of renewal, said (p. 373): "Whatever views may have been held as to their position before *Boulter* v. *Kent Justices* (1) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a Court, and that the transaction itself is in no sense a 'lis' to which there are parties. The objector is not a 'party': his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not." *Boulter* v. *Kent Justices* (1) was also followed in *Mann, Crossman & Paulin* v. *Pinhorn* (3), where Darling J. ruled that absolute privilege could not be claimed in respect of defamatory statements made before licensing justices. That case is precisely in point. In *Rex* v. *Woodhouse* (4) it was held that a writ of certiorari would lie to bring up an order made by licensing justices referring an application for renewal to quarter sessions; but, as was pointed out by Fletcher Moulton L.J. (5), the writ is not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. As to the cases relied upon in support of the defendant's view: in *Royal Aquarium, &c. Society* v. *Parkinson* (6) Lord Esher M.R. said that the doctrine of immunity from liability to an action in respect of statements made in the course of proceedings "has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act," and then he proceeded to say that a meeting of the county council, when engaged in considering applications for licences for music and dancing, could not be considered such a tribunal. In the present case, as in the proceedings before the county council, what was being dealt with was not a litigation between one person and another, but whether in the public interest a particular licence should be granted or not. The case of *Rex* v. *Southampton*

(1) [1897] A. C. 556.
(2) [1902] 2 K. B. 363.
(3) (1910) *The Times*, February 1.
(4) [1906] 2 K. B. 501.
(5) Ibid. at p. 535.
(6) [1892] 1 Q. B. 431, at p. 442.

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Justices (1), where it was held that the committee of quarter sessions sitting as the compensation authority had power to state a case, is explained on the ground that the committee were exercising the powers of quarter sessions. *Hodson* v. *Pare* (2) was decided on the language of the Lunacy Act which made it clear that the proceedings in question were judicial. In *Lilley* v. *Roney* (3) it was not attempted to be argued that proceedings before the statutory committee of the Law Society were not judicial proceedings. That case is of no assistance in the present case.

On the second point: even assuming the licensing justices are a Court, the defendant is not protected, inasmuch as that which is complained of was not done in the ordinary course of judicial proceedings. Serving the notice of objection on the licensee may be in the ordinary course of the proceedings before the licensing justices, but how can the same be said in reference to the notice served on the brewers? There is no provision for serving them with notice; and serving them was unnecessary and was a voluntary and extra-judicial act and therefore is not privileged: *Maloney* v. *Bartley*. (4)

Clavell Salter, *K.C.*, in reply. Licensing justices certainly act in a way similar to a Court of justice. There is undoubtedly a lis between the applicant for the renewal of the licence and the objector, and the justices have to decide between them. On the other point, the notice was properly sent to the brewers. If it had not been sent to them by the objector, it would have been sent by the licensee himself. The question is not whether the proceedings could or could not have gone on if all these notices had not been sent, but whether they were sent in the ordinary course, and it is submitted that they were.

Cur. adv. vult.

June 16. AVORY J. read the following judgment:—This action is brought to recover damages for an alleged libel contained in a written notice of objection to the renewal of the

(1) [1906] 1 K. B. 446.
(2) [1899] 1 Q. B. 455.
(3) 61 L. J. (Q.B.) 727.
(4) (1812) 3 Camp. 210.

licence of the Castle Inn, in the county of Berks, an old on-licence within the meaning of ss. 16 and 18 of the Licensing (Consolidation) Act, 1910, of which the plaintiff was then the holder, and which notice was served by the defendant on the plaintiff, on the clerk to the licensing justices, on the superintendent of police, and on Messrs. H. & G. Simonds, Limited, the owners of the said premises. The question of law set down for argument is whether the occasion of this publication was one of absolute privilege; in other words, whether the defendant can claim absolute immunity from liability to an action for libel in respect of anything defamatory of the plaintiff contained in this notice of objection. For the purposes of the decision it must be assumed that the defamatory statement complained of may have been made falsely, with knowledge of its falsity, and maliciously—i.e., from a motive of personal ill-will; and the principle of law to be applied is that contained in the judgment of the Exchequer Chamber in *Dawkins* v. *Lord Rokeby* (1), namely, that no action for libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law. This principle was approved by the Court of Appeal in the case of *Royal Aquarium, &c. Society* v. *Parkinson* (2), with the qualification that the tribunal referred to must be a Court in law or a Court recognized by law: see the judgments of Fry L.J. and Lopes L.J.

The first question to be determined, therefore, is whether the licensing justices sitting at the general annual licensing meeting for the consideration of the renewal of an old on-licence, in the case where the applicant for the renewal is the holder of the existing licence, are a Court in law or recognized by law within the meaning of these decisions. In such a case the holder of the licence need not attend in person at the licensing meeting unless he is required to attend; the licensing justices cannot entertain any objection or take any evidence with respect to the renewal unless written notice of an intention to oppose the renewal has been served on the holder, and the licensing justices cannot receive any evidence with respect to the renewal of the licence

(1) (1873) L. R. 8 Q. B. 255. (2) [1892] 1 Q. B. 431.

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which is not given on oath (see s. 16, sub-ss. 2, 3, and 6, of the Licensing (Consolidation) Act, 1910). The notice of objection in this case was upon grounds specified in the second part of the Second Schedule to the Act and therefore, if established, gave jurisdiction to the licensing justices at the annual meeting to refuse the renewal under s. 18, and it is contended on behalf of the defendant that under these circumstances the licensing justices would be investigating a charge of personal misconduct involving, perhaps, offences against the law which could only be decided upon the evidence on oath before them; that, being justices of the peace engaged in an investigation of that character, they ought to be held to constitute a Court in law to which the privilege claimed attaches, and several decisions of the High Court to the effect that licensing justices must act judicially were quoted in support of this view.

On the other hand, it is to be observed that the licensing justices at the annual meeting may themselves object to the renewal of such a licence (see s. 16, sub-s. 4) and afterwards sit and adjudicate upon their own objection—see *Rex* v. *Howard and Others* (*Farnham Justices*) (1)—and may in the exercise of their discretion, upon proper materials, including their own knowledge of the locality, refer the matter of the renewal to the compensation authority under s. 19, although the objection of which notice has been given, as in this case, is not established by the evidence, and in the event of such a reference the licensing justices themselves are entitled to be heard before the compensation authority in support of their own report: see s. 19, sub-s. 2. Further, in the event of the licensing justices refusing the renewal of the licence on such an objection as is made in this case, the applicant has a right of appeal to quarter sessions. On such appeal the licensing justices themselves are the only possible respondents,—see s. 29—provision being made for their costs in ss. 31 and 32, and the objector has no right to appear or be heard,—see *Tynemouth Corporation* v. *Attorney-General* (2)—a position which appears incompatible with that of a Court recognized by law, and against the contention of the defendant in this case there is finally the opinion expressed by

(1) [1902] 2 K. B. 363. (2) [1899] A. C. 293, at p. 307.

Lord Halsbury in *Boulter* v. *Kent Justices* (1) that justices sitting at a licensing meeting are not a Court at all. In answer to this it has been argued that this opinion was not necessary to the decision, the only question before the House of Lords in that case being whether they were a Court of summary jurisdiction, and that since the decision in that case the jurisdiction of the licensing justices to refuse the renewal of an old licence has been restricted to the grounds specified in the schedule to the Licensing (Consolidation) Act, 1910, but I do not think the opinion can be regarded as an obiter dictum. It was the foundation of the reasoning by which that learned Lord arrived at his conclusion, and was adopted by the Court of Appeal in *Rex* v. *Howard and Others* (*Farnham Justices*) (2), and I do not think the restriction on the jurisdiction can be held to have completely altered the nature of the tribunal.

As to the point that licensing justices dealing with objections to renewal and other matters are bound to act judicially, I think the passage in the judgment of Fry L.J. in the *Royal Aquarium Case* (3) applies in this case. He there said this: "It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical

(1) [1897] A. C. at p. 561. (2) [1902] 2 K. B. 363.
(3) [1892] 1 Q. B. at p. 447.

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man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege." The rule of law which establishes this immunity being founded on grounds of public policy and convenience, it would, I think, lead to much confusion and inconvenience if the licensing justices when dealing with the renewal of an old on-licence on the application of the holder were held to be a Court in law to which the privilege attaches, and not such a Court when dealing at their same meeting with applications for new licences or the renewal of licences which are not old licences within the definition, or in respect of which the applicant is not the holder, in which latter case the applicant is not entitled to notice of objection under s. 16, sub-s. 3. While recognizing the force of the argument for the defendant, I have come to the conclusion that the licensing justices at their annual meeting, even when dealing with an objection to a renewal of a licence as in this case, are not a Court in law to which the privilege attaches.

The second question is whether the defendant, in objecting to the renewal of the licence, comes within any of the classes of persons entitled to claim the privilege, if the meeting of licensing justices were held to be a Court in law. It was clearly held in *Boulter* v. *Kent Justices* (1) that such an objector was not a party. He cannot be made liable in costs either on the original hearing or on appeal, and is not entitled to notice of appeal, nor can the privilege in this case be claimed as that of a witness, and therefore he does not appear to come within the category of persons on whose behalf the immunity has been established.

The third question is whether, if the licensing justices at their annual meeting were held to be a Court in law and the objector a person who could claim the privilege, such privilege or immunity from action would extend to the notices of objection served in this case on the superintendent of police and on the brewers, the owners of the premises. The Licensing (Consolidation) Act, s. 16, only requires the notice of objection to be

(1) [1897] A. C. 556.

served on the holder of the licence. It is obviously convenient and necessary for purposes of procedure that the notice should also be served on the clerk to the justices, and it was said in argument that it is usual in such cases also to serve the superintendent of police and the owners of the premises. I do not know that this is so where the objection is made by a private individual, but in my opinion such a statement of procedure is not sufficient to justify me in holding that the notices served upon the superintendent and the owners which were unnecessary come within the rule as to words written in the ordinary course of any proceeding before a Court.

On all grounds, therefore, I think the defendant's plea of absolute privilege and immunity from liability in this action fails, and the plaintiff is entitled to judgment on the question of law.

Judgment for plaintiff on question of law.

Solicitors for plaintiff: *Fielder, Jones & Harrison, for C. Lucas, Newbury.*

Solicitors for defendant: *Cunningham & Co.*

J. S. H.

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[IN THE COURT OF APPEAL.]

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March 27, 30;
May 29.

WATNEY, COMBE, REID & CO., LIMITED *v.* BERNERS.

Revenue—Licensed Premises—Increase of Duty—Lease—Sub-lease—Liability of Lessor to pay Proportion of Increase—"Held under a lease"—Licence-holder—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that "where the licensed premises are held under a lease" which does not contain any covenant by the lessee to obtain intoxicating liquor from the lessor, the lessee shall be entitled to recover from the lessor a proportion of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held by Kennedy L.J. and Bray J., Lord Sumner dissenting, that this provision does not apply to the case of a lessee of licensed premises who has sub-let the premises and who is not himself the holder of the licence.

Judgment of the Divisional Court [1913] 3 K. B. 427 affirmed.

Appeal from the judgment of a Divisional Court (Ridley and Lord Coleridge JJ.), reversing the judgment of the judge of the Bloomsbury County Court; reported [1913] 3 K. B. 427.

The plaintiffs claimed to recover from the defendant, under s. 2 of the Finance Act, 1912, a proportion of the increase of the licence duty charged in respect of a certain public-house under the Finance (1909-10) Act, 1910. (1)

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-1910) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-1910) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by

The facts were as follows: The plaintiffs were the lessees of the public-house under a lease dated May 4, 1904, of which the defendant was the grantor. The lease was for twenty-one years from Midsummer, 1906, at a yearly rental of 150*l.*, and did not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor. The premises were sub-let by the plaintiffs to W. E. Saile, who was the licensee and occupier of them, by an agreement dated January 4, 1911, for a period of one year from January 10, 1911, and so on from year to year, at a rent of 156*l.* By the terms of this agreement Saile agreed to purchase from the plaintiffs or their nominees, and from no other person or persons whomsoever, all ale, beer, porter, stout, and other malt liquor whether in bottle or otherwise, and all wines, spirits, and spirituous liquors and liqueurs that should be sold and consumed in, upon, or from the premises. The plaintiffs further agreed with Saile to pay and in fact paid the licence duty payable by him in respect of the premises. Before the Finance (1909-10) Act, 1910, the duty payable in respect of the premises was 30*l.* The duty was now 64*l.*—an increase of 34*l.* The rental value of the premises unlicensed was at the date of the grant of the lease 87*l.*, at the date of the grant of the sub-lease 88*l.*, at the date of the coming into force of the Act of 1912 89*l.*, and at the date of the beginning of the present proceedings 90*l.* If the estimated

rules of court by a county court in England or Ireland and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee respectively."

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 46: "Where the licence-holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence-holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

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rent of the licensed premises unlicensed—that is to say, 87*l.*, 88*l.*, 89*l.*, or 90*l.*—were deducted from the rent of 150*l.* payable in respect of the premises when licensed, the rent attributable to the licence would be 63*l.*, 62*l.*, 61*l.*, or 60*l.*

The county court judge (Judge Bray) gave judgment for the plaintiffs for 14*l.* 5*s.* 7*d.*, which sum bore to 34*l.*, the increase in the duty, the same proportion as 63*l.*, the increase in the rental value of the premises due to their being licensed, bore to 150*l.*, the rent reserved by the lease. The Divisional Court reversed the judgment of the county court judge and entered judgment for the defendant, upon the ground that s. 2 of the Finance Act, 1912, did not apply to the case of a lessee of licensed premises who had sub-let them and who was not himself the holder of the licence. (1) The plaintiffs appealed.

Sir R. B. Finlay, K.C., and *Ryde, K.C.* (*Wootten* with them), for the plaintiffs. Where a licence-holder is bound by covenant or otherwise to obtain a supply of intoxicating liquor from any particular person, that person receives a benefit from the licence, and therefore s. 46 of the Finance (1909-10) Act, 1910, gives the licence-holder a right to recover from him a proportion of the increased licence duty imposed by the Act. Sect. 46 is expressly confined to the case of a licence-holder. Sect. 2 of the Finance Act, 1912, is directed to a totally different state of things. It deals with the case of a lease of licensed premises not containing a covenant or agreement on the part of the lessee to obtain a supply of intoxicating liquor from the lessor. The section is not confined to the case of a licence-holder. The words used in the section must be construed in their natural meaning: *Inland Revenue Commissioners* v. *Herbert*. (2) The opening words of the section are exactly applicable to the present case. The licensed premises are "held" by the plaintiffs under a lease made before the passing of the Act of 1910, which lease does not contain a covenant, agreement, or undertaking on the part of the lessees, the plaintiffs, to obtain a supply of intoxicating liquor from the defendant, the grantor of the lease. The word "held" does not necessarily mean "occupied." As Littledale J. said in *Rex*

(1) [1913] 3 K. B. 427.

(2) [1913] A. C. 326, at p. 332.

v. *Inhabitants of Ditcheat* (1), "There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another; he does not necessarily occupy." The Divisional Court were of opinion that the section, like s. 46 of the Act of 1910, only applies to a lessee who is the licence-holder. But the Legislature, having expressly confined s. 46 of the earlier Act to the licence-holder, in s. 2 of the later Act deliberately omits all reference to the licence-holder, and uses general language making the section applicable to any lessee (which includes a sub-lessee) of licensed premises held without a "tie." The section embraces the case of a lessee who takes the premises for the purpose of sub-letting them. Its object is to throw a portion of the increased duty payable in respect of the licence on the grantor of the lease or sub-lease who derives a benefit from the premises being licensed through obtaining a higher rent for them. The Legislature intended that all interested in the licensed premises should share the burden of the increase of duty. The result of the judgment of the Divisional Court is that, where there is a lease and sub-lease, the lessor, who gets an increased rent owing to the premises being licensed, bears no part of the increased licence duty, whereas the lessee, who sub-lets to the licence-holder at the same rent without a "tie," has to pay the proportion of the increased duty. The variation in the language of the two sections is important. The language of s. 46 of the Act of 1910 is largely reproduced in s. 2 of the Act of 1912. The former section, however, speaks of the increase of the duty payable in respect of "his" licence, whereas s. 2 of the Act of 1912 speaks of the increase of the duty payable in respect of "the" licence. This points to the conclusion that s. 2 of the later Act is not dealing only with the licence-holder. The Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), speaks of the holder of the licence, not the holder of the licensed premises: see especially Sched. IV. to the Act; and where the Legislature intends to refer to an occupier of premises it does so in clear language, as in s. 1 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), where it speaks of "the real resident holder and

(1) (1829) 9 B. & C. 176, at p. 183.

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occupier of the dwelling-house"—words which are now repealed by s. 2 of the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35). Sect. 2 of the Finance Act, 1912, deals with the rights of lessors and lessees inter se, irrespective of whether they are brewers or licence-holders. The plaintiffs' case comes within the natural meaning of the language of s. 2, and the decision of the Divisional Court is wrong. [*Rex* v. *Shoreditch Assessment Committee* (1) and *Procter* v. *Tarry* (2) were also referred to.]

Danckwerts, K.C., and *Lord Tiverton*, for the defendant. Sect. 46 of the Finance (1909-10) Act, 1910, enables the licence-holder, who has agreed to obtain a supply of intoxicating liquor from a particular person, to pass on to that person a proportionate part of the increase of the licence duty. That section deals only with a licence-holder who holds his licensed premises subject to a "tie." The Act omitted to deal with the case of the licensee of a free house. Sect. 2 of the Finance Act, 1912, fills up that gap, and deals with the case where licensed premises are held under a lease or agreement for lease made before the passing of the Act of 1910 which does not contain a covenant or agreement on the part of the lessee to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease. This section applies where the premises are let as licensed premises without a "tie," and it enables the licence-holder in such a case to pass on a proportion of the increase of the licence duty to the grantor of the lease. The object of the two enactments is to relieve the licence-holder from bearing the full burden of the increased duty. There is no reason for introducing a whole succession, it may be, of lessors and lessees for the purpose of enabling each lessee to pass on a proportion of the increase of the duty to his immediate lessor. Where a lessee sub-lets the premises he is not usually called a person "who holds the premises under a lease." He is only entitled to the reversion expectant on the sub-lease. The word "held" is never applied to a reversioner. A tenant holding over always means the occupying tenant. Under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), the "tenant of a holding" means the occupier thereof. "To hold" means to have and possess. In *Rex* v.

(1) [1910] 2 K. B. 859. (2) [1914] 2 K. B. 178.

Inhabitants of Ditcheat (1) Littledale J. was speaking of "occupied" as contrasted with "held," and therefore gave the latter word its strict technical meaning as applied to feudal tenure. Parke J. in the same case laid down the rule for the construction of statutes thus (2): "But it is a very safe rule of construction to adhere to the words of an Act of Parliament in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense." That is the rule which was in substance re-stated by Lord Haldane L.C. in *Inland Revenue Commissioners* v. *Herbert.* (3) "Held" in s. 2 of the Finance Act, 1912, in its natural and popular sense means held by the occupying tenant; and the succeeding words, as to there being no covenant or agreement in the lease to obtain a supply of intoxicating liquor from a particular person, shew that the Legislature is dealing with a lessee who is the licensed occupier. In such a case the lessee may recover from the grantor of the lease a proportion of the "increase of the duty payable in respect of the licence"—that is, payable by the lessee who is the licence-holder. The definition of "lease" at the end of s. 2 as including a sub-lease shews that the words of the section are to be read in their popular sense, because in law a lease does not include a sub-lease, though a sub-lease is commonly spoken of as a lease. If the contention of the plaintiffs is correct, a brewer, who is the lessee of licensed premises, might make a profit out of the enactment if he sub-let the licensed premises to the licensee at a higher rent than he himself paid to his lessor. That cannot have been the intention of the Legislature. The judgment of the Divisional Court is therefore right.

Ryde, K.C., in reply. The meaning of the words in the Agricultural Holdings Act, 1908, "the tenant of a holding," cannot affect the construction of s. 2 of the Finance Act, 1912. The former Act was passed to give occupying tenants certain rights. In Wharton's Law Lexicon, 11th ed., the word "hold" is defined as meaning "to have as tenant." That is appropriate to an intermediate lessee. If it was intended to limit the scope

(1) 9 B. & C. 176, at p. 183. (2) Ibid. at p. 186.
(3) [1913] A. C. 326, at p. 332.

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of s. 2 to an occupying tenant who was also the licence-holder, the opening words of the section would have been framed as in s. 46 of the Finance (1909-10) Act, 1910. The form of the language is altered, thus shewing that the object is altered.

Cur. adv. vult.

May 29. The following written judgments were delivered:—

LORD SUMNER. (1) The licensed premises in question are "held" by the plaintiffs, the appellants, under a lease made before the passing of the Finance (1909-10) Act, 1910. It neither contains nor imports any undertaking on their part to obtain a supply of intoxicating liquor from the grantor, the respondent. Why, then, are not they, by virtue of s. 2 of the Finance Act, 1912, as lessees thereunder, entitled to recover from him, as they claim to do in this action, the proportion sued for (the amount of which is not in dispute) of the "increase of the duty payable in respect of the licence" under that Finance Act, which increased duty was payable and has been paid? The above description of them and of the premises is in the very words of the Finance Act, 1912, s. 2, and it also specifies the above right of recovery as belonging to persons so described.

Prima facie the plaintiffs are entitled to recover under the section. The matter is purely one of construction. Though there is no provision in the Finance Act, 1912, that it is to be construed as one with the Finance (1909-10) Act, 1910, so as to make the later enactment subordinate to the former, or to make its clauses provisoes upon corresponding clauses in the former, it is, of course, necessary to include both Acts in one review, so as to appreciate the scheme of the legislation. One observes that s. 46 of the earlier Act deals with tied houses generally, and s. 2 of the later Act with free houses, and that those free houses are such only as are held under leases made before the passing of the earlier Act. So far there is some ground for saying that the later section deals with a casus omissus from the earlier Act, but that is all. It does not follow that it may not at the same time go outside the lines of the earlier Act.

(1) This judgment was read by Kennedy L.J.

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On the other hand, it is evident that both sections employ terms of legal art; that they are not used only in a popular or business sense, and that the similarities and the differences in the wording of the two sections are intentional. The sections differ in structure and to some extent in object. Both are based on the fact that legislation has considerably increased the licence duty payable in respect of licensed premises. Both enable a part of the increase, notwithstanding any agreement to the contrary, to be recovered from a person not otherwise liable to pay or bear it. Each has its own separate structure and its own provision in respect of (*a*) the event in which the section applies; (*b*) the proportion by which the part of the increase recoverable over is determined; (*c*) the tribunal by which, failing agreement, that proportion is to be ascertained. The earlier section applies "where the licence-holder is bound"; the later "where the licensed premises are held." In the earlier the premises are tied, and in the later they are free. In the earlier the thing to be apportioned is "any increase of the duty payable in respect of his licence" (that is, of the licence held by the party entitled to recover). In the later it is "any increase of the duty payable in respect of the licence" of the premises, without specifying by whom such increase is payable or such licence is held. In the former the apportionment is with reference to the benefit derived from the tie by the party supplying the intoxicating liquor to the public-house in the shape of increased rent for the premises, increased prices for the liquor, or otherwise. In the latter it is with reference to the benefit derived from "any increased rent or premium payable in respect of the premises" by reason "of the premises being let as licensed premises." In the former, therefore, recovery over is from a liquor-seller as such; in the latter from a landlord as such. In the former the Commissioners settle amounts in case of dispute; in the latter the county courts. I think there is at least as much ground for supposing that this passing on of the burden of the increase of licence duty is to apply in new cases, on new principles, and for a new object, as for deeming it to be confined to the old case of the licence-holder only.

Discussion centres on the word "held." In legal language

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premises may be "held" by a mesne lessee, who does not occupy, just as much as by his sub-lessee, who does occupy. Why is the full legal meaning of "held" to be excluded? Yet, unless it is excluded and the word is confined to occupying holders, the appellants come within this section. Nowhere in the Licensing Act is the "holder of the premises," or anything corresponding to it, an equivalent term for "holder of the licence" or "licence-holder." The Agricultural Holdings Act, 1908, has been referred to as an analogy, but in my opinion is not one. There (s. 48, sub-s. 1) "holding" is defined as "any parcel of land held by a tenant," and "tenant" as "the holder of land under a contract of tenancy," and in s. 12 a person who "occupies a holding" is mentioned, but I can draw no inference from language, which deals with the noun substantive "holding" in the defined sense of a physical parcel of ground, to language which predicates the participle "held" of premises in respect of contractual obligations entered into with regard to them. Again, it is pointed out that the Act of 1912, in stating that quality in the lease, the absence of which conditions the case in which the section is to apply, speaks, in language almost identical with that of the Act of 1910, of "a covenant . . . . on the part of the lessee . . . . to obtain a supply of intoxicating liquor from the grantor," and it is asked to what lease can this refer except only to such as is granted to a person whose business it is to obtain and not to provide such supply. I feel the force of this, and such a reading might make the legislative effect of the two provisions more symmetrical. Still the licensing of premises may result in benefit alike to those who provide the ground and to those who purvey the liquor, and there is nothing irrational in enacting that, by a statutory process of passing on, the liquor-seller shall bear a part of the burden of the increased licence duty in cases where the house is tied but the landlord in cases where it is not.

If it be assumed that the object of the Legislature was only to relieve the licence-holder, it may well be that only that lessee should be given this power of deduction who is the holder both of the premises and of the licence; but suppose the assumption be that its object was to cause all persons to bear their share of the increased licence duty who profit by the grant of the licence,

and that the licence-holder is not the sole subject of burden and of benefit, but is the conduit through whom the revenue collects those shares along with his own. Then the section would naturally seek to pass on a part of the duty right back to the freeholder, and that by a series of intermediate deductions. Neither view of the policy of the section avoids anomalous cases; perhaps no fiscal legislation ever can. If on the appellants' construction there is the odd result that a brewer makes a profit out of the landlord by reason of this increase of licence duty, so on the respondent's it oddly follows that the licence-holder gets relief at the expense of a mesne lessee, who cannot pass the burden on, and so the superior landlord escapes altogether. It may be an unexpected result that a mortgagee by sub-demise should be entangled in this chain of tax-paying and tax-bearing, but after all the licensed house is an important part of his security, and to that extent he may have been intended to share the burden of the duty as he shares the advantage of the licence.

I think we are not entitled to make any assumptions about the policy of the sections, but have simply to construe them. It seems to have been the view of the Divisional Court that the Legislature could not have meant a liquor-seller to make a profit out of the increase of duty, at any rate not out of a landlord. I think this is an assumption, not a construction. It is an accident that the claimants here are brewers; they succeed, if at all, as mesne landlords. We were given numerous illustrations, by means of hypothetical figures, of the way in which the section might work on alternative constructions of it. These would be very proper for the consideration of those who enacted the section. I think them of no assistance for us, who have only to construe it. When grammar fails arithmetic will not help us out; so I do not discuss them. The words of this section exactly fit the case before us, and it is only by assuming a limited object for the enactment that a limitation can be put on its words. I have no knowledge of the object in view beyond the enactment itself, and no right to use it if I had any.

I think that the appeal should be allowed, and the judgment of the Divisional Court should be set aside and the judgment of the learned county court judge restored.

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KENNEDY L.J. The question to be solved in this case is not an easy one, as is sufficiently shewn by the difference of opinion between the learned county court judge and the Divisional Court, and by the difference of opinion in this Court. The difficulty arises from the ambiguity of the statutory enactment upon the interpretation of which the case depends—the Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2. The point itself can be very shortly stated: Does the term "lessee" as used in that section include a lessee who is not also the holder of the licence? At the hearing of the appeal I was inclined to answer this question in the affirmative. Further consideration has led me to form a different conclusion and to hold that this appeal should be dismissed.

The strength of the case for the appellants resides in the fact that the opening words of the section—"Where the licensed premises are held under a lease or agreement for lease"—are wide enough to include a lessee who is not the occupying tenant but has sub-let the premises to another. This cannot be disputed. "Holding" is quite appropriately applied to a lessee who also occupies, but, as a term of legal art, it does not connote occupation. I agree, therefore, with the appellants that, in order to justify us in confining the term "lessee" by whom "the licensed premises are held under a lease or agreement for lease," as the respondent asks us to confine it, to a lessee who is himself the licence-holding occupier, we ought to be satisfied that there is something in the immediate context or in the legislative scheme, whereof the section forms part, which points to the correctness of preferring the narrower of the two interpretations. From such a course of inquiry a judicial tribunal must not allow itself to be diverted by mere conjectures as to the intention of the Legislature founded upon a comparison of the justice or the expediency of the results which flow from one interpretation or another. At the same time it is clear that general words in a statute may not improperly be construed in a narrower sense, if we find indications which point clearly, having regard to the subject-matter, to the conclusion that according to the intention of the Legislature this narrower sense is to be preferred. In the language of Lord Halsbury L.C. in *Cox* v. *Hakes* (1), "it is impossible to

(1) (1890) 15 App. Cas. 506, at p. 517.

contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy."

Looking, in the first place, at the immediate context—the rest of the section itself—I think we do find evidence in support of the narrower interpretation. What is the thing in respect of which the section provides relief for the lessee who holds under a lease or agreement for a lease? That thing is, in the words of the latter part of the section, "any increase of the duty payable in respect of the licence" (more shortly the Excise liquor licence duty) "under the provisions of the Finance (1909-10) Act, 1910." Upon whom did that statute impose that increase? Clearly and undoubtedly only upon the licence-holder. In the language of the First Schedule (C) of that statute, which read with s. 43 created the increase of duty, the duty is payable in respect of a licence to be taken out annually by the retailer of intoxicating liquors as there classified. It follows therefore, I venture to think, that the lessee, the person who holds the premises under a lease or agreement for a lease,—designated by this s. 2 of the Finance Act, 1912, as the person entitled to relief by a deduction from rent payable by him to his lessor—is the licence-holder lessee and no other lessee; for it is upon him as the holder of the licence, and upon no other lessee, that the payment of an increase of the Excise liquor licence is imposed under the provisions of the Finance (1909-10) Act, 1910.

And if we turn from s. 2 and look at the scheme of legislation read with the earlier Act, we see that it is no answer on the part of the present appellants to say that in this particular case by virtue of s. 46 of the earlier Act the appellants have to submit to a certain deduction from the rent payable to them by their lessee, Mr. Saile, who is the licence-holder. That deduction is made because the rent is a sum due from Mr. Saile to the appellants, but not because the appellants are Mr. Saile's lessors, nor is it calculated upon the basis or settled by the tribunal provided by s. 2 of the Finance Act, 1912, which we are considering. It is a deduction from any sum due on any account from Mr. Saile, the licence-holder, to the appellants, quite apart from any relation of landlord and tenant, because the appellants happen to be

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persons to whom, in the words of s. 46, "the licence-holder" (Mr. Saile) "is bound by covenant to obtain a supply of intoxicating liquor"; in other words, because the house is a "tied" house, and the licence-holder is obliged by contract to get his supply of liquors from the appellants.

Sect. 2 of the Finance Act, 1912, is expressly confined to cases in which the house is not a "tied" house; and it appears to be an unnatural interpretation of s. 2 of the Finance Act, 1912, whether read by itself or in connection with s. 46 of the earlier Act, to hold that it is to be construed as giving to a lessee a pecuniary benefit by a deduction from rent due to his lessor, not because any deduction from the rent payable to him by his sub-lessee, the actual licence-holder, has been imposed upon him as a lessee of the premises who has sub-let to the licence-holder, but because he has chosen to enter into an agreement with that licence-holder for the exclusive right of the supply of intoxicating liquors—the very agreement upon the absence of which s. 2 is based.

Much stress was laid by the learned counsel for the appellants upon the difference between the opening words in s. 2 and the opening words of s. 46 of the earlier Act. It appears to me that the obviously different purport of the legislation supplies an obvious reason. In s. 46 the Legislature is not concerned with any relation of tenancy; it gives a certain relief to the licence-holder, in the case of his having bound himself to take his liquors from a particular person, at the expense of that person, who may or may not be a lessee who has sub-let the licensed premises to the licence-holder. The licence-holder, as far as regards s. 46, may be himself the absolute owner of the premises. Sect. 2, on its face, is dealing with the licence-holder who is not owner, but lessee, and therefore appropriately begins by referring to him as the holder of the premises under a lease or agreement for a lease whereunder he is not under an obligation to take his liquors from his lessor. I have already shewn why the language of the section itself is, in my judgment, applicable only to the licence-holding lessee—because he is the only lessee upon whom the burden of an increase of licence duty has been cast by the legislation of 1910.

To sum up, the Legislature by s. 2 has given to a licence-holder, who is the lessee holding under a lease or agreement which does not create a "tied house," a special relief which otherwise he could not have got, although the increase of his licence duty renders it equitable that he should have some relief—a relief analogous to that granted by the earlier Act to the licence-holder in the case of a "tied house," but assessed upon a different basis, and dependent upon the existence of a tenancy. It is for these reasons, and not on account of the curious result of the appellants' interpretation which has been dwelt upon in the judgments of the Divisional Court, and in the respondent's argument in this Court—namely, that the lessee who sub-lets to the licence-holder would in such a case as the present recover from his lessor a larger sum than he has been called upon, as the liquor supplier, under s. 46 to allow to his sub-lessee—that I think that this appeal should be dismissed.

The consideration of consequences is an unsafe interpreter of a statutory enactment. But I will add this. According to the appellants' contention, this second section is to be held to operate in the case of a succession of sub-leases to create a right in each sub-lessee to a claim against his immediate lessor. One would, I think, be justified in expecting, if this had been the intention of the Legislature, that language would have been used which made such an intention clear, as in s. 21 of the Licensing (Consolidation) Act, 1910.

BRAY J. I have read the judgment of Kennedy L.J. I agree with it, and I only desire to add a few words on my own account. It is true, no doubt, that in a legal sense the words "held under a lease" do not always connote possession, but the primary meaning of the words "hold" and "holding" does, I think, connote possession. In a demise the words "to have and to hold" mean to have and to hold, i.e., to have and keep possession. When a lessee sub-demises to a sub-tenant "to have and to hold," he ceases himself to have and to hold according to the ordinary interpretation of those words. The expressions "agricultural holding," "small holding," and "hold any allotment" certainly connote possession. The holder of licensed premises

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is not, so far as I am aware, an expression used in any statute, but in ordinary parlance if you speak of a holder of licensed premises you mean the man who is in possession and holds the licence. It follows, I think, that you must look at the context, in other words, you must carefully analyse the section where these words are used, in order to see what is the meaning of the words "lessee" and "held under a lease" in s. 2 of the Finance Act, 1912. This has been done by Kennedy L.J., and I agree with his analysis and the result at which he arrives. Looking at the section as a whole, it seems to me that it is only dealing with one lease and one lessee of the licensed premises, and not with a succession of leases or of lessees, and the one lessee is the licence-holder. I think, in construing the section, it must be remembered that it is imposing a burden on the lessor and freeing the lessee from a burden which by contract between them has been agreed to be borne by the lessee, and it should not be construed as altering that burden except in cases which the language of the section clearly contemplates. I cannot think it was intended to relieve a lessor, who is letting the premises with a tie, and who is thus deriving a profit from the sale of liquor, from the burden expressly imposed on him by the Finance (1909-10) Act, 1910. The object of the section was to extend the relief given to the licence-holder by the Act of 1910. I do not think it is necessary to refer to the anomalous results which the construction contended for by the appellants brings about, but they should not be altogether ignored.

Appeal dismissed.

Solicitors for plaintiffs: *Godden, Holme & Ward.*
Solicitors for defendant: *Saxton & Morgan.*

W. F. B.

MAPLES *v.* THE COMMISSIONERS OF INLAND REVENUE.

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June 10, 11, 15.

Revenue—Stamp—Conveyance on Sale—Agreement for Purchase of Property—Sub-sales of Part—Conveyances direct by Vendor to Sub-purchasers—Conveyance of Remaining Portion to Purchaser—Ad valorem Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 58, 59.

The appellant agreed to purchase certain property from F., the consideration being (1.) a payment of 45,000*l.*, and (2.) the assumption by the appellant of certain charges of which the agreed amount was 997*l.* 5*s.* 9*d.* The appellant, not having obtained a conveyance, contracted to sell portions of the property to sub-purchasers, and, in consequence, F. by divers conveyances conveyed those portions to the various sub-purchasers, each of the conveyances being stamped with ad valorem conveyance duty on the purchase-money paid by each sub-purchaser, the total consideration stated in these various conveyances amounting to 45,000*l.* and upwards. The appellant then took a conveyance to himself from F. of the remaining portion of the property. By that conveyance, which recited the agreement for sale between F. and the appellant and that the 45,000*l.* had already been paid to F. by or under the direction of the appellant on the execution of the conveyances to the sub-purchasers, the appellant covenanted to assume liability for the charges of 997*l.* 5*s.* 9*d.* :—

Held, that the conveyance to the appellant was liable to stamp duty on so much of the original purchase-money (45,997*l.* 5*s.* 9*d.*) as, having regard to the relative values of the property sub-sold and not sub-sold, was apportionable to that part of the property conveyed to the appellant.

Case stated by the Commissioners of Inland Revenue.

On February 26, 1913, an instrument was presented on behalf of the appellant to the Commissioners of Inland Revenue for their opinion as to the stamp duty with which it was chargeable.

By an agreement dated September 17, 1912 (hereinafter called "the agreement for sale"), J. St. Vigor Fox agreed to sell certain property to the appellant. This property is hereinafter referred to as "the property sold." The consideration for this sale was, first, a payment of 45,000*l.* agreed to be made by the appellant to J. St. Vigor Fox, and, secondly, the assumption by the appellant of certain charges in favour of the Lands Improvement Company in respect of which the agreed amount was 997*l.* 5*s.* 9*d.* The appellant, not having obtained a conveyance,

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contracted, by several agreements hereinafter called collectively "the agreements for sub-sale," to sell certain portions of the property sold to divers sub-purchasers, and in consequence the said J. St. Vigor Fox, by divers conveyances, some of which were dated February 3, 1913, and others bore a later date, conveyed the portions of property, the subjects of the agreements for sub-sale, to the respective sub-purchasers. Each conveyance to a sub-purchaser was stamped with ad valorem conveyance duty on the purchase-money paid under each of these conveyances, the total consideration stated in these various conveyances to sub-purchasers amounting to rather more than 45,000*l.*, the amount in excess of 45,000*l.* being paid to the appellant. The remaining portion of the property sold was conveyed by the instrument in question to the appellant. That instrument was dated February 3, 1913, and it recited that the vendor, J. St. Vigor Fox, had entered into an agreement to sell the hereditaments thereinafter described, together with other hereditaments, to the appellant at the price of 45,000*l.*; it then continued: "And whereas the whole of the said purchase-money of 45,000*l.* has already been paid to the vendor by or under the direction of the purchaser prior to or upon the execution of conveyances to nominees of the purchaser of portions of the hereditaments the subject of such agreement as he the vendor doth hereby acknowledge And whereas no conveyance has yet been executed by the vendor of the hereditaments hereinafter described in pursuance of such agreement for sale Now this indenture witnesseth that in consideration of the premises the vendor as beneficial owner hereby conveys unto the purchaser" the remaining portion of the property sold, subject to payment by the purchaser, the appellant, of the said charges in favour of the Lands Improvement Company.

The appellant contended that the principal money owing in respect of the land charges (namely, 997*l.* 5*s.* 9*d.*) subject to which the property was conveyed was the only consideration for the conveyance to the original purchaser and that the stamp duty must be calculated on this consideration, and on this footing the appellant admitted liability to conveyance on sale duty in respect of 997*l.* 5*s.* 9*d.* above mentioned.

The Commissioners were of opinion that the conveyance in

question (being the conveyance of that portion of the property sold which had not been included in any of the agreements for sub-sale) was liable to duty either, first, on the whole of the original purchase-money of 45,997*l.* 5*s.* 9*d.*, or, secondly, on so much of the original purchase-money (namely, 45,997*l.* 5*s.* 9*d.*) of the property sold as, having regard to the relative values of the property sub-sold and not sub-sold, was fairly apportionable to the portion of the property sold which was conveyed by the instrument in question, and they claimed conveyance on sale duty on the latter basis; the amount of the said purchase-money that would be apportionable on that basis being agreed at 9337*l.* The Commissioners accordingly assessed the instrument in question to a duty of 93*l.* 10*s.*, that being the duty by reference to the heading "Conveyance or Transfer on Sale" in Sched. I. to the Stamp Act, 1891, at the rate thereby imposed, as altered by s. 73 of the Finance (1909-10) Act, 1910.

The appellant being dissatisfied with the assessment required the Commissioners to state this case.

The question for the opinion of the Court was whether the instrument was liable to ad valorem conveyance on sale duty on 9337*l.* as assessed.

A. J. Ashton, K.C., and *A. M. Latter*, for the appellant. The question in this case turns on ss. 54 and 58 of the Stamp Act, 1891. (1) Under these sections stamp duty is only

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

Sect. 58, sub-s. 1: "Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with ad valorem duty in respect of such distinct consideration."

Sub-s. 4: "Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with ad valorem duty in

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payable on the consideration moving from the appellant to the vendor, namely, the covenant in respect of the land charges. The Commissioners claim that they are entitled to be paid stamp duty on the conveyance in question on the whole 45,997*l.* 5*s.* 9*d.*, the amount of the original contract, or that a valuation must be made of that part of the property which is conveyed to the appellant and stamp duty paid on that footing. The first view entirely ignores the fact that duty is payable not on the contract but on the conveyance, and that being so it is impossible to contend that this conveyance is to be stamped on the whole 45,997*l.* 5*s.* 9*d.* The second view disregards all the conveyances to the sub-purchasers on which stamp duty on the consideration moving from these sub-purchasers, namely, over 45,000*l.*, has already been paid. This conveyance is in respect of the remaining portion of the land, and as the only consideration moving from the appellant to the vendor is the covenant to indemnify him in respect of the land charges, duty is only payable on that footing.

Sir John Simon, A.-G., and *W. Finlay*, for the Commissioners. Duty is not claimed on this deed in respect of the whole 45,997*l.* 5*s.* 9*d.*, but is claimed only on the 9337*l.*, the amount of the consideration apportionable in respect of the land conveyed to the purchaser. The Commissioners are not concluded by what is stated in a deed; they are entitled to be satisfied as to the real facts: see s. 12, sub-s. 2, of the Stamp Act, 1891. In a case like this where the whole of the land purchased is not conveyed to sub-purchasers there must be an apportionment in the same way as is done under s. 59, although there is no express provision in that section about apportionment: see *West London Syndicate* v. *Commissioners of Inland Revenue* (1), where Rigby L.J.

respect of the consideration moving from the sub-purchaser."

Sub-s. 5: "Where a person having contracted for the purchase of any property, but not having obtained a conveyance contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with ad valorem duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration."

(1) [1898] 2 Q. B. 507.

said (p. 526) that "any apportionment to affect the question of duty under s. 59 must be a bona fide apportionment and not a merely formal one; otherwise the section would be reduced, in a case where different properties are included in one agreement, to a nullity." If the view contended for by the appellant is right the result will be different according as the conveyance to the original purchaser precedes or is subsequent to the conveyances to the sub-purchasers, for, if it is earlier in date than the conveyances to the sub-purchasers, the original purchaser cannot say when he brings his conveyance to be stamped that the revenue has already collected duty on the 45,000*l.*, for such would not be the fact. The question cannot depend upon the order of events.

Ashton, K.C., in reply. The order of date of the various conveyances is not important. If the original purchaser and the sub-purchasers have in fact arranged among themselves to pay to the original vendor his full purchase-money, the order in which the conveyances are made will only affect the recitals in the deed whereby the original purchaser obtains the conveyance of his share.

Cur. adv. vult.

June 15. SCRUTTON J. read the following judgment:—This appeal by case stated raises the question what stamp duty is payable on a conveyance dated February 3, 1913.

By an agreement for sale Mr. Fox, the vendor, agreed to sell certain properties to Mr. Maples, the purchaser, for 45,000*l.*, the purchaser assuming liability for charges amounting to 997*l.* 5*s.* 9*d.* The purchaser presented certain conveyances to sub-purchasers of parts of the lands sold to the vendor for execution, paying him the prices given by the sub-purchasers and paying ad valorem stamp duty on those prices. As the purchaser was reselling at a profit, he thus caused to be paid to the vendor 45,000*l.*, the purchase price, and still had some land unconveyed. The purchaser then took a conveyance to himself of the unconveyed land, reciting the agreement for sale, that the 45,000*l.* had been paid, and covenanting to assume liability for the charges of 997*l.* 5*s.* 9*d.* He then presented this conveyance for adjudication of stamp duty, alleging that the consideration

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was 997*l.* 5*s.* 9*d.* The Commissioners assessed it ad valorem at the proportionate price of the lands thereby conveyed, on the basis of the price for the whole lands being 45,997*l.* 5*s.* 9*d.*. On this basis it was agreed that the price of these lands so conveyed would be 9337*l.* The purchaser appeals against this adjudication.

At first sight it seems that the purchaser is evading stamp duty by only having one conveyance instead of two for each piece of land sub-sold. But s. 58 of the Stamp Act, 1891, shews that Parliament contemplated and allowed this. Sub-s. 5 of that section shews that if the purchaser resold all the land to different sub-purchasers, and took direct conveyances from the vendor to each sub-purchaser, the stamp duty is assessed on the prices paid by the sub-purchasers, whether in the aggregate they exceed the original consideration or not. Similarly, if the purchaser took the land purchased himself by several direct conveyances from the vendor, sub-s. 1 of s. 58 allows him by agreement with his vendor to apportion the original consideration among the separate conveyances as they please, provided that each conveyance states a distinct consideration, and that the total considerations make up the original consideration. But for this clause, as the consideration must be truly stated, and is undivided, I think each conveyance must have paid duty on the whole original consideration. But the question in the present case is what is to happen when the purchaser adopts neither of these courses, and has some conveyances to sub-purchasers and some to himself. I at one time thought that s. 58, sub-s. 1, would still apply, and the sub-purchasers might be treated as nominees of the purchaser, but both counsel convinced me I was wrong for the reason, amongst others, that when the vendor conveys to the sub-purchaser, the consideration moving from the latter is alone to be looked at without regard to the original consideration; and one cannot apportion the original consideration into considerations which are independent of it and may exceed it. When, therefore, conveyances of parts both to the original purchaser and sub-purchasers are taken, those to the sub-purchasers are provided for by sub-s. 5. Ad valorem duty will be paid on the consideration moving from the sub-purchaser in each case, without regard to the original consideration. What is to happen

to the conveyance of the residue to the original purchaser? Take two properties of equal value sold for an undivided price of 20,000*l.*, and one resold at a profit for the price of 20,000*l.* to a sub-purchaser. His conveyance from the vendor will pay ad valorem on 20,000*l.* The other conveyance of half to the original purchaser will, it seems to me, pay on a consideration based on the fact that the two properties were sold for 20,000*l.*, and half is therefore to be treated as sold for 10,000*l.* on which the ad valorem duty will be based. In other words the Commissioners must apportion the original purchase price among the properties sold.

This they have already to do under s. 59, sub-s. 1, where the same agreement for sale contains land, the agreement for sale of which is not taxable ad valorem, and goodwill, the agreement for sale of which is taxable ad valorem. Such an apportionment was made by the Commissioners and approved by the Court of Appeal in *West London Syndicate* v. *Commissioners of Inland Revenue.* (1) I think the Attorney-General is justified in saying that on this method the same and an intelligible result is arrived at whether the conveyance to the purchaser of part is executed and presented for stamping first or last, while the appellant is in hopeless difficulties if he assumes the conveyance to the purchaser of part to be made and presented first instead of last. The truth is that when the purchaser breaks away from the original consideration, and introduces considerations moving from sub-purchasers, he is no longer able to say that the total of all the taxable consideration must not be more than the original consideration, for he has introduced a person who is a stranger to the original consideration, and a bargain which is not the original bargain.

For these reasons in my opinion the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant : *Field, Roscoe & Co., for Oliver Jones, Billson & Co., Liverpool.*

Solicitor for respondents : *Solicitor of Inland Revenue.*

(1) [1898] 2 Q. B. 507.

J. S. H.

1914
April 30.

THE KING *v.* LONDON COUNTY COUNCIL.

Criminal Law—Costs in Criminal Cases—Offence committed in one County and tried in another—"County in which the offence is supposed to have been committed"—Costs in Criminal Cases Act, 1908 (8 *Edw.* 7, *c.* 15), *s.* 4.

By s. 57 of the Offences against the Person Act, 1861, the offence of bigamy "may be dealt with, inquired of, tried, determined, and punished in any county . . . . where the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county."

By s. 4 of the Costs in Criminal Cases Act, 1908, the costs of prosecution of offences are payable "out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed."

Where an offence of bigamy is committed in one county and the offender is apprehended in another the fact that the authorities of the county where the offender was apprehended have elected to commit him for trial in that county, and that he has been tried there, does not render that county liable to pay the costs of the prosecution as being the county in which the offence "is supposed to have been committed" within the meaning of s. 4 of the Act of 1908.

Rule calling on the London County Council to shew cause why the treasurer of the London County Fund should not be ordered to pay the costs of the prosecution of one Marguerite Stickels, who was tried and convicted of the offence of bigamy at the Manchester Autumn Assizes, 1913, to William Keys, a superintendent of the Lancashire police and prosecutor of the said indictment. The bigamy of which Stickels was convicted was committed in the county of London on July 5, 1912. On October 7, 1913, she went to the Old Trafford police station at Stretford in the county of Lancaster and surrendered herself on a charge of bigamy. Superintendent Keys took her to the county police court at Strangeways, and she was there committed for trial upon the said charge at the Manchester Assizes by virtue of s. 57 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), which provides that the offence of bigamy "may be dealt with, inquired of, tried, determined, and punished in any county . . . . where the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county."

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The costs of the prosecutor Superintendent Keys having been taxed at 12*l.* 15*s.* 9*d.*, an order was made by the clerk of assize at Manchester directed to the treasurer of the county of London requiring him to pay that sum to the prosecutor. The order was made under s. 4 of the Costs in Criminal Cases Act, 1908. (1) The treasurer of the county of London refused to comply with the order, whereupon the present rule was obtained.

A. H. Bodkin, for the London County Council, shewed cause. The Assize Court at Manchester had no jurisdiction to order the treasurer of the county of London to pay these costs. By s. 1 of the Costs in Criminal Cases Act "a Court of assize . . . . before which any indictable offence is tried . . . . may . . . . by order direct the payment of the costs of the prosecution . . . . out of the funds of the county or county borough out of which they are payable under this Act," and by s. 4, sub-s. 1, they are payable out of the fund of the county "in which the offence is committed or is supposed to have been committed." As a general rule offences are only triable in the county in which they were committed, but to that rule there are four exceptions of which bigamy is one, the others being post office offences, and offences under the Explosives Acts, and until recently forgery. In such cases the committing magistrates have the option of sending the case for trial in the county where the offence was committed or retaining it for trial in their own county, and if they elect to adopt the latter course the case "may be dealt with . . . . in the

(1) By s. 4, sub-s. 1, of the Costs in Criminal Cases Act, 1908, "Costs in the case of offences committed or supposed to have been committed in a county borough whether the Court directing the payment is held in the borough or not are payable under this Act out of the borough fund or borough rate of the county borough, and costs in the case of other offences are payable under this Act out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed."

By sub-s. 3, "The council of every county and of every county borough shall cause their treasurer or some other person on his behalf to attend at every Court of assize or quarter sessions at which any indictable offence in respect of which an order can be made under this Act on the treasurer is to be tried for the purpose of paying any orders so made, and to remain in attendance for that purpose during the sitting of the Court or until such hour as the Court shall direct."

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same manner in all respects as if the offence had been actually committed in that county." The "dealing with" the case includes making an order for the payment of the costs. It is to such cases of election to treat the offence as if it had been committed where the offender is apprehended that the words "or is supposed to have been committed" in the Act of 1908 are directed. They are equivalent to "is deemed to have been committed." It is reasonable in such cases that the costs of the prosecution, which must necessarily be increased by having to bring the witnesses from the county where the offence was committed, should be borne by the fund of the county whose authorities caused that additional expense. If the contention of the prosecutor is right that the county in which the offence was committed can be made to pay the costs of the prosecution in another county, s. 4, sub-s. 3, of the Act of 1908 will involve this strange result, that the council of every county in England and Wales will have to cause their treasurer to attend on their behalf at every Court of assize throughout the kingdom, on the chance of orders for payment of costs being made against them. Such a result cannot have been intended. The words "at every Court of assize or quarter sessions" must be understood to mean at every Court of assize or quarter sessions in the council's own county.

Merriman, in support of the rule. The words "or is supposed to have been committed" were intended to meet the case of an acquittal, or possibly a case in which it is doubtful in which county the offence was committed. "Supposed" does not mean the same thing as "deemed." Where the Legislature mean "deemed" they say so. Thus whereas in s. 41 of the Forgery Act, 1861 (24 & 25 Vict. c. 98), precisely the same words with regard to venue are used as in s. 57 of the Offences against the Person Act, in the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 14, the language is altered, and for all purposes of the prosecution of a person charged with forgery the offence "shall be deemed to have been committed in that county or place" in which the person charged was apprehended. The county of trial would in such case be liable to pay the costs under the Act of 1913 but not under the earlier Act. So too under the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 9, any offence against that Act

may be dealt with in the county where the person charged was apprehended and for all purposes incidental to the trial "the offence shall be deemed to have been committed in that county."

AVORY J. The question raised by this rule turns upon the construction of s. 4 of the Costs in Criminal Cases Act, 1908, and s. 57 of the Offences against the Person Act, 1861. A similar question may arise in the case of some other offences; such a question would have arisen before 1913 if the offence charged had been forgery, though no such question will arise in the case of forgery under the present Forgery Act, 1913. The present case was one where the offence of bigamy was committed by the accused person in the county of London. She was apprehended in Lancashire, was committed for trial at the assizes at Manchester, and was tried and convicted there. An order was then made for the payment of the costs on the treasurer of the county of London, upon the ground that the county of London was the county in which the offence had been committed. Sect. 4 says that the costs in such a case are payable "out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed." But for the words "or is supposed to have been committed" there could not be any question under this section that the costs were payable out of the county fund of the county of London, because that was the county in which the offence was committed. In my opinion the words "or is supposed to have been committed" do not carry the matter any further in such a case as the present. I think they were intended to cover the case where the accused person is acquitted, or where there may be some difficulty in ascertaining where the offence was actually committed. Unless then s. 57 of the Offences against the Person Act affords some foundation for Mr. Bodkin's contention I can see no foundation for it. Sect. 57 enacts that "such offence" of bigamy "may be dealt with, inquired of, tried, determined, and punished in any county . . . . where the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county." In my opinion there is no word in that section which can properly cover an order for

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payment of the costs of the prosecution. The words "dealt with" &c. are, I think, intended to deal with the sequence of events leading up to the trial and punishment of the offender. I do not think the words "such offence may be dealt with" give the Court jurisdiction to order costs to be paid in the same manner as if the offence had been actually committed in the county of trial. The terms of the Forgery Act, 1913, to which our attention has been called shew that the Legislature thought fit to amend the provision which existed in the earlier Forgery Act, a provision in identical terms with those in s. 57 of the Offences against the Person Act, and inserted words which would cover such a case as the present apparently because it was not covered by the words of the earlier Act. I think that this rule should be made absolute.

ROWLATT J. I agree and for the same reasons.

SHEARMAN J. I am of the same opinion. It appears to me that the scheme of the Act of 1908 was that the costs should be paid out of one fund and one fund alone. If I had seen anything in the Act giving a discretion to the Court to order payment either out of the fund of the county in which the offence was committed or alternatively out of the fund of the county in which it was supposed to have been committed I should have thought that there was something in Mr. Bodkin's argument, but it appears to me that the scheme provides for one county fund only being liable for the costs. In my opinion the words "county in which the offence is committed or is supposed to have been committed" refer to one and the same county, and if so, then that county in the present case must be the county of London.

Rule absolute.

Solicitors for prosecutor: *Snow, Fox & Higginson, for Harcourt E. Clare, Preston.*

Solicitor for London County Council: *Edward Tanner.*

J. F. C.

EVANS & CO., LIMITED *v.* LONDON COUNTY COUNCIL.

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April 30.

Shop—Duty of Occupier of Shop to close for Weekly Half-Holiday—Whether a Company can be Occupier—Shops Act, 1912 (2 *&* 3 *Geo.* 5, *c.* 3), *s.* 4—*Liability of Company to Conviction in Penalty—Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43).

There is nothing in the provisions of the Shops Act, 1912, to exclude an incorporated company which occupies a shop from the obligation imposed by s. 4 of that Act upon occupiers of shops to close their shops on the afternoon of one day in the week.

The provisions of the Summary Jurisdiction Acts as to summoning offenders before a Court of summary jurisdiction to answer an information for a penalty apply to corporations as well as to natural persons.

Case stated by a metropolitan police magistrate.

The appellants were summoned to answer an information charging that they during the week ending October 25, 1913, being the occupiers of a shop known as Nos. 197—201, Brompton Road, did not close the shop for the service of customers at 1 o'clock in the afternoon on one weekday in the said week as required by the Shops Act, 1912, s. 4.

At the hearing the following facts were proved or admitted. The appellants are a limited liability company incorporated and registered under the Companies Acts and carry on business as milliners, fancy drapers, and ladies' outfitters at the said premises. An inspector employed by the London County Council under the said Act inspected the said premises every day during the week in question, and the premises were open on each day during that week for the service of customers after 1 p.m., and customers were served therein after 1 p.m. on each of such days.

On behalf of the appellants it was contended that they being an incorporated company were not occupiers within the meaning of s. 4 of the Shops Act; and that such a company is not a person within ss. 1 and 2 of the Summary Jurisdiction Act, 1848.

The magistrate was of opinion that the appellants were occupiers within the meaning of the Shops Act, s. 4, and that

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the provisions of that section were intended to include corporations, as otherwise many of the largest and most important shops in the kingdom would be in the anomalous position of being outside the operation of the Act. It was not suggested before him that the offence had been committed by any manager or other person without the knowledge, consent, or connivance of the appellants, and he was of opinion that under s. 2, sub-s. 1, of the Interpretation Act, 1889, the Summary Jurisdiction Acts were applicable to corporations in respect of these offences, and that there was nothing in the nature of the appellants' offence or of the penalty imposed by the Act or otherwise to indicate any contrary intention. He therefore overruled the contention of the appellants and imposed a penalty.

R. W. Turner, for the appellants. That the expression "occupier" in s. 4 of the Shops Act, 1912, was not intended to include an incorporated company is shewn by sub-s. 4 of that section, which provides that if the local authority have reason to believe that the majority of the occupiers of shops of a particular class in any area are in favour of being exempted from the section they are to ascertain their wishes, and if on a vote being taken half the occupiers record their votes in favour of exemption the local authority are to make an order exempting that class of shops. The occupiers therefore must be persons capable of recording a vote, which, in the absence of special provisions allowing them to vote by proxy, corporations are not. There is no provision in the Shops Act allowing a company to record its vote by one of its officers. Secondly, even if an incorporated company can be said to be an occupier for the purposes of s. 4, there is no means of prosecuting a company for a breach of that section. By s. 14 all offences against the Act are to be prosecuted and all fines recovered in like manner as offences and fines are prosecuted and recovered under the Factory and Workshop Act, 1901; and by s. 144 of that Act all offences under that Act shall be prosecuted and all fines recovered before a Court of summary jurisdiction "in manner provided by the Summary Jurisdiction Acts." But those Acts provide no machinery for

bringing a corporation before a Court of summary jurisdiction even for the purpose of being fined. Sect. 2 of the Summary Jurisdiction Act, 1848, provides that if the person served with a summons fails to appear the justices may issue a warrant for that person's arrest. But a corporation cannot be arrested. Therefore the word "person" for the purpose of those Acts must mean a natural person. It is true that in a variety of cases corporations have been fined, but the point has never been taken.

Bodkin, for the respondents. A corporation may be convicted of an offence punishable by fine, such as that of giving to a purchaser a false warranty under the Sale of Food and Drugs Act, 1899: *Chuter* v. *Freeth* (1); but not of one punishable corporally by imprisonment or whipping, such as that of publishing a scheme for the sale of chances in a lottery contrary to the Lotteries Act, 1823: *Hawke* v. *Hulton & Co.* (2) And in *Pharmaceutical Society* v. *London and Provincial Supply Association* (3) Lord Blackburn said: "I quite agree that a corporation cannot in one sense commit a crime—a corporation cannot be imprisoned if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so in those senses a corporation cannot commit a crime. But a corporation may be fined . . . . ; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined . . . .; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like." The procedure under the Summary Jurisdiction Acts is applicable to a corporation. The fact that a corporation cannot be arrested under s. 2 of the Act of 1848 does not raise any difficulty in the way of serving it with a summons under s. 1, and that is all that is required.

AVORY J. The question whether a company incorporated under the Companies Acts may be made liable under the

(1) (1911) 75 J. P. 430. (2) [1909] 2 K. B. 93.
(3) (1880) 5 App. Cas. 857, at p. 869.

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provisions of a penal statute has been the subject of discussion in many cases in recent years, and the decision on that question turns in my opinion upon the application of s. 2 of the Interpretation Act, 1889, to the particular case. That section says that "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall unless the contrary intention appears include a body corporate," and in every case which comes before the Court the question has to be determined whether the contrary intention appears in the statute under which the proceedings are taken. In this case the proceedings are taken under s. 4 of the Shops Act, 1912, which provides by sub-s. 1 that "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week," and by sub-s. 7 that "In the case of any contravention of or failure to comply with any of the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act and shall be liable to a fine" of the amount therein specified. And by s. 14 "All offences against this Act shall be prosecuted and all fines under this Act shall be recovered in like manner as offences and fines are prosecuted and recovered under the Factory and Workshop Act, 1901," which is in effect saying that they are to be prosecuted and recovered under the Summary Jurisdiction Acts. The first contention of the appellants was that they did not come within s. 4 because they were not "occupiers" within the meaning of that section. It was not disputed that they were on the rate-book as the occupiers of the shop, and therefore prima facie they were within the section. But it was said that sub-s. 4 of that section shews that the term "occupier" is used in a restricted sense, for it provides that where the local authority have reason to believe that a majority of the occupiers of shops of any particular class are in favour of being exempted from the provisions of the section they are to take steps to ascertain the wishes of the occupiers, and if satisfied that a majority are in favour of the exemption, or, in case of a vote being taken, at

least one half of the votes recorded by the occupiers are in favour of it, they shall make an order exempting the shops of that class. It was said that a limited company cannot vote under that section. I am by no means satisfied that it cannot. There is nothing in the section which renders it impracticable for a company to exercise the right of voting. It does not say that the occupiers must be personally present when recording their vote. There is certainly nothing which prevents a limited company from expressing their wishes as occupiers. They can do so in the ordinary way, either by a resolution of the directors, or by the directors authorizing the manager to express their views on their behalf. But even if that were not the case a difficulty in the way of exercising a right of voting would not in my opinion justify the contention that this section cannot be applied in the case of a company occupying a shop which is admittedly kept open in breach of its provisions. Secondly, Mr. Turner has argued, apart from the provisions of the Shops Act, that as the fine has to be recovered under the Summary Jurisdiction Acts, and as the Summary Jurisdiction Act, 1848, contains certain provisions which are applicable to "*persons*" but inapplicable to an incorporated company, proceedings cannot be taken against such a company for the recovery of a fine, and consequently the proceedings cannot be maintained in the present case. It is quite true that there are certain provisions in that Act which contemplate imprisonment of the defendant in certain events and which are not applicable to a company, but this Court has for many years past had to consider this question in connection with a variety of statutes under which fines are directed to be recovered under the Summary Jurisdiction Acts. For instance it has been held in cases under the Sale of Food and Drugs Act and under the Merchandise Marks Act that there is nothing in the provisions of those Acts or of the Summary Jurisdiction Acts to prevent the summary recovery of a fine from an incorporated company. The fact that some of the provisions of the Summary Jurisdiction Act, 1848, are inapplicable to a company does not shew that all its provisions are inapplicable, and does not afford any evidence of that contrary intention which under the provisions of the Interpretation Act

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is necessary to prevent the term "person" including a corporation. For these reasons I think the appeal must be dismissed.

ROWLATT J. I agree. In this shop there was a state of facts which subjected the occupiers to a fine. The appellants were in the ordinary acceptation of that term the occupiers of the shop, and as such they were convicted and fined. It is objected that they are not occupiers because occupiers have votes, and a corporation cannot exercise a right of voting. If it be true that they cannot exercise the vote, as to which I offer no opinion, that circumstance may be unfortunate without being relevant, because a vote is a privilege conferred on an occupier if he can exercise it. If he cannot he is none the less the occupier and must accept the liabilities of that position.

SHEARMAN J. I agree and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Stileman & Neate.*
Solicitor for respondents: *Edward Tanner.*

J. F. C.

PILKINGTON *v.* ROSS.

1914
April 30.

Licensing Acts—Child—Exclusion from "Bar" of Licensed Premises—Part of Premises "mainly used" for the Sale and Consumption of Liquor—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 120, *sub-s.* 5.

By s. 120, sub-s. 1, of the Children Act, 1908, "The holder of the licence of any licensed premises shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing."

Sub-s. 5: "In this section the bar of licensed premises means any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor."

Semble, per Rowlatt and Shearman JJ., that for the purpose of determining whether a room is "mainly used" for the sale and consumption of intoxicating liquor regard must be had to the user of the room during the whole portion of the day that the house is open, and that if the user as a whole is not mainly for that purpose it is immaterial whether the room is or is not being used for that purpose at the time when the child is found in it.

Case stated by justices for the borough of Leigh.

The appellant was summoned upon an information charging that he being the holder of a beer-house licence allowed one Jane Smith, a child aged two years, to be in the bar of his licensed premises at a time when they were open for the sale and consumption of liquor, contrary to the provisions of s. 120, sub-s. 1, of the Children Act, 1908.

At the hearing the following facts were proved or admitted:—

The appellant was a licensed beerseller and was on September 21, 1913, the licensee of the Globe Inn at Leigh in the county of Lancaster. On the date in question at 8.40 p.m. a woman named Smith was found by the police in a room in the appellant's beer-house drinking beer which she had bought from the appellant. She had with her in the room her daughter, a child aged two years. There were two other customers in the room, and later whilst the police were there three other customers came into the room. The room in question was the kitchen of the appellant's beer-house. The house is a small one, only two storeys high, and has on the ground floor a bar, a

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parlour, a tap-room, and a kitchen. The kitchen was the only room in the house that was used or could be reasonably used for domestic purposes. In the room were the ordinary fittings and appliances of a kitchen. But the room was also fitted up as a drinking room, there being in it a long table with a white top and a hand bell on it, a form or bench such as is commonly used by customers of beer-houses, and a number of stools. It was not disputed that the appellant allowed the child to be in the kitchen at the time mentioned, and that at that time the kitchen was being used for the sale and consumption of intoxicating liquor. The defence was that the kitchen was not a "bar" within the meaning of s. 120 of the Children Act, 1908, sub-s. 5 of which provides that "In this section the bar of licensed premises means any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor." The contention of the appellant was that the main user of the room was for domestic purposes as a kitchen. The justices found that the room was exclusively used for trade purposes during certain portions of the day, and held that the user of it during certain portions of the day for domestic purposes did not preclude them from holding that the same room during other portions of the day could be mainly used for the sale and consumption of intoxicating liquor within the meaning of the section.

They accordingly convicted the appellant.

A. F. Wootten, for the appellant. The justices appear to have thought that it was enough if the room was being mainly used for drinking purposes during the particular part of the day when the child was found there. It is contended that that view is wrong. The user as a whole is what is to be considered; and here there is no finding by the justices that the user of the room as a whole was mainly for the sale and consumption of liquor; in fact it was mainly used as a kitchen. It is not permissible to insert after the words "mainly used" the words "at the time in question." The character of the room does not vary from hour to hour. There cannot be more than one main user.

F. J. Rigby, for the respondent. The words of the sub-section mean "being principally used at the particular time when the child is there." The justices' reading was correct. 1914 PILKINGTON v. ROSS.

AVORY J. If the appellant had satisfied us that the justices meant to find that they had to look at that particular period of the day when the offence was alleged to be committed and determine whether at that particular period the room in question was being mainly used for the sale and consumption of intoxicating liquor the case would, I think, have required further consideration. But as I read the case that was not what they meant. There was clear evidence before them that on every day, throughout the whole time that the house was open for business purposes, the kitchen was extensively used for the purposes of drinking. It contained the ordinary furniture for those purposes, a long table, stools, and a bell on the table with which to summon the barman; and I think that the justices intended to find that the user of the room as a whole was mainly for the sale and consumption of intoxicating liquor, and that they were not precluded from so finding by the mere fact that during certain portions of the day the room was used for ordinary domestic purposes. The appeal must be dismissed.

ROWLATT J. I agree. The case turns entirely upon what we think is the proper construction to be put on the finding of the justices. But I wish, speaking for myself, to guard against giving any countenance to the idea that for the purpose of ascertaining what is the main user of a room you can split the day up into parts and say that a room comes within the definition of a bar during certain parts of the day and does not come within that definition during others. It seems to me that this definition contemplates a room either being one which is open to children or one which is forbidden to them at all times. Any other construction would open the door to great danger to children, because in any case in which the justices had to go into the question whether a room was mainly used for the sale of intoxicating drink it would be open to the licensed person to say "Although this is the bar parlour of the public-house I

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can prove that at this particular time of the day there never was anybody supplied with drink or consuming it there."

SHEARMAN J. I am of the same opinion. I think the language of sub-s. 1 shews that what the justices have to consider is what is the regular and general user of the room. It says "The holder of the licence of any licensed premises shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing." Those words make it clear that it is intended to impress a regular character on each room in the premises, and to divide them into two classes, those which are prohibited to children and those which are not, and it is a question for the justices in each case to decide whether the room in which a child is found comes within the one class or the other. In the present case, upon a fair construction of what the justices said, I think they must be understood to have found that this particular room came within the prohibited class and that they were not prevented from finding that it did so because during certain portions of the day it was used as a kitchen.

Appeal dismissed.

Solicitors for appellant: *Kinch & Richardson, for A. H. Hayward, Leigh.*

Solicitors for respondent: *Snow, Fox & Higginson, for Harcourt Clare, Preston.*

J. F. C.

MELLUISH *v.* LONDON COUNTY COUNCIL.

1914
May 6.

Shop—Kitchen of Restaurant—Shop Assistant—Kitchenmaid—Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 19.

By s. 1 of the Shops Act, 1912, "On at least one day in each week a shop assistant shall not be employed about the business of the shop after half-past one o'clock in the afternoon."

By s. 19, "The expression 'shop assistant' means any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods":—

Held, that a kitchenmaid employed in the kitchen of a restaurant, whose duties do not take her into the room where the customers are served, is nevertheless a person "employed in a shop in connection with the serving of customers," and consequently her employer is bound to give her the statutory weekly half-holiday.

CASE stated by a metropolitan police magistrate.

The appellant was summoned for having during each of the weeks ending on the 18th and 25th respectively of October, 1913, failed to comply with the provisions of s. 1, sub-s. 1, of the Shops Act, 1912, in respect of the employment of a shop assistant named Nellie Cook.

At the hearing the following facts were proved:—

The appellant kept a refreshment house at 11, Chapel Street, in the parish of Marylebone. Nellie Cook was employed by him in the kitchen thereof attending to the fires, washing up china and dishes, and preparing the vegetables for cooking for the customers. The kitchen was connected with the place in which the customers were served in the refreshment house and was on the same level as that place. Nellie Cook was so employed during the weeks ending October 18 and October 25, 1913. During the said two weeks she was employed on each weekday in the kitchen of the said house until 3 o'clock in the afternoon. The magistrate was of opinion that the refreshment house kept by the appellant was a shop, and that the place in which the customers were served and the kitchen in which Nellie Cook was employed formed one shop, the kitchen being the place in which the goods sold in the shop were prepared for the customers; and that Nellie Cook was a shop assistant within the meaning of

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the section. He was further of opinion that the attending to the fires, the washing up of china and dishes, and preparing vegetables for customers was work done in the shop in connection with the serving of customers therein. (1) He accordingly convicted the appellant.

Rigby Swift, K.C., and *Macoun*, for the appellant. The magistrate was wrong on both the points decided by him. The employee in question was not a shop assistant within the meaning of the Act. First, she was not "employed in connection with the serving of customers." The serving of customers implies that the employee is brought into direct relation with the customers, which the woman here was not, for her duties never took her outside the kitchen; she never saw the customers. That there may be persons employed on a refreshment house keeper's premises in connection with the business of the shop who are not shop assistants is recognized by the Legislature in the amending Act, Shops Act, 1913 (2 & 3 Geo. 5, c. 24), which enacts that the Act of 1912 shall not apply to premises used for the sale of refreshments if the occupier elects to come in under the scheme there provided, and by s. 1, sub-s. 5, says that for the purposes of that scheme "The Shops Act, 1912, ... shall . . . . have effect as though the definition of 'shop assistant' included all persons wholly or mainly employed in any capacity at the premises in connection with the business there carried on." The woman in question here would be a shop assistant under the Act of 1913 but not under that of 1912. Secondly, the kitchen was not a shop or part of the shop. It was rather in the nature of a factory where the goods were produced which were subsequently retailed in the shop. The portion of a draper's premises occupied by the seamstresses who make the garments is no part of the shop.

(1) By s. 19, sub-s. 1, of the Shops Act, 1912, "In this Act the expression 'shop' includes any premises where any retail trade or business is carried on;

"The expression 'retail trade or business' includes . . . . the sale of refreshments or intoxicating liquors:

"The expression 'shop assistant' means any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods."

Patrick Hastings, for the respondents. There was evidence here upon which the magistrate could properly convict. To constitute a person a shop assistant it is not necessary that he or she should be brought into personal contact with the customers. The definition includes persons employed in connection with the despatch of goods. But conceivably the place where the parcels are tied up and the goods despatched may be a totally different part of the premises to that in which the customers are served, so that the customers may never see the persons engaged in that work. Nor is the expression "shop" limited to part of the premises where the sale is conducted. Any part of the premises where a retail trade is carried on is a shop.

Rigby Swift, K.C., in reply.

AVORY J. The question here is not an easy one to determine, and one has to look carefully to see that the decision of the Court does not involve consequences which were never contemplated by the Legislature. The appellant was summoned for a breach of s. 1 of the Shops Act, 1912, and the question is whether there was any evidence upon which the magistrate could properly convict. I am of opinion that there was. First there was evidence on which he could find that the kitchen where the girl was employed was a part of the premises where the retail trade or business of this shop was carried on. The kitchen of a restaurant is an essential part of the premises on which the business of the restaurant is conducted. She was therefore employed in a shop. Then comes the more difficult question, which has chiefly been argued before us, as to whether she was employed "in connection with the serving of customers." In my opinion there was evidence on which the magistrate could so find. The words are not employed "in serving customers," a phrase which is to be found in s. 3, but employed "in connection with the serving of customers," which is wider, and may include the case of an assistant who is employed in operations which form part of the operation of serving customers. I agree that it would not be possible to hold that every person employed in any capacity on premises where a retail business is carried on is employed in connection with the serving of customers. I think

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there must be a direct connection with the serving of customers and not a remote and indirect connection. Our attention was called to the Shops Act, 1913, which amends the Shops Act, 1912, and we were asked to infer from the amended definition of "shop assistant" in s. 1, sub-s. 5, as a person "employed in any capacity at the premises in connection with the business there carried on," that that term has under the Act of 1912 a limited application. To that contention I assent. It does not include all persons employed on the premises in connection with the business in whatever capacity they may be so employed. But nevertheless I think it does include persons who are employed in connection with the serving of customers in the sense which I have explained.

ROWLATT J. I agree. On both points I think there were materials on which the magistrate could find as he has done. The kitchen here was on the same floor as the restaurant with which it was connected, and the magistrate found that it was a part of the shop. One can imagine very different degrees of such connection. In the case of a restaurant you may have the cook conducting the operations of the grill in the presence of the customers, or just outside the door, or in a different part of the building. Whether there is such connection as to constitute the kitchen a part of the restaurant must in each case be a question of fact for the magistrate. With regard to the second point as to the girl being employed in connection with the serving of customers, it is to be observed that in washing up the plates and preparing the vegetables for cooking she was engaged in coping with the immediate demands of the customers as they came in; she was supplying the demands of the trade as they arose. I do not mean to say that that is an essential element, but where it is present I think it is impossible to say that it is not in the power of the magistrate to find as a fact that the girl is employed in connection with the serving of customers.

SHEARMAN J. I am of the same opinion. The magistrate had to decide two questions. The first was whether the kitchen was part of a shop; I think he was right in holding that it was. It

is clear that a restaurant is a shop within the meaning of the Act, and it appears to me that under any but very exceptional circumstances the kitchen of the restaurant must be part of the shop, because it is part of the premises where the business of retailing eatables is carried on. The other question was whether the work which the girl did was done in connection with the serving of customers. The magistrate held that it was, and I think that was a right finding. No doubt there may be persons employed on the premises who are not shop assistants; that seems clear from the language of the amending Act to which we were referred. On the other hand for the purpose of shewing that an employee is engaged in connection with the serving of customers it is not necessary to shew that she is engaged in actually serving them. The magistrate, I think, was right in putting a wide and comprehensive meaning on the words "in connection with."

Appeal dismissed.

Solicitors for appellant: *C. W. & S. E. Brown.*
Solicitor for respondents: *Edward Tanner.*

J. F. C.

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April 27;
May 1.

WORCESTERSHIRE COUNTY COUNCIL, Appellants *v.* NOTLEY BROTHERS, Respondents.

Fertilisers and Feeding Stuffs—Poultry Food—Article artificially prepared—Invoice—Percentages of Oil and Albuminoids—Natural Substance produced by Separation—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-s.* 2.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, it is enacted that every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating, in the case of any article artificially prepared otherwise than by being mixed broken ground or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article.

The respondents sold for use as food for cattle or poultry an article called sharps which contained oil and albuminoids. Sharps are an offal of wheat and are that part of the wheat which remains after the flour and bran have been removed, and are made in the following way:—Wheat is taken in the whole grain and passed by the miller through his mill. The wheat meal thus made is then by mechanical means in the mill passed by air currents through a series of sieves whereby it is separated and divided into three substances, namely, flour, sharps, and bran. The chemical composition of each of these three substances (when made) differs both from that of each other and from that of the original wheat. The mechanical process does not otherwise effect any chemical change:—

Held by Avory and Shearman JJ., Rowlatt J. dissenting, that sharps were not an article which had been artificially prepared within the meaning of the enactment, and, further, that if they were, they were not artificially prepared otherwise than by being ground, and that the respondents were therefore not bound to give to the purchaser an invoice stating the percentages of oil and albuminoids contained in the article.

Case stated by justices for Worcestershire.

An information was preferred by Richard Griffin, official sampler under the Fertilisers and Feeding Stuffs Act, 1906, duly authorized in that behalf by the appellants, the Worcestershire County Council, against the respondents, Notley Brothers, for that they on selling for use as food for cattle or poultry a certain article, to wit, 3½ lbs. weight of sharps, to the said Griffin unlawfully did fail without reasonable excuse to give to Griffin, the purchaser, on or before, or as soon as possible after, the delivery

of the article (such article being an article artificially prepared otherwise than by being mixed, broken, ground or chopped) the invoice required by s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906 (1), stating the respective percentages of oil and albuminoids contained in the article.

Upon the hearing of the information the following facts were proved:—

The sharps referred to in the information were purchased at the respondents' place of business by Griffin for use as food for cattle or poultry. A sample of the sharps was duly analysed in conformity with the procedure prescribed by s. 3 of the Act, and it was found to contain 4·15 per cent. oil and 15·78 per cent. albuminoids. An invoice was given to the purchaser by the respondents, but it did not state the respective percentages of oil and albuminoids contained in the sharps.

Sharps are an offal of wheat, and are that part of the wheat which remains after the flour and bran have been removed.

Sharps are made in the following way:—Wheat is taken in the whole grain and passed by the miller through his mill. The wheat meal thus made is then by mechanical means in the mill passed by air currents through a series of sieves whereby it is separated and divided into three substances, namely, flour, sharps, and bran. The chemical composition of each of these three substances, when made, differs both from that of each other and from that of the original wheat. Sharps contain a larger percentage of oil and albuminoids than flour. The mechanical process does not otherwise effect any chemical change.

The sharps sold by the respondents were a good average sample. Sharps are almost universally of even quality, both in respect of oil and albuminoids.

On behalf of the appellants it was contended that sharps are artificially prepared otherwise than by being mixed, broken,

(1) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 1, sub-s. 2: "Every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating the name of the article, ... and in the case of any article artificially prepared otherwise than by being mixed broken ground or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article . . . ."

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ground or chopped, as they are not the whole product of the grain of wheat, but are obtained by being separated from flour and bran by a mechanical process which alters their respective chemical compositions and which cannot be described as either mixing, breaking, grinding or chopping; that sharps being an article artificially prepared by other means than being mixed, broken, ground or chopped, by reason of the flour and bran being separated therefrom, fall within the scope of the provisions of s. 1, sub-s. 2, of the Act; that sharps having been separated from the flour and bran are no longer a natural article as the grain of wheat was originally; that taking the sharps away from the originally mixed, broken, ground or chopped grains of wheat constituted an artificial preparation; that the case came within the decision of *Lathom* v. *Spillers & Bakers*. (1)

On behalf of the respondents it was contended that sharps are a natural product of wheat, and that the mere separation of sharps from flour and bran does not amount to such artificial preparation as was intended by the Legislature; that the artificial preparation contemplated by Parliament was something very different, such as the manufacture of linseed cake produced by heating, baking, or boiling; that sharps are not an artificial preparation otherwise than by being mixed, broken, ground or chopped, any more than wheat meal, which admittedly is not, although wheat before being ground into meal goes through a process of winnowing to separate tares and other foreign bodies therefrom.

The justices were of opinion that sharps were not, by being separated from flour and bran by the process above mentioned, artificially prepared, otherwise than by being mixed, broken ground or chopped within the meaning of s. 1, sub-s. 2, of the Act, and the justices therefore dismissed the information.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct decision in point of law.

Tindal Atkinson, K.C., and *H. S. Cautley*, for the appellants. The respondents ought to have been convicted unless it can be

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said that sharps are an "article artificially prepared otherwise than by being mixed broken ground or chopped" within the meaning of sub-s. 2 of s. 1. The facts stated in the case shew that sharps are not prepared by being mixed, broken, ground or chopped, but they are artificially prepared. In *Lathom* v. *Spillers & Bakers* (1) Ridley J. said that sub-s. 2 of s. 1 "deals with articles artificially prepared in the sense of articles in a condition other than as nature made them."

Sharps cannot be said to be in a condition in which nature made them, for they are not a natural product and have no natural existence; they can only be obtained as a separate article by an artificial process.

C. E. E. Jenkins, K.C., and *Hon. R. Coventry*, for the respondents. Sharps are not artificially prepared. They exist as part of the wheat ear. By grinding the wheat, that which nature made separate, namely, the wheat meal, the bran, and the sharps, are mixed together; by the winnowing process these three component parts are once more made separate, and they remain chemically unchanged. "The object of the Act was to inform the purchaser as to the nature of the substance which he was buying": *Lathom* v. *Spillers & Bakers* (2), per Avory J. The Act aimed at cases where by an artificial process an article is produced which is not a natural article in that the chemical composition of the natural product has been changed. That is not so in the case of sharps. If sharps are artificially prepared, so also are peas when extracted from the pod, and hay, for neither of these articles can be said to be in the condition in which nature made them.

[ROWLATT J. An article may be an artificial product as distinguished from a natural product, but it is not necessarily "artificially prepared." The word "prepared" in sub-s. 2 of s. 1 must be read as meaning "produced."]

If sharps can be said to be artificially prepared at all, they are so prepared by being ground, and therefore come within the exemption.

Tindal Atkinson, K.C., replied.

Cur. adv. vult.

(1) [1913] 2 K. B. 355. (2) [1913] 2 K. B. at p. 360.

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May 1. AVORY J. read the following judgment:—The question for decision in this case is whether an article known as "sharps" which was sold for use as food for cattle or poultry is an article artificially prepared otherwise than by being mixed, broken, ground or chopped within the meaning of s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906. The decision of this Court in *Lathom* v. *Spillers & Bakers* (1) to which reference is made in the special case does not, in my opinion, govern the present case. The article sold in that case was composed of various substances, some of which had been artificially prepared, and the contention was that, as the different substances had been merely mixed together, the article so produced was not an article artificially prepared otherwise than by being mixed. There are, however, expressions of opinion in the judgment of Ridley J. as reported not necessary to the decision, upon which reliance has been placed in the argument for the appellants, the effect of which is that any article in a condition other than as nature made it is artificially prepared within the meaning of this section if it is prepared otherwise than by being mixed, broken, ground or chopped. I adhere to what I said in *Lathom* v. *Spillers & Bakers* (2): "The section as a whole applies to articles artificially prepared. This Act was passed because of a practice of selling for food substances the composition of which was hidden from the purchaser. The object of the Act was to inform the purchaser as to the nature of the substance which he was buying." "Sharps" is a well-known substance, and, as found in the case, is that part of wheat which remains after the flour and bran have been removed. The flour, sharps, and bran are produced by a process of grinding and sifting whereby the grain of wheat is separated into these three component parts, and no chemical change is effected by the process in the component parts. It follows, if the argument of the appellants is right, that both flour and bran, produced by the same process, are "articles artificially prepared otherwise than" &c. It would follow also I think from the argument that hay which is prepared by a process of cutting and drying would be an article artificially prepared within the meaning of the section, although chopped hay would appear to be just such

(1) [1913] 2 K. B. 355. (2) [1913] 2 K. B. at p. 360.

an article as is contemplated in the exception. I think that such substances as hay, flour, sharps and bran are clearly not within the object of the Act. The question is whether they, or sharps in particular, are within the plain meaning of the words. In my opinion, although I admit the difficulty of construing the words, the section cannot mean that any article prepared otherwise than by being mixed, broken, ground or chopped, as for instance peas separated from the pod and dried, or eggs hard boiled, is to be deemed artificially prepared within the meaning of the section. I think that natural substances such as flour, sharps, and bran, the nature of which is well known to the purchaser and which are produced merely by a process of separation without any chemical change, are not artificial preparations within the meaning of the Act, and on this ground I should uphold the decision of the justices in dismissing the information.

If the words of the section compelled me to hold that sharps or flour or bran was an artificial preparation I should also hold that it was not prepared otherwise than by being ground within the meaning of the section. I cannot believe that the Act contemplated that samples of hay and bran should be submitted to the official agricultural analyst and the chief Government analyst appointed under the Act for analysis.

For these reasons I think the appeal ought to be dismissed.

ROWLATT J. read the following judgment:—I regret that I have come to a different conclusion. The first question is what is meant by the words "artificially prepared." The wording of the latter part of the section forces one, in my view irresistibly, to the admission that mere mixture, breaking, grinding or chopping may, at any rate in some cases, (I do not say necessarily in all) amount to artificial preparation. This was not seriously disputed by Mr. Jenkins. On the other hand it seems impossible to hold that an article like hay or shelled peas has been "artificially prepared" within the meaning of this section, although there can be no doubt that the art of man has been exercised upon the natural product. The object of this section is to secure to a purchaser some idea of the ingredients of a substance, the composition of which is presumably not apparent, and the words

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"artificially prepared" must, I think, receive a construction wide enough to secure this result, while not going beyond it. I do not think it necessary to go as far as the dicta of Ridley J. in *Lathom* v. *Spillers & Bakers*. (1)

In sub-s. 1, dealing with "fertilisers," the phrase used is "subjected to any artificial process." This would include, though I do not say would be confined to, the case of an article which had been artificially treated without in any way losing its obvious identity. In sub-s. 2 this phrase is discarded in favour of the phrase "artificially prepared," and where an article has been artificially prepared the purchaser is entitled to a statement whether it has been prepared from one substance or seed or more. This seems to me to indicate that what is in view is an article "artificially prepared" from another or others in the sense of changing the recognizable form of the constituent or constituents. This would exclude the case of hay and the like but would include the cases which the subsequent part of the section compels us to treat as capable of inclusion, such as mixtures and the like, and among them the case most material for the present purpose, namely, that of meal of all sorts. It is to be observed that in the third sub-section the phrases used are "prepared from" and "the product of," again shewing that the word "prepared" may be used in the sense of making one article from another as opposed to merely treating an article which remains broadly the same. For these reasons I think that meal and similar products obtained by grinding grain are "artificially prepared."

So far the respondents in the present case did not resist the conclusion at which I have arrived, because they gave an invoice complying with the earlier part of the section. The question now arises, however, whether these sharps have been "artificially prepared otherwise than by being ground." Now, what is the object and policy of this exception of some articles from the further requirements of the section? It seems to me that the Legislature recognized that where you have a simple mixture of two or more substances, or a product the result merely of breaking, grinding or chopping, the purchaser knows what the constituents of the product are, for the natural products have been

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altered in form, and in form only, and not in composition, whereas if a further process has taken place, it might have caused some of the original constituents to disappear. I can see no other ground for the distinction drawn by the section between the articles of which a mere description and those of which a partial analysis is required to be given in the invoice. I therefore think that, when the product produced by, in this case, the grinding has been altered by the selection of some constituents and the rejection of the rest, the artificial preparation of the article offered for sale (which is the article we are dealing with) has included something more than the mere grinding; and it does not seem to me to matter whether the elimination of some of the constituents has taken place by mechanical means such as winnowing or sifting or by the application of heat or by chemical agency or otherwise. In the particular case (that of sharps) the sifting of the meal in fact produces commodities differing chemically from each other and from the original wheat. I am further unable to treat the sharps as being the product of the mere grinding of a distinct part of the grain. They are, as I understand the facts, an intermediate product between bran and flour, and contain (we were told) more or less flour adhering to the husky element. They are the result of a mechanical separation of the constituents of the whole meal which may be more, or may be less, exact, and contain more or less oil and albuminoids according as they contain less or more flour. I should not say for instance that ground oyster shells (to take an article of poultry food) were prepared otherwise than by grinding because the flesh of the oyster had been removed, nor ground peas because the pods had been removed. But I am unable to treat the part of the grain which finds its way into sharps as in the same category as empty oyster shells or shelled peas. I think a close examination of the language of the Act bears this out. The word "ground" must refer to the grain. The sharps have never been ground. There is no separate substance which can be ground and so become sharps. The grain has been ground and you do not thereby get sharps. But the section when it speaks of the article artificially prepared is speaking of the article sold to the customer, namely, the sharps, and yet it speaks of that

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article as being ground. To put it in another way, the article artificially prepared is spoken of as being "ground." It is the grain which is ground. The article "artificially prepared" is also ex hypothesi the article sold. It is the sharps which are sold. It seems to me clear that the draftsman was limiting his view to the case of an article existing both in an unground and a ground condition. There is nothing existing which represents unground sharps.

For these reasons I am of opinion that the appeal should succeed. I think sharps are really an extract of wheat produced otherwise than by being ground.

SHEARMAN J. read the following judgment:—The questions for our decision in this case are two: firstly, are sharps an article which has been artificially prepared within the meaning of s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906? Secondly, if yes, are they an article artificially prepared otherwise than by being mixed, broken, ground or chopped within the meaning of the same section? But for the phraseology of this section I should have entertained very little doubt but that sharps were a natural and not an artificially prepared article as they are a constituent part of the natural grain, the two other constituents of the whole being the flour and the bran. The words of the section, however, create some difficulty. The words are "artificially prepared otherwise than by being mixed broken ground or chopped," and these words seem at first sight to point to these four processes as being processes which the statute means to declare necessarily to be kinds of artificial preparation. With some doubt I have come to the conclusion that it is unreasonable to describe every kind of mixing, breaking, grinding or chopping as an artificial preparation. I do not think, for instance, that chopped hay or chopped swedes could reasonably be described as articles artificially prepared. I am, therefore, prepared with some hesitation to hold that the flour, sharps, and bran, produced by passing wheat through a mill, are natural articles and not articles artificially prepared. Assuming, however, that I am wrong in this opinion, I think it reasonably clear that sharps are a substance produced by being ground, and therefore

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in any event they come within the words of the section "articles prepared by being ground," the grinding is the substantial cause of their production, and after the grain is ground all that is done is to separate the total product into parts by passing it through sieves, and this produces flour, sharps, and bran, and these three substances all being constituent parts of the whole they, in my judgment, come within the exemption in s. 1, sub-s. 2, of the Act. For these reasons I think that the magistrates came to a correct decision in point of law and that their decision should be affirmed.

Appeal dismissed.

Solicitors for appellants: *Blundell, Gordon & Co., for S. Thornely, Worcester.*

Solicitors for respondents: *Timbrell & Deighton, for T. G. Dobbs, Worcester.*

F. O. R.

[COURT OF CRIMINAL APPEAL.]

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May 4, 11.

THE KING *v.* BOYLE AND MERCHANT.

Criminal Law—Demanding Money with Menaces—Threat to publish Attacks upon a Commercial Company—Evidence—Evidence of previous Offence—Admissibility—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 45.

The appellants, partly through an agent, made threats to the chairman of a company that attacks upon the company would be published in a paper, which would have the effect of reducing the market price of the shares, and the agent demanded payment of 600*l.* in gold as the price of refraining from such attacks:—

Held, that the appellants could properly be convicted, under s. 45 of the Larceny Act, 1861, of the offence of demanding money "with menaces with intent to steal the same."

Evidence was admitted at the trial to prove that a few months previously a transaction similar in all respects to that charged had been carried out by the same agent and a sum of money paid to him in gold:—

Held, that this evidence was properly admitted.

APPEALS from convictions at the Central Criminal Court.

The appellants were indicted under s. 45 of the Larceny Act, 1861 (1), for demanding money with menaces with intent to

(1) 24 & 25 Vict. c. 96, s. 45: "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony . . . ."

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steal the same. The prosecutor, R. W. Barnett, was the chairman of a company called the Roumanian Consolidated Oilfields, Limited, which had an issued capital of over a million. Attacks had been made upon the company in a paper called *Rubber and Oil* in July and August, 1913. In the following November the appellants, partly through one Carter, who was alleged to be their agent, made threats to Barnett that the attacks upon the company would be continued in *Rubber and Oil*, and that as the result of such attacks the market price of the shares of the company would easily be reduced by at least 5*s.* per 1*l.* share; and Carter demanded the sum of 600*l.*, to be paid in gold, as the price of refraining from so attacking the company.

At the trial evidence was admitted to prove that in the previous May a transaction in all respects similar to that charged against the appellants had been carried out by Carter, as a result of which one Newberry had paid a sum of 80*l.* in gold to Carter in order to prevent attacks being made upon another company in *Rubber and Oil*.

The appellants were convicted, and Boyle was sentenced to five years' penal servitude and Merchant to imprisonment without hard labour for eighteen months. They appealed against the convictions upon the grounds that the facts proved could not constitute the offence of demanding money with menaces within s. 45 of the Larceny Act, and that the evidence as to the transaction with Newberry had been improperly admitted.

J. A. Foote, K.C., and *Stomm*, for the appellant Boyle. To constitute "menaces" within the meaning of s. 45 of the Larceny Act, 1861, there must be threats of criminal violence or of injury to character; and, further, the threats must be of a character to put the person threatened into a state of fear which unnerves him and interferes with his volition and judgment. Here there were no threats of violence or of injury to character, but, at the most, only to do something which might injure property. The word "menaces" has been used in a series of statutes before the Act of 1861 (7 Geo. 2, c. 21, s. 1; 4 Geo. 4, c. 54, s. 5; 7 & 8 Geo. 4, c. 29, s. 6; 7 Will. 4 & 1 Vict. c. 87, s. 7). Those statutes were dealing with the crime of robbery with violence

and in the cases under those statutes it was held that "menaces" meant threats of personal violence or injury, or of injury to character, of such a kind as to induce terror: *Rex* v. *Jones* (1); *Rex* v. *Donnally* (2); *Rex* v. *Hickman* (3); *Rex* v. *Southerton* (4); *Reg.* v. *Smith* (5); 1 Hawkins P. C., 214 (ed. 1824); 1 Hale P. C., 532. The two latest cases upon this question are *Reg.* v. *Walton* (6) and *Reg.* v. *Tomlinson.* (7) In those two cases the meaning and operation of the word "menaces" in s. 45 of the Act of 1861 seems to have been rather extended, but not so far as to cover the present case. A threat of the kind here charged is not capable of being a menace within the meaning of the statute, and the learned judge ought to have so directed the jury. That is a question of law for the judge, and not a question which can be left generally to the jury.

The evidence in respect of the earlier transaction, when 80*l.* was paid by Newberry, was inadmissible and must have seriously prejudiced the case of the appellant. It was evidence that the accused had previously committed an offence similar to that for which they were being tried, and in this case it was not admissible under any of the rules which have been laid down as to the cases in which such evidence may be admitted.

The appellant Merchant, in person.

R. D. Muir, *Cecil Whiteley*, and *Leycester Muir*, for the Crown. The evidence as to the previous transaction with Newberry was admissible to shew that the acts charged in this prosecution were done with a criminal and not with an innocent intent, that the accused had been engaged in a course of blackmailing, and to meet the anticipated defence that the conduct of the accused was innocent and in good faith in the course of the business of the journal: *Reg.* v. *Ollis* (8); *Rex* v. *Bond.* (9) In the latter case Lord Alverstone C.J. stated that the established rule is that such evidence is admissible if it is "material to the question whether the acts alleged to constitute the crime were designed or accidental; or to rebut a defence which would otherwise be open

(1) (1776) 1 Leach, 139.
(2) (1779) 1 Leach, 193.
(3) (1783) 1 Leach, 278.
(4) (1805) 6 East, 126.
(5) (1850) 4 Cox, C. C. 42.
(6) (1863) 9 Cox, C. C. 268.
(7) [1895] 1 Q. B. 706.
(8) [1900] 2 Q. B. 758.
(9) [1906] 2 K. B. 389.

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to the accused." This evidence was also admissible to prove that Carter was an agent of the appellants.

The threats made in this case were "menaces" within the meaning of s. 45. The true test is that which is stated in *Reg.* v. *Walton* (1), where Wilde B. said that the proper limit of the operation of the section "is to be found in the words 'with intent to steal.' Nothing is said about violence in conjunction with menaces, still less of violence to the person as distinct from violence to property. . . . . The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates and take away from his acts that element of free voluntary action which alone constitutes consent." Any threat which induces fear and takes away from the person threatened the capacity to act voluntarily and freely, whether it is a threat of injury to the person, to character, or to property, may be a "menace" within the meaning of the section: *Reg.* v. *Smith* (2); *Reg.* v. *MacGrath* (3); *Reg.* v. *Robertson.* (4)

Cur. adv. vult.

May 11. The judgment of the COURT (Lord Reading C.J., Lord Coleridge and Sankey JJ.) was delivered by (5)

LORD READING C.J. The appellants were indicted with another person under s. 45 of the Larceny Act, 1861, which makes it a felony to demand money with menaces, or by force, with intent to steal the same. After a lengthy trial the three accused were convicted, and Boyle was sentenced to five years' penal servitude and Merchant to eighteen months' imprisonment without hard labour. Both appellants appeal against their conviction upon two grounds: (1.) That the facts, as proved, do not constitute the offence charged against them; (2.) that evidence was wrongfully admitted by the learned judge at the trial.

With regard to the first point the facts may be shortly stated as follows: The prosecutor, one Richard Whieldon Barnett, was chairman of a company known as the Roumanian Consolidated Oilfields, Limited, which had an issued capital of over a million

(1) 9 Cox, C. C. 268.
(2) 4 Cox, C. C. 42, 48.
(3) (1869) 11 Cox, C. C. 347.
(4) (1864) 10 Cox, C. C. 9.
(5) The judgment was written.

sterling. That company had been the subject of attacks in a paper known as *Rubber and Oil* upon July 28 and August 20, 1913. In the following November the appellants threatened to continue the attacks upon the company. They represented that they had done very well from the market standpoint out of an attack on a rival company, and that they thought a similar attack on the Roumanian Consolidated Company would easily reduce the market price of the shares by 5*s.* per 1*l.* share. They demanded from Mr. Barnett the payment of a considerable sum of money and the delivery to them of a large number of shares as the price of their silence.

It was contended by counsel for the appellants that these facts did not bring the conduct of the prisoners within the words of s. 45 of the Larceny Act, 1861. The answer to this contention depends upon the meaning to be attributed to the word "menaces" as used in that section. A number of old statutes and cases were cited to us with the object of establishing that a menace must either be a threat of physical violence or a threat of injury to character, and it was said that the threat used by the appellants did not come within either of these categories inasmuch as it amounted, at most, to a threat to depreciate the market value of the property of the shareholders of the company by adverse criticism or comment which would reduce the price obtainable in the market for shares in the company, but would not and could not affect the intrinsic value of the property of the company or its shareholders. We do not think that the meaning of the word "menaces" in the section is so restricted. Whatever may have been the view in earlier days under the older statutes and decisions a wider meaning has been given to the word by later decisions, beginning with *Reg.* v. *Walton* (1), decided by a very strong Court more than fifty years ago. That case was argued before Erle C.J., Blackburn and Keating JJ., Wilde B., and Mellor J. on an indictment under the same section of the statute now under review. In delivering the considered judgment of that Court Wilde B. laid down what we think is the true test. He said: "Where then is the proper limit to the operation of this section? It is to be found in the words 'with

(1) 9 Cox, C. C. 268.

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intent to steal.' Nothing is said about violence in conjunction with menaces, still less of violence to the person, as distinct from violence to property. There is no express limit except in the words ' with intent to steal.' " He then proceeds to discuss the incidents attending the demand of money or property which are necessary to constitute stealing. In the result he arrives at the conclusion that if a man is induced to part with his money or property through fear or alarm he is no longer a free agent and is no longer capable of parting with the property with his consent. If the threat was of a character to produce in an ordinary man such a degree of fear or alarm as would " unsettle his mind . . . . and take away from his acts that element of free voluntary action which alone constitutes consent," and was made with that intent, it would constitute the offence under the section now under consideration notwithstanding that the threat was not of physical violence or of injury to character. A similar view was taken of the meaning of the word as used in the previous section (s. 44) of the Larceny Act, 1861, by the Court for Crown Cases Reserved in *Reg.* v. *Tomlinson.* (1) Lord Russell of Killowen C.J. delivered a judgment wherein he held that the word " menaces " must be construed in a wide sense, and moreover that it was not confined to a threat of injury to the person or property of the person threatened. Some of the expressions used by Wills J. in that case may have gone too far, but we agree with him that the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind should receive a liberal construction in practice. We think it would be unwise to attempt to lay down any exhaustive definition of the words of the section. The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have greater effect upon his mind than a threat of physical violence. When there is evidence of such a threat as is calculated to operate upon the mind of a person of ordinarily firm mind, and the jury have been properly directed, it is for them to determine whether in fact the conduct of

(1) [1895] 1 Q. B. 706.

the accused has brought them within the section, and whether in the particular case the "menace" is established. If the threat is of such a character that it is not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind it would not be a menace within the meaning of the section. In our judgment when a man, with intent to steal, threatens either to do violence to the person of another, or to commit acts calculated to injure the property or character of another, it is a menace within the meaning of the section. Although in this case there has been some criticism of part of the direction of the learned judge upon this point, we think that in substance, and viewing the summing up as a whole, his direction to the jury was in accordance with the views that we have expressed and therefore any complaint of misdirection fails. In the judgment of this Court there was ample evidence fit for the consideration of the jury at the close of the case for the prosecution that the appellants were guilty of the offence charged. The learned judge was right in not stopping the case at that stage, and eventually was right in submitting the case to the jury. The Court is of opinion that the jury, upon a direction by the judge which we hold to have been proper and adequate, were entitled to find that the conduct of the appellants had brought them within the section, and the appeal on the first point therefore fails.

With regard to the second point the facts may be stated as follows: It was complained, in respect of the charge that the payment of the money, 600*l.*, had been demanded in gold, so as to conceal the names of the recipients and the transaction generally, that evidence had been admitted to prove that in the previous May a transaction of a character in all substantial respects similar to that charged had taken place, as a result of which one Newberry had paid over a sum of 80*l.* in gold to a representative of the paper *Rubber and Oil* and of the appellants. It was contended that such evidence was not admissible in law, and that, having been admitted, it seriously prejudiced the appellants, and therefore the conviction should be quashed. We are of opinion that the contention is wrong, and that the evidence

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was properly admitted. The learned counsel for the prosecution anticipated that a defence would be set up that the paper *Rubber and Oil* was conducted in good faith and as a legitimate journalistic enterprise, and that the conduct of the accused in relation thereto was inconsistent with any criminal intent, whereas the case for the prosecution was that upon the true state of the facts such a defence was wholly unfounded and untrue. That his anticipation was justified was shewn by the cross-examination of the witnesses for the Crown. The law regulating the admission of such evidence was authoritatively laid down by Lord Herschell L.C. in *Makin* v. *Attorney-General for New South Wales* (1) in the following passage: "In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other." No doubt differences of judicial opinion have arisen with regard to the application of this principle in subsequent cases: see *Reg.* v. *Ollis* (2) and *Rex* v. *Bond.* (3) In the latter case the prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution

(1) [1894] A. C. 57, 65. (2) [1900] 2 Q. B. 758.
(3) [1906] 2 K. B. 389.

to shew that some nine months previously the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to shew that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted and the prisoner was convicted.

We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to shew generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible : see *Reg.* v. *Rhodes* (1), per Lord Russell, C.J. and *Rex* v. *Ellis*. (2) In the recent case of *Rex* v. *Mason* (3) this Court followed the decision in *Reg.* v. *Rhodes* (1), and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible in order to rebut the defence set up. It would serve no useful purpose to discuss in detail the relevant facts in this particular case. It is sufficient to say that the prosecution's case was that the paper *Rubber and Oil* was carried on by the appellants for the purpose of making and enforcing such demands for money as were made in this case, and that it was not carried on as a legitimate journalistic enterprise, and that various devices were resorted to for the purpose of concealing the connection of the appellants with the operations of this paper : whereas one of the defences was that *Rubber and Oil* was a financial newspaper existing for the purpose of dealing

(1) [1899] 1 Q. B. 77. (2) [1910] 2 K. B. 746.
(3) (1914) 10 Cr. App. Rep. 169.

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with undertakings connected with rubber and oil, and that one of its legitimate functions was to comment upon and criticize the affairs of the company in question and its management by the chairman. Again, the case for the prosecution was that Carter in demanding the payment of the money, and in gold, was acting as the agent of the appellants, whereas the defence was a denial of this fact. Carter had acted as the agent of Boyle in demanding the 80*l.* from Newberry in gold. It became of distinct importance to determine which of these views was correct, and we are of opinion that upon the above-mentioned principles of law evidence was admissible of the circumstances of the payment of the 80*l.* in gold and of Carter's having acted as agent for the appellants in the matters relating thereto, as such evidence tended to rebut the defences of the accused. We are not attempting in this case to lay down any new principles of law. We are merely applying well-established principles to the particular facts of this case. For these reasons we are of opinion that the appeal fails and that the conviction must be affirmed.

Appeal dismissed.

Solicitors for appellant: *H. Wilson & Co.*

Solicitor for prosecution: *Director of Public Prosecutions.*

J. H. W.

THE KING *v.* THE LICENSING JUSTICES AND COMPENSATION AUTHORITY FOR THE CITY OF CHESTER.

Ex parte BENNION.

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May 18.

Licensing Acts—Renewal of On-Licence—Objection to Renewal—Reference of Question of Renewal to Compensation Authority—Report of Licensing Justices good on its Face—Allegation that Report wrongly made to Compensation Authority—Prohibition—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19.

Where licensing justices, acting under s. 19, sub-s. 1, of the Licensing (Consolidation) Act, 1910, refer the question of the renewal of an old on-licence to the compensation authority, together with their report thereon, the compensation authority are bound, under s. 19, sub-s. 2, to proceed with the consideration of the report, if it is good on its face, and a writ of prohibition will not lie prohibiting them from doing so on the ground that the licensing justices wrongly referred the question of the renewal of the licence to them.

RULE NISI calling upon the licensing justices and the compensation authority for the city of Chester to shew cause why a writ or writs of prohibition should not be awarded to prohibit the licensing justices from proceeding with the reference to the said compensation authority of the renewal of a licence to the applicant Sarah Bennion, and to prohibit the compensation authority from further considering such reference, on the ground that the necessary notice of objection to the application of the said Sarah Bennion for the renewal of her licence was not given, and that the licensing justices had no jurisdiction to hear evidence in opposition to such renewal or refer the licence for compensation.

It appeared from the affidavits filed on behalf of the applicant that Mrs. Bennion, the applicant's mother, was tenant and licensee of the King's Arms in the city of Chester—an old fully-licensed public-house—until her death on December 4, 1913. By her will Mrs. Bennion appointed Thomas Ledger and Elizabeth Scarratt her executors, and they obtained probate on January 6, 1914. On January 8, 1914, two notices, one signed by the clerk to the licensing justices and the other by the chief constable of Chester, and addressed "To the legal personal

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representatives of the late Mrs. Sarah Bennion of the King's Arms, Union Street, in the city of Chester, licensed victualler," were left at the King's Arms. Neither of Mrs. Bennion's executors lived there, but the applicant subsequently informed them that the two notices had been left. The notice signed by the clerk to the licensing justices stated that " should you intend to apply at the general annual licensing meeting for the city of Chester . . . . on Thursday the 5th day of February, 1914, for the renewal of the licence now held by you for the sale of intoxicating liquors by retail at the premises now occupied by you, [the licensing justices] require you to attend in person to make your application and to answer the undermentioned objections by the chief constable of the city of Chester to the renewal of your licence." The objections stated were that having regard to the character and necessities of the neighbourhood, &c., the house in question was not required. The notice signed by the chief constable was to the same effect. On February 5, 1914, the general annual licensing meeting was held, and the applicant, who had become tenant of the house, applied for and obtained a protection order to enable her to sell intoxicating liquor at the King's Arms until the next transfer day, which was fixed for March 5. On March 5 the applicant attended at the adjourned annual licensing meeting. Applications for transfers were taken first, and application was made for a transfer of the licence to the applicant, and this the licensing justices said they would grant. The applicant's solicitor then applied for a renewal of the licence to the applicant, contending that, as no notice of objection had been served upon her, the justices had no power to refuse the renewal unless they further adjourned the annual licensing meeting, and he cited *Blencowe* v. *Lord Hatherton and Others* (*Justices*) (1) in support of this contention. The justices, however, decided to hear evidence in opposition to the renewal. They accordingly heard the evidence of the chief constable on oath, and thereafter the justices referred the house for compensation and provisionally renewed the licence.

From the affidavits filed on behalf of the licensing justices it appeared that when the applicant attended before them on

(1) (1907) 96 L. T. 817.

February 5 and obtained a protection order, a police inspector stated that he objected to the renewal of certain licences, including that of the King's Arms, and that formal notices had been served, whereupon the justices announced that all those cases would be adjourned till March 5, on which date the applicants for renewal must attend. On March 5 the licensing justices expressed their willingness to grant a transfer, but no transfer was signed till the close of the meeting. When the applications for renewals were reached, the chief constable formally objected to the renewal of the licence of the King's Arms and gave evidence on oath to the effect that the licence was not required. The applicant's solicitor cross-examined the chief constable and put forward the contention which he had raised at the opening of the case, namely, that the notice of objection which had been served was not sufficient to enable the justices to deal with the objection, but he addressed the Bench on the merits and called the applicant, who gave evidence as to the amount and class of business done at the house. The justices were satisfied that the surviving executor of Mrs. Bennion—the other having died shortly before—had full knowledge of the notices of objection which had been served, and, further, was in Court on February 5 and heard what was then said, and in these circumstances they considered that sufficient notice had been given to enable them to deal with the matter without any further adjournment. They further were of opinion that if the applicant's solicitor could legally have insisted upon a further adjournment he had waived that right by going into the merits.

The rule nisi was granted on March 17, 1914, but before it was served upon the licensing justices, namely, on March 20, 1914, the licence of the King's Arms had been referred to the compensation authority for compensation.

G. R. Hill, for the licensing justices and compensation authority, shewed cause. (1) The applicant has pursued the

(1) He argued that the licensing justices were right on the merits of the proceedings before them, but it is unnecessary to set out the argument on this point in view of the way in which the Court dealt with the case.

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wrong remedy. Prohibition will not lie in the circumstances of this case. It has never been decided that prohibition will lie to licensing justices. The point was raised but not decided in *Rex* v. *Tolhurst* (1), but even if it lies in a proper case, it cannot lie in this case to the licensing justices, inasmuch as at the time when the rule was served upon them they had sent their report to the compensation authority and so were functi officio. The matter was then in the hands of the compensation authority, who alone could decide whether to extinguish the licence or not. Next, with regard to the rule directed to the compensation authority: doubts have been expressed whether prohibition will lie to them, but even assuming that it does lie in a proper case, it does not lie in this case. The compensation authority had before them a report from the licensing justices, good on its face, and by s. 19, sub-s. 2, of the Licensing (Consolidation) Act, 1910, their duty is to proceed with its consideration and come to a decision upon it: *Rex* v. *Somerset Justices, Ex parte Joyce.* (2) The applicant should have proceeded by mandamus to the licensing justices to hear and determine her application for a renewal according to law, but probably if the justices had heard it afresh they might send another report to the compensation authority.

[He was stopped.]

R. M. Montgomery, in support of the rule. In *Rex* v. *South Shields Justices, Ex parte Lovibond* (3) it was held that prohibition would lie to a compensation authority.

[*G. R. Hill.* That was because the compensation authority refused a renewal without hearing evidence.]

This Court must have jurisdiction to prevent a matter being dealt with by the compensation authority where a report has been improperly sent to them. Suppose that in a report sent by the licensing justices the name of a house which should not have been included was by some blunder included, it is clear

(1) [1905] 2 K. B. 478.

(2) Unreported. Decided by a Divisional Court on January 16, 1906. Referred to in a note to Paterson's Licensing Acts, ed. for 1914, p. 455.

(3) Unreported. Decided by a Divisional Court on May 16, 1906; see Paterson's Licensing Acts, ed. for 1914, p. 113.

that this Court would prohibit the compensation authority from proceeding to deal with it. In this case the report as to the King's Arms was wrongly sent to the compensation authority, no proper objection being taken to the renewal before the licensing justices, and prohibition ought therefore to go.

RIDLEY J. In my opinion there may have been good grounds for the objection taken by the applicant that a transfer had been granted to her, and that therefore she was the holder of a licence who had not received notice of objection to which she was entitled under s. 16, sub-s. 3, if a renewal was to be refused. It is, however, unnecessary to decide this and I express no definite opinion upon it, for in my view prohibition is not the proper remedy in the circumstances of this case. The Licensing (Consolidation) Act, 1910, s. 19, sub-s. 2, says that the compensation authority shall consider all reports made to them by the licensing justices, and upon the evidence before them come to a conclusion whether the premises are to be shut up and compensation awarded. That is the position which they occupy. The applicant for the rule in this case asks us to prohibit the compensation authority from doing that which the statute says they are to do. Mr. Montgomery, with much ingenuity, argued that by reason of the want of jurisdiction of the licensing justices who made the order referring the licence the order must be treated as bad, and therefore that the compensation authority must be prohibited from acting upon it. That, in my opinion, is an unsound view of the remedy by way of prohibition. Prohibition is granted to prevent tribunals from proceeding where they have no jurisdiction. But where, as here, and as in *Rex* v. *Somersetshire Justices, Ex parte Joyce* (1), the compensation authority have before them the report of the licensing justices which is prima facie a good report, the proper remedy, if it is suggested that the report ought not to have been made, is to apply to get it set aside, and not to proceed by way of prohibition against the tribunal which cannot do otherwise than act upon the report sent to them. The rule must be discharged.

1) Unreported.

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ROWLATT J. I am of the same opinion. Sect. 19, sub-s. 1, of the Licensing (Consolidation) Act, 1910, says that where the licensing justices are of opinion that the question of the renewal of any particular old on-licence requires consideration on grounds other than those on which the renewal of an old on-licence can be refused by them, they shall refer the matter to the compensation authority, together with their report thereon. Sub-s. 2 of the same section says that the compensation authority shall consider all reports so made to them. The construction of that seems to be quite clear. The compensation authority, when they get a report, are to proceed upon it. It was conceded by Mr. Montgomery that in the ordinary case the compensation authority have no option; they must proceed and deal with the matter, and no one can object to their doing so. But he says that if the reference has been made without proper notice of objection having been given in the first instance this Court can prohibit them from going on; in other words, that this Court can prohibit the compensation authority from proceeding with a matter which they cannot refuse to proceed with. A more grotesque view of the remedy by prohibition I have never heard of. Prohibition is granted to prevent an inferior tribunal usurping jurisdiction, and it involves this, that the inferior tribunal is doing something which it ought not to do. To say that the compensation authority can be prohibited from doing that which they could not have refused to do appears to be a contradiction in terms. It is easy to see why this step has been taken. Mr. Montgomery admitted that if steps were taken to make the licensing justices proceed properly, namely, to grant an adjournment and go into this objection as to which it is said no notice was given, he might not gain by the delay, for the justices might conceivably come to the same conclusion. Therefore he adopted this ingenious plan of trying to prevent the compensation proceedings taking place, so that the provisional licence might enure for the whole year. It is ingenious but it fails. I express no opinion on the point which would have arisen if the decision of the licensing justices had been attacked by mandamus because in my judgment that does not arise.

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SHEARMAN J. I am of the same opinion. It appears to me that the licensing justices made exactly the same slip as was made by the justices in *Blencowe* v. *Lord Hatherton and Others* (*Justices*) (1), and, speaking for myself, I think if the applicant had confined herself to asking the licensing justices to reconsider that decision because she had not been served with proper notice she would have succeeded; but, instead of asking that, she took this step of applying to prohibit the compensation authority from proceeding with the reference. The statute is clear. The house was referred to the compensation authority by the licensing justices, and by s. 19, sub-s. 2, of the Licensing (Consolidation) Act, 1910, their duty is to consider all reports sent to them. This report was sent to them and it was their duty to consider it. If the report is wrong proper steps should be taken to set it aside. It is clear that in a case of this kind prohibition will not lie.

Rule discharged.

Solicitors for applicant: *Davenport, Cunliffe & Blake, for W. H. Churton & Son, Chester.*

Solicitors for justices: *Chester, Broome & Griffithes.*

(1) 96 L. T. 817

J. S. H.

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Jan. 19, 20, 23, 27, 28, 29; *April* 8.

[IN THE COURT OF APPEAL.]

MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK, LIMITED.

[1912 M. 446.]

Bill of Exchange—Banker and Customer—Cheque—Authority to sign per pro. —Misuse of Authority—Forgery—Forgery Act, 1861 (24 *&* 25 *Vict. c.* 98), *s.* 24—*Crossed Cheque—Bank in Good Faith receiving Payment for Customer—Negligence—Ratification—Bills of Exchange Act*, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 25, 82.

A banker who in good faith collects a cheque signed per pro. is not negligent within the meaning of s. 82 of the Bills of Exchange Act, 1882, merely because he does not inquire into the drawer's authority.

Sects. 25 and 82 of the Bills of Exchange Act, 1882, are distinct from one another and have reference to different states of things, s. 25 to rights and liabilities while a bill is current, and s. 82 to rights and liabilities after it has been discharged.

A cheque signed per pro. by a person having authority so to sign cheques for specified purposes is not a forgery within s. 24 of the Forgery Act, 1861, because it is drawn for purposes outside and in fraud of the authority.

Reg. v. *White* (1847) 1 Den. C. C. 208 distinguished.

A., having authority to draw and sign cheques per pro. for the purposes of the plaintiff's business, paid in cheques so signed, for his own purposes and in fraud of the plaintiff, during a number of years, to his own account with the defendants, who, in good faith and without objection by the plaintiff, collected them in ordinary course and placed the proceeds to A.'s credit. The plaintiff sued the defendants for the amount of the cheques as damages for conversion or, alternatively, as money had and received:—

Held, that, in regard to crossed cheques collected after the first year or two, the defendants, having during one or two years collected cheques for A. without any protest from the plaintiff, were justified in assuming that A. was acting within his authority, and were protected by s. 82 of the Bills of Exchange Act, 1882, as having acted without negligence.

Held, also, upon the facts, that in regard to cheques collected during the first year or two the defendants were not liable because the plaintiff had subsequently, either himself or through his accountants, ratified the acts of A.

Decision of Lord Coleridge J. [1913] W. N. 84 reversed.

APPEAL from a decision of Lord Coleridge J. (1)

The plaintiff carried on business as an insurance broker in the

(1) [1913] W. N. 84.

name of Bruce Morison & Co. In 1888 he gave authority to one Abbott to draw cheques for the purposes of the business on the banking account of Bruce Morison & Co. at the National Provincial Bank, and to sign them in his (Abbott's) name "per pro. Bruce Morison & Co."; and he gave directions to the National Provincial Bank to honour cheques so drawn. In 1900 he appointed Abbott manager of his business in the city of London.

In 1905 Abbott opened a private banking account for his own purposes with the defendants without the plaintiff's knowledge, and from May, 1907, to November, 1911, paid into that account cheques, fifty in number and amounting to 1885*l.* 3*s.* 9*d.*, which he had drawn and, when necessary, indorsed by means of the "per pro." signature in fraud of the plaintiff. The cheques, with the exception of two open ones, were crossed either specially to the defendants or generally. They were collected in the ordinary way by the defendants and the proceeds placed to the credit of Abbott's account. About the beginning of 1912 the plaintiff discovered, and the defendants were first made aware, that Abbott had fraudulently drawn and applied the cheques for his own purposes. The plaintiff brought this action against the defendants for the 1885*l.* 3*s.* 9*d.* as damages for conversion of the cheques or, alternatively, as money had and received to the use of the plaintiff.

At the trial without a jury Lord Coleridge J. gave judgment for the plaintiff. The defendants appealed.

Sir R. Finlay, K.C., and *R. A. Wright*, for the appellants. The plaintiff based his claim in this action against the defendants upon s. 25 of the Bills of Exchange Act, 1882. (1)

(1) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25: "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

Sect. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

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But that section cannot be read without reference to s. 82. Lord Coleridge J. thought that the defendants had been guilty of negligence in their dealings with the cheques, as the signature per pro. should have put them upon inquiry as to the extent of Abbott's authority. But the answer is that they have acted in good faith and without negligence within the meaning of s. 82, and that section is a complete answer to the main part of the plaintiff's claim: *Bissell* v. *Fox* (1); *Hannan's Lake View Central* v. *Armstrong* (2); *Gompertz* v. *Cook* (3); *Bevan* v. *National Bank* (4); *Morison* v. *Kemp* (5); *Crumplin* v. *London Joint Stock Bank* (6); *Stagg* v. *Elliott* (7); *Reid* v. *Rigby*. (8)

If a bank in the case of a cheque signed by an agent per pro. has to inquire whether it was drawn within the limits of the authority of the agent, a banker's business could not be carried on under such conditions. [They referred to and discussed on this point *Morison* v. *Kemp* (5); *Attwood* v. *Munnings* (9); *Smith* v. *Prosser* (10); *Bissell* v. *Fox* (1); *Hannan's Lake View Central* v. *Armstrong* (2); and *Gompertz* v. *Cook*. (3)]

Upon the facts, it is impossible to say that there was any negligence on the part of the defendants in collecting without inquiry cheques paid in by Abbott. There would be no negligence even if there had been only one isolated transaction. But more than that. In 1909 the plaintiff condoned former irregularities of Abbott without informing the appellants. He had full means of knowing what was being done, he adopted and ratified the acts of Abbott, he gave no notice to the appellants, and the doctrine of estoppel applies; *Freeman* v. *Cook* (11); *M'Kenzie* v. *British Linen Co.* (12); *Morris* v. *Bethell* (13); *Barber* v. *Gingell* (14); *Bank of England* v. *Vagliano Brothers*. (15) If

(1) (1885) 53 L. T. 193.
(2) (1900) 5 Com. Cas. 188.
(3) (1903) 20 Times L. R. 106.
(4) (1906) 23 Times L. R. 65.
(5) (1912) 29 Times L. R. 70.
(6) (1913) 19 Com. Cas. 69.
(7) (1862) 12 C. B. (N.S.) 373; 31 L. J. (C.P.) 260.
(8) [1894] 2 Q. B. 40.
(9) (1827) 7 B. & C. 278.
(10) [1907] 2 K. B. 735.
(11) (1848) 2 Ex. 654.
(12) (1881) 6 App. Cas. 82.
(13) (1869) L. R. 5 C. P. 47.
(14) (1799) 3 Esp. 60.
(15) [1891] A. C. 107.

the plaintiff did not personally know the facts, his accountants must have known them. (1)

The plaintiff had no right of action at all, as he was not the drawer or true owner of the cheques within the meaning of s 82. If he was the owner and had the right of action, s. 82 is a complete answer to his claim, in regard to the later crossed cheques, as there was no negligence on the appellants' part.

Sect. 82 does not apply to the two uncrossed cheques. But as to those and the five early crossed cheques of 1907 and 1908 the plaintiff adopted and ratified the acts of Abbott and is effectually precluded by the doctrine of estoppel.

F. A. Greer, K.C., E. R. Bartley Denniss, and *H. A. H. Christie*, for the plaintiff. The plaintiff is only estopped as against his own bank, the National Provincial Bank, from saying that the cheques were paid without authority. Abbott had no general authority to draw cheques per pro. It was not within the authority given to him that he should draw cheques for his own purposes and not for the purposes of the business. The moment he drew cheques to pay gambling debts he was acting without authority. He could give no good title to the appellants. As against the appellants the drawing of the cheques was unauthorized. The Forgery Act, 1861 (2), makes the cheques forgeries, s. 24 having been enacted for the purpose of meeting the case of cheques fraudulently drawn by procuration. That Act makes the cheques statutory forgeries, and the drawing of them a criminal act, included as such in the Forgery Consolidation Act, 1913.

[PHILLIMORE L.J. The Act of 1861 was passed in consequence of *Reg.* v. *White.* (3)]

On the facts there has been conversion of the plaintiff's property by the appellants. As regards the two open or uncrossed cheques, as to which s. 82 offers no protection, there was clear conversion and there is no defence. The plaintiff has been deprived of fifty valuable pieces of paper which are his property. Damages can be given for such wrongful conversion. The

(1) The facts on the question of ratification are fully set out in the judgments.

(2) 24 & 25 Vict. c. 98, s. 24.

(3) 1 Den. C. C. 208.

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damages are the face value of the instruments; *Kleinwort* v. *Comptoir National d'Escompte de Paris* (1); *Lacave & Co.* v. *Crédit Lyonnais* (2); *Arnold* v. *Cheque Bank* (3); *Bavins* v. *London and South Western Bank* (4); *Bobbett* v. *Pinkett* (5); *Macbeth* v. *North and South Wales Bank* (6); *Great Western Railway* v. *London and County Banking Co.* (7); *Fine Art Society* v. *Union Bank of London* (8); *Capital and Counties Bank* v. *Gordon* (9); *Ogden* v. *Benas.* (10)

In the alternative, the appellants have had the plaintiff's money and he is entitled to sue them for money had and received.

Sect. 25 of the Bills of Exchange Act deals only with the question of a signature by procuration, and such a signature puts the person to whom the cheque is handed upon inquiry, and is notice that the authority to sign it is limited. It prevents the bank from becoming a bona fide holder without notice. Assuming, however, that the case does come within the purview of s. 82, the bank must still satisfy the Court that they have received payment for their customer without negligence. With regard to the six earlier cheques in 1907 and 1908 there was clear negligence, and there was negligence also with regard to all the other cheques: *Bissell* v. *Fox* (11); *Gordon* v. *London City and Midland Bank.* (12)

As to the alleged ratification by the plaintiff, the acts relied upon do not amount to ratification and, even assuming they did, there was not the knowledge which the law requires. The plaintiff's accountant was not an agent and his knowledge is not that of the plaintiff: *Kepitigalla Rubber Estates* v. *National Bank of India* (13); *Walker* v. *Manchester and Liverpool District Banking Co.* (14); *Kelly* v. *Solari.* (15) [They also referred to *Swan* v. *North British Australasian Co.* (16); *Lewes Sanitary*

(1) [1894] 2 Q. B. 157.
(2) [1897] 1 Q. B. 148.
(3) (1876) 1 C. P. D. 578.
(4) [1900] 1 Q. B. 270.
(5) (1876) 1 Ex. D. 368.
(6) [1908] 1 K. B. 13; affirmed [1908] A. C. 137.
(7) [1901] A. C. 414.
(8) (1886) 17 Q. B. D. 705.
(9) [1903] A. C. 240.
(10) (1874) L. R. 9 C. P. 513.
(11) 53 L. T. 193.
(12) [1902] 1 K. B. 242, 264, 275.
(13) [1909] 2 K. B. 1010.
(14) (1913) 108 L. T. 728.
(15) (1841) 11 L. J. (Ex.) 10.
(16) (1863) 2 H. & C. 175.

Steam Laundry v. *Barclay, Bevan & Co.* (1); *Carlisle and Cumberland Banking Co.* v. *Bragg* (2); *Russo-Chinese Bank* v. *Li Yau Sam* (3); and *Smith* v. *Prosser.* (4)]

Sir R. Finlay, K.C., in reply. This is not a case of forgery but of abuse of authority.

There was ratification by the plaintiff within the authorities; he had a general knowledge of what was going on, and it was his fault if he did not go into details: *M'Kenzie* v. *British Linen Co.* (5); *Howard* v. *Duncan* (6); *Union Bank* v. *Middlebrook* (7); *Brook* v. *Hook.* (8)

Sect. 25 of the Bills of Exchange Act only operates to give the party to the instrument a defence to the action on the instrument in certain events and has no application where the instrument has been paid. It is here attempted to extend the section, and to do so would have extraordinary consequences.

There was no conversion by the appellants. The claim for conversion is unsustainable on the facts. Where a cheque has been cashed and it is sought to recover the money, the claim must be made promptly: *London and River Plate Bank* v. *Bank of Liverpool* (9); *Imperial Bank of Canada* v. *Bank of Hamilton* (10); *Holland* v. *Russell.* (11) The plaintiff was not the owner of the cheques, and even if he was he cannot get their face value as damages for conversion.

Nor can the alternative claim for money had and received be sustained. Money which an agent has, in good faith and without notice of anything being wrong, paid over to his principal cannot be recovered from the agent: *Newall* v. *Tomlinson* (12); *Bavins* v. *London and South Western Bank.* (13)

The defendants, in indorsing a cheque drawn in favour of themselves "or order," were not exercising any dominion over it and making it their own, but were only doing what was

(1) (1906) 11 Com. Cas. 255.
(2) [1911] 1 K. B. 489.
(3) [1910] A. C. 174.
(4) [1907] 2 K. B. 735.
(5) 6 App. Cas. 82.
(6) (1870) 3 Lansing's New York Rep. 174.
(7) (1865) 33 Connecticut Rep. 95.
(8) (1871) L. R. 6 Ex. 89.
(9) [1896] 1 Q. B. 7.
(10) [1903] A. C. 49.
(11) (1863) 4 B. & S. 14.
(12) (1871) L. R. 6 C. P. 405.
(13) [1900] 1 Q. B. 270.

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incidental to the main object of collection: *Gordon* v. *London City and Midland Bank.* (1)

[PHILLIMORE L.J. Either they were cheques and the plaintiff was the true owner, or they were not cheques and the defendants were getting money on forged documents and could not retain it, but must replace it if claimed in due time. There is the dilemma.]

Mere presentation of a negotiable instrument is no warranty of the genuineness of the signature: *Starkey* v. *Bank of England* (2); *Collen* v. *Wright* (3); *Bank of England* v. *Cutler* (4); *Imperial Bank of Canada* v. *Bank of Hamilton.* (5)

[LORD READING C.J. referred to *Sheffield Corporation* v. *Barclay.* (6)]

Cur. adv. vult.

1914. April 8. LORD READING C.J. The plaintiff brought his action to recover 1885*l.* 3*s.* 9*d.* damages for the conversion of fifty cheques drawn upon and honoured by the National Provincial Bank for his account, or alternatively for the same amount as money had and received by the defendants to his use. At the trial of the action without a jury, Lord Coleridge J. gave judgment for the plaintiff against the defendants for the amount claimed, and the defendants appeal from that judgment.

The plaintiff carried on business as an insurance broker in the city of London in the name of Bruce Morison & Co. In 1888 he gave authority to one Harry Abbott, who had been some years in his employment, to draw cheques for the purpose of the plaintiff's business on the banking account of Bruce Morison & Co. at the National Provincial Bank, and to sign them "per pro. Bruce Morison & Co., H. Abbott," and the plaintiff gave written directions and authority to such bank to honour for his account all cheques so signed by Abbott. From 1888 until the end of 1911 Abbott signed cheques per procuration for the plaintiff which were duly honoured. In 1900 the plaintiff, who continued

(1) [1902] 1 K. B. 242, 275, 276.
(2) [1903] A. C. 114.
(3) (1857) 8 E. & B. 647.
(4) [1907] 1 K. B. 889; affirmed [1908] 2 K. B. 208.
(5) [1903] A. C. 49.
(6) [1905] A. C. 392.

to have implicit confidence in Abbott, appointed him manager of his business in the City, and thenceforward until the end of 1911 Abbott acted as manager of such business. About January, 1912, the plaintiff discovered that Abbott by means of the "per pro." signature had drawn a number of cheques on the plaintiff's aforesaid banking account, and had fraudulently applied the same to his own use. In June, 1905, Abbott had opened a banking account in his own name for his own private purposes and without the knowledge of the plaintiff at the Euston branch of the defendant bank. He was introduced to the defendants by one of their staff as the manager of a firm of insurance brokers. He continued to draw cheques upon and pay cheques into this account with the defendants until the beginning of 1912, when the defendants were first made aware that Abbott had grossly abused the plaintiff's confidence, and had by means of the "per pro." signature drawn a number of cheques for his own purposes on the plaintiff's account at the National Provincial Bank, which had been duly honoured. It appeared that from May 29, 1907, until November 23, 1911, fifty cheques so drawn, and when necessary so indorsed, for sums amounting, in the aggregate, to 1885*l.* 3*s.* 9*d.* had been paid by Abbott into the defendants' bank at Euston for collection by the defendants on his behalf. All the said cheques were crossed, with the exception of two open or uncrossed cheques; forty-six were crossed generally, and two were crossed to the defendants. The said sums were collected in the ordinary way by the defendants during the said period from the National Provincial Bank, and the plaintiff's account was duly debited with the same. The plaintiff makes no complaint against the National Provincial Bank. It is clear that they were bound in pursuance of the directions and authority given in 1888 to honour the said cheques on his account. The defendants placed the amount of such cheques to the credit of Abbott's account with their branch as and when they were paid in, and Abbott drew against them when the cheques had been cleared. During the currency of his banking account with the defendants Abbott paid in other moneys and cheques. It was, as the manager said, not a very active account, but a satisfactory account from the bank's point of view. Abbott drew cheques

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against his credit balance with the defendants which were in the ordinary course duly honoured by them.

Upon these facts the plaintiff, in my judgment, is entitled, prima facie, to recover the sum claimed, either as damages for conversion or as money had and received. Lord Ellenborough in *M'Combie* v. *Davies* (1) said: "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect." This principle has been frequently applied in actions to recover the proceeds of cheques or other negotiable instruments for the payment of money, collected by a bank without authority. (See *Gordon* v. *London City and Midland Bank* (2) and *Fine Art Society* v. *Union Bank of London* (3) and cases therein cited.) In the present case the defendants were not mere intermediaries but became the holders of the cheques when these were issued to them by Abbott. It is not disputed that the defendants received them in good faith, but it is contended that they received them from a person who had no authority to draw them or to issue them to the defendants and could give no title, or only a defective title, to the defendants. The cheques were at all times, until issued, the property of the plaintiff. They never were the property of Abbott, who had no title to them. The defendants, having received the cheques for collection on behalf of Abbott, presented them, and obtained the proceeds from the plaintiff's bank, and applied the same to the credit of Abbott's account. Abbott had no account at the National Provincial Bank, and was only in possession of the cheque forms as manager for the plaintiff. When he had filled up the forms and signed them "per pro. Bruce Morison & Co." the plaintiff was the true owner of the instruments, and Abbott had no authority to dispose of the cheques for his own purposes, or to pay them into his own banking account. They came into existence as cheques on the plaintiff's banking account by the fraud of Abbott and were issued by him to the defendants in fraud of the plaintiff. The defendants collected the proceeds, and their right to retain the money so collected

(1) (1805) 6 East, 538, at p. 540. 265.
(2) [1902] 1 K. B. 242, at pp. 264, (3) 17 Q. B. D. 705.

must depend upon the validity of Abbott's title to the cheques, and, if such title was invalid, upon the protection of s. 82 of the Bills of Exchange Act, 1882. In my judgment the defendant's title to such cheques was defective as Abbott issued them to the defendants in fraud of the plaintiff. The defendants dealt with them in a manner inconsistent with the rights of the plaintiff, who was the true owner, and are liable to him for the conversion of his property.

Damages for such conversion may be, and in my opinion are, in this case the face value of the instruments. The plaintiff is entitled to compensation for the loss he has sustained by reason of the conversion, and that loss is the equivalent of the amounts paid to the defendants by the National Provincial Bank and debited to the plaintiff's banking account. The defendants have wrongfully obtained money on valuable instruments of the plaintiff, and his banking account at the National Provincial Bank has been depleted to the amounts paid on the cheques. The plaintiff has lost the sums which the defendants have wrongfully received, and the plaintiff is therefore entitled to recover such sums as damages for the conversion. That such damages may be given for the conversion of a cheque or bill of exchange has been decided in many cases. (See *Bobbett* v. *Pinkett* (1); *Fine Art Society* v. *Union Bank of London* (2); *Kleinwort* v. *Comptoir National d'Escompte de Paris* (3); *Bavins* v. *London and South Western Bank* (4); *Capital and Counties Bank* v. *Gordon* (5); *Macbeth* v. *North and South Wales Bank* (6).)

The same result would be reached by the plaintiff upon the alternative claim for money had and received. The plaintiff is entitled to waive the tort and sue for the same amount as money had and received to his use: *Hollins* v. *Fowler*. (7) In this case, as he is clearly entitled to recover on the claim for conversion, he need not rely upon the alternative count. It may be that the claim in trover of the cheque is a somewhat artificial and cumbrous way of arriving at the remedy, but it is well established

(1) 1 Ex. D. 368.
(2) 17 Q. B. D. 705.
(3) [1894] 2 Q. B. 157.
(4) [1900] 1 Q. B. 270.
(5) [1903] A. C. 240.
(6) [1908] 1 K. B. 13; affirmed [1908] A. C. 137.
(7) (1875) L. R. 7 H. L. 757.

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by a long series of authorities. The law regards the substance of the transaction and gives an adequate remedy for the wrong.

The plaintiff further contended that the signatures per procuration by Abbott to the cheques were forgeries, and that therefore the instruments were nullities and the defendants could not retain the proceeds obtained by means of forged instruments. In fact the signature was the genuine signature of Abbott in the form authorized by the plaintiff. The forgery was, as alleged by the plaintiff, in the misuse of his authority to sign cheques per procuration, as this amounted to the making of a bill per procuration without lawful authority or excuse and with intent to defraud, and it was contended that all the necessary elements of a statutory forgery under 24 & 25 Vict. c. 98, s. 24, were thus present. I cannot accept this contention. The National Provincial Bank, the plaintiff's bankers, were admittedly bound to honour the cheques so signed by Abbott under the direction or authority given to them by the plaintiff in 1888. The cheques bore genuine signatures by Abbott, notwithstanding that these were made by Abbott with the intention of misapplying the cheques and the proceeds. If, as is admitted, the National Provincial Bank were entitled and indeed bound to honour cheques so signed, these were valid instruments for that purpose, and if so they cannot be forgeries in the hands of the defendants. The signature to a cheque cannot be a valid signature in the hands of one person and a forgery in the hands of another ; it cannot be valid to-day and a forgery to-morrow, although in some circumstances by the application of the doctrine of estoppel a person whose money has been wrongfully obtained by a forgery might be precluded from setting it up. In my judgment, the statute mentioned does not make it a forgery if a genuine signature is affixed by a person who indicates on the face of the document that he signs per procuration on behalf of another, notwithstanding that the authority so to sign has been misused and fraudulently used. Sect. 24 was passed to meet the difficulty created by the decision in *Reg.* v. *White* (1), where it was held that a person who signed the name of another per procuration could not be convicted under s. 39 of the statute 11 Geo. 4 &

(1) 1 Den. C. C. 208.

1 Will. 4, c. 66. The recent case of *Rex* v. *Holden* (1) does not assist the plaintiff. It decides that a partner who had no authority to sign the firm name to a bill and makes and issues a bill signed with his partner's name without authority and also with his own name is guilty of forgery. The question we are considering is whether Abbott in so drawing and issuing the cheques had committed the crime of forgery, and not whether he had committed a criminal offence.

To the claim thus prima facie established by the plaintiff, the defendants set up a defence based upon the protection afforded by s. 82 of the Bills of Exchange Act, 1882, to bankers who collect payment of cheques for their customers, if the bankers have acted in good faith and without negligence. The defendants' good faith is not questioned, but it is contended that they did not act without negligence. Lord Coleridge J., being of opinion that s. 25 of the Bills of Exchange Act, 1882, must be read with s. 82, came to the conclusion that the defendants were put upon inquiry by the mere fact that the cheques bore a signature per procuration, and that, as the defendants failed to make inquiry, they cannot be held to have acted without negligence. I do not agree with this view of the effect of s. 25. Sect. 82 only comes into operation when a banker receives payment of the proceeds for his customer and therefore when the cheque has been honoured. The effect of s. 25 is that, notwithstanding the negotiable character of the instrument and the obligations upon the signatory to such an instrument to holders and more particularly to a holder in due course, and notwithstanding the authority given by the principal to the agent to sign negotiable instruments per procuration so as to bind the principal, the principal is not liable upon the instrument, even to a holder in due course, if the agent in so signing the cheque has exceeded the actual limits of his authority. The principal in such circumstances and before the instrument is honoured could refuse to pay the cheque or bill upon presentation, and would have a good defence to a claim, even when made by a holder in due course, upon the cheque or bill. I agree with Lord Coleridge J. that this section is declaratory of the common law (see *Stagg* v. *Elliott* (2)), but it does not, in my

(1) [1912] 1 K. B. 483. (2) 31 L. J. (C.P.) 260; 12 C. B. (N.S.) 373.

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judgment, extend beyond it or alter it. When a bill so signed in excess of authority has been honoured, s. 25 does not confer a right to recover the proceeds. If such a right exists in the particular case it must be found elsewhere. Nevertheless, the fact that the signature to the cheques is made per procuration, and is not the signature of the principal, is not to be entirely disregarded. In my opinion, when considering whether the bank has acted without negligence, it is to be borne in mind with other facts and circumstances. It is also to be observed that Lord Coleridge J. did not rely exclusively upon his view of s. 25 as bearing upon s. 82, for in a later part of his judgment he refers to the payment in of these cheques by the agent to his private account at another bank as another circumstance which should have caused the bank to make inquiries. Whether or not the evidence establishes that the bank did not act without negligence is a question of fact, and in strictness should be determined separately with regard to each of the fifty cheques signed by Abbott.

With reference to the earlier transactions, limited to the years 1907 and 1908, I agree with the decision of Lord Coleridge J., that the defendants did not act without negligence. The proceeds of six cheques were collected in these two years for Abbott by the defendants. The first was an open or uncrossed cheque to which s. 82 does not apply. The next three were drawn to "selves or order" and indorsed by Abbott per procuration. The other two were made payable to "Abbott or order" and were indorsed by Abbott. The defendants knew that Abbott was manager to a firm of insurance brokers, and the signature on the cheques was express notice to them that he was purporting to act in the signing and indorsing of these cheques as agent. The most cursory examination would have shewn the defendants that they were collecting payment for their customer of cheques drawn by him as agent upon the account of his principal at another bank, and that the first three of these crossed cheques were made payable on the face of the instruments to the principal or order and issued to the bank by means of the indorsement of the agent purporting to act for the principal. For a firm to pay salary or commission or any debt to a manager by cheques made payable to the firm or order, and for a manager to pay cheques so drawn to his own

private banking account after himself indorsing them as agent for the payees, appear to me transactions so out of the ordinary course that they ought to have aroused doubts in the defendants' mind and caused them to make inquiry. Sir Robert Finlay argued that the Courts had only deprived bankers of the immunity afforded to them by s. 82 when the cheques collected by the bank were signed by third persons in favour of the principal, and he sought thus to distinguish this case from *Bissell* v. *Fox* (1), *Hannan's Lake View Central* v. *Armstrong* (2), *Gompertz* v. *Cook* (3), *Bevan* v. *National Bank* (4), and other such cases, but I can see no distinction in principle between these authorities and the present case. They are merely instances of the application of the principle of law to the facts and circumstances of particular cases.

Different considerations apply, however, to the collection of the later cheques issued in 1909, 1910, and 1911. No question had been raised in reference to the cheques paid in to Abbott's account in the preceding two years, and any doubt or suspicion which the defendants ought to have had of these earlier transactions would have disappeared by this time. I cannot think that the defendants were guilty of negligence in not making inquiries in reference to these cheques after their experience of Abbott's transactions with them in the preceding two years. It is true that the plaintiff owed no duty to the defendants to examine his pass-books or check his accounts with them or with Abbott, but, when we are asked to find as a fact that the defendants were negligent, it is necessary to consider all the circumstances, and in my judgment, as these transactions were only repetitions of those of the previous years which had passed unchallenged, the defendants should not be deprived of the protection of the statute. During these later years the defendants collected for Abbott's account the proceeds of forty-four cheques signed by him per procuration for the plaintiff, most of which were drawn to the defendants or bearer, as appears from the following list: One dated August 27, 1909, not crossed and therefore not within s. 82; five were drawn to "selves or order";

(1) 53 L. T. 193.
(2) 5 Com. Cas. 188.
(3) 20 Times L. R. 106.
(4) 23 Times L. R. 65.

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four to "Abbott or order"; one to "defendants or order"; one to "bearer"; one to "selves or bearer"; one to "Abbott or bearer"; and thirty to "defendants or bearer." It is argued by the plaintiff that, as the amounts so collected increased yearly, this was an additional circumstance which established the negligence of the defendants. By reference to Abbott's banking account with the defendants it will be seen that the cheques of the plaintiff paid in by Abbott to the credit of his account had increased in number and amounts every year since 1907. The summary is as follows: 1907, two cheques, 82*l.*; 1908, four cheques, 188*l.* 17*s.* 6*d.*; 1909, nine cheques, 260*l.*; 1910, twelve cheques, 591*l.* 6*s.* 3*d.*; 1911, twenty-three cheques, 763*l.*, making a total of fifty cheques of the value of 1885*l.* 3*s.* 9*d.* This yearly increase would not of itself arouse doubt or suspicion. Abbott's salary or commission or share of profits might easily have risen in amount, and as each year passed there would appear to be less and not more reason for inquiry. In my judgment, therefore, the defendants are entitled to the protection of s. 82 and are not liable to the plaintiff in this action in respect of the forty-three crossed cheques during the three later years.

I have now further to consider the position of the parties in reference to the earlier crossed cheques and the two uncrossed cheques. For the defendants it was contended that upon the facts proved, and even assuming that they had been negligent in not making inquiry, they were not liable in this action because the plaintiff had ratified the acts of Abbott.

The main additional facts necessary for the determination of this point are as follows: It was the practice of the plaintiff to have a yearly balance-sheet prepared and presented to him by his accountants, Messrs. Blakemore & Co. In 1908 it was discovered that there was a considerable deficiency in the capital of the firm, and in August, 1908, Abbott admitted that he was responsible for the shortage and explained that he had lost it by speculating in the name of the firm. The plaintiff was not satisfied with the explanation and thereupon determined to have a thorough investigation of the affairs of the firm by his accountants. According to his statement, having given

these instructions to them, he left himself entirely in their hands. By a letter of August 12, 1908, to the accountants the plaintiff pointed out that "surely the losses should be proved by cheques that must have been drawn." In the end, and at some time in 1908, it was agreed that the deficiency then ascertained at 5929*l.* should be dealt with for the year 1907 by debiting Abbott in the balance-sheet for that year with 2929*l.* and goodwill account with 3000*l.* It is plain that the mere examination of the cheques and the most rudimentary investigation into the accounts and pass-books of the plaintiff's firm and Abbott's private account with the firm would have shewn that Abbott for his own purposes had drawn the two cheques on the plaintiff's banking account which are the earliest in date of the fifty now in issue. When in 1909 the balance-sheet was being drawn up for 1908 it was discovered that there was a debit balance in Abbott's private account for that year with the plaintiff's firm of 306*l.* 0*s.* 4*d.*, and again the most elementary examination of the vouchers and accounts would have disclosed Abbott's wrongful dealings with the cheques, and that three out of the four cheques in 1908 involved in this action appeared in that account, and that the other would be found in an account called the exchange cheque account in the plaintiff's books. The plaintiff has stated, and the learned judge has found, that the plaintiff personally had no knowledge that Abbott was paying cheques signed per procuration into his own private banking account, but it must, in my judgment, be assumed that the accountants in whose hands he had left the whole matter had such knowledge. The accountants were in Court, but were not called to give evidence. In my opinion, as the duty was entrusted to them of investigating the accounts and of preparing and drawing the balance-sheets for 1907 and 1908, and as those wrongful drawings by Abbott appeared upon the surface of the accounts, and must have been discovered by any accountants who did their duty, it must be assumed that they did discover these transactions and had knowledge of Abbott's wrongful dealing with these cheques. For the plaintiff Mr. Greer contended that this assumption could not be made without imputing to the accountants that they were parties

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to Abbott's frauds. I do not agree with that contention and do not come to any such conclusion, but I think the Court must assume, in the absence of evidence to the contrary, and upon the plaintiff's evidence that he was not aware that they had been negligent, that they did their duty and not that they failed to do it, and therefore that they must have ascertained that these cheques were being drawn on the plaintiff's banking account and paid by Abbott into his account with the defendants for his own purposes. In my opinion, although the plaintiff did not himself know that Abbott had been paying these moneys into his private account with the defendants, the persons to whom the plaintiff had entrusted the matter did know it. The plaintiff undoubtedly was aware on September 30, 1909, that Abbott had defrauded him by drawing cheques on the plaintiff's banking account and applying them to his own purposes. He had received the balance-sheet for the year 1908 on September 28, 1909, and had become aware that Abbott was debited in that balance-sheet for cheques wrongfully drawn and used by him in 1908. The plaintiff then knew that there was a private account with Abbott in the books of the plaintiff's firm and that items representing cheques wrongfully drawn by Abbott on the plaintiff's banking account, including cheques drawn in 1909, appeared in such private account. The plaintiff at this time knew of the repeated dishonesty of his servant, but thought in his own words "that Abbott was not dishonest at heart and would go straight after a severe lesson and would retrieve his position." If the plaintiff did not know all the details of the dishonesty it was because he was content to leave them to the accountants. In consequence of the discovery of the dishonesty of Abbott a new agreement between the plaintiff and Abbott was drawn up dated November 16, 1909, "inter alia" to regulate drawings in the future by Abbott. Abbott thereby agreed not to draw any moneys except as specified in the agreement, or to incur any liabilities without the plaintiff's previous sanction except in the ordinary business transactions of the firm, and it was further agreed that the balance-sheet issued by the accountants of December 31, 1908, was to be the basis of the accounts between Abbott and the plaintiff. The cheques representing the 306*l.* 0*s.* 4*d.* were treated for the purpose of the

accounts as drawn upon the plaintiff's account at the National Provincial Bank and as items to be debited to Abbott in the accounts of the plaintiff's firm, and I come to the conclusion upon these facts that the plaintiff must be held to have ratified these transactions of Abbott, and therefore that the plaintiff's claim in respect of the cheques for 1907 and 1908 and the uncrossed cheque for 1909 fails.

As I am clearly of opinion that the plaintiff is entitled to maintain his action for damages for conversion of the cheques and is not driven to rely upon the alternative count for money had and received to the plaintiff's use, it is unnecessary to deal in detail with the points raised by Sir Robert Finlay in answer to the alternative claim. They would, in my judgment, in themselves form no answer to the alternative claim. I content myself with expressing my view that the principle in *London and River Plate Bank* v. *Bank of Liverpool* (1) and not that in *Holland* v. *Russell* (2) governs this case.

The addition of the words "not negotiable" and in some cases "not negotiable account payee" to some of the crossed cheques under consideration has, in my opinion, no bearing upon the matters to be decided in this case. The protection of s. 82 is afforded to crossed cheques marked "not negotiable" as well as to cheques not so marked. It is certainly not conclusive evidence of negligence against a banker who collects crossed cheques so marked (see *Gordon* v. *Capital and Counties Bank* (3)). Even if I assume that the taking of a crossed cheque bearing these words would be some evidence of negligence, it could not affect my decision upon the later cheques, as the other considerations to which I have referred would outweigh any value I could attribute to such evidence.

The words "account payee" never appear upon any of the crossed cheques made payable to "selves or order" or to "selves or bearer." They are only to be found on the crossed cheques made payable to "Abbott or order," "Abbott or bearer," defendants "or bearer," and defendants "or order." The words "account payee" are a direction to the bankers collecting payment that

(1) [1896] 1 Q. B. 7. (2) 4 B. & S. 14.
(3) [1902] 1 K. B. 242, at p. 275.

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the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque. They do not, on the facts of this case, afford any evidence of negligence, for if, as the defendants thought, Abbott was entitled to issue the cheques to the defendants for collection, the directions to them by the addition of these words would be quite natural and correct. In one case (January 27, 1911) a cheque so marked was made payable to the defendants "or order" and was indorsed by their manager per procuration for them, and the proceeds, when collected, were credited to Abbott's account. It was argued that this indorsement was a wrongful dealing by the defendants with the cheque outside the protection of s. 82, but in my view the indorsement by the defendants was made in the ordinary course and merely for the purpose of collecting the proceeds. It was unobjectionable if, as they thought, Abbott was entitled to issue the cheque to them, and the plaintiff's claim on this cheque stands or falls with the other cheques.

I am of opinion, therefore, that this appeal should be allowed with costs, and that judgment should be entered for the defendants with costs.

BUCKLEY L.J. I am also of opinion that this appeal succeeds. As we are differing with the learned judge from whom this appeal is brought, I add a few words of my own upon some of the points which have been argued before us.

The authority which Morison gave to the National Provincial Bank of England on April 7, 1888, was in general terms. There is no question but that, as between Morison and the National Provincial Bank of England, the cheques signed per pro. by Abbott were effectual, and the bank were entitled and bound to pay them. Under these circumstances it is impossible to say that the instrument was not a cheque. As between Morison and the National Provincial Bank of England, it was a cheque and not a forged instrument. A document cannot be a forged instrument as between certain persons and not as between others. The decision in *Rex* v. *Holden* (1) does not, I think, apply. The

(1) [1912] 1 K. B. 483.

instruments were Morison's cheques, and none the less because they were cheques drawn in fraud of Morison.

The next question is whether Morison was the true owner of the cheques. If he was not, the defendants cannot be liable in conversion. If he was, then s. 82 of the Bills of Exchange Act, 1882, applies, unless the words "true owner" in that section bear some meaning different from that which they bear when the subject under consideration is conversion. Having regard to what Lord Halsbury said in *Great Western Railway* v. *London and County Banking Co.* (1) it seems to me that I ought not to draw a distinction between the title to the cheque itself and the title to the money obtained or represented by it. In the case referred to the cheque was one drawn by the appellants, the Great Western Railway Company. The bank were held liable to them for the amount of the cheque. In *Ogden* v. *Benas* (2) the plaintiff was again the drawer, and he recovered upon the footing that the money paid was money of the plaintiff which the defendant had no right to receive, and that consequently the plaintiff was entitled to recover it back.

Next, treating the plaintiff as true owner of the cheque within s. 82, does s. 25 apply to a case in which the instrument has served its purpose and the money has been paid under it? Can the principal then claim to recover the money on the ground, in the words of s. 25, that he is not bound by the signature because the agent was not acting within the limits of his authority? Sir Robert Finlay has argued, and I think his argument is sound, that s. 25 is not addressed to that case. In any action brought upon the instrument s. 25 applies. But to such a case as the present it has no application. The section is found as one of a group of sections dealing with the capacity and authority of the parties as persons concurring in the instrument. It goes, I think, to the validity of the instrument as an instrument. It does not deal with the case of rights arising in respect of the disposition of the proceeds when the instrument has served its purpose and the amount has been paid. In considering, therefore, s. 82 as a defence, I think s. 25 may be set out of consideration.

(1) [1901] A. C. 414, at p. 418. (2) L. R. 9 C. P. 513.

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There remain those which are to my mind the important points of this case, namely, the questions, first, whether there was negligence; secondly, whether there was ratification; and thirdly, whether Morison, with the knowledge which he had, can render the defendants liable for the loss which he sustained by continuing to employ a dishonest agent. For convenience I collect the main significant dates upon these points. The first agreement of employment was on November 2, 1900. Abbott's account with the defendants was opened in June, 1905; the first relevant cheque was on May 29, 1907, 26*l.* The second was on June 10, 1907, 56*l.* The balance-sheet of December 31, 1907, disclosed the 5929*l.*, of which 2929*l.* was debited to Abbott and 3000*l.* to goodwill. On August 12, 1908, Morison wrote a letter of that date to the accountants, from which it is plain that he knew that Abbott had lost money (as he said) in speculation. By that letter Morison urged that the losses should be proved by cheques which must, he said, have been drawn, and added that he ought to know that the money lost was actually lost in speculation and not used for any other purposes. The two cheques of 26*l.* and 56*l.* must, of course, have formed items in arriving at that balance-sheet. The balance-sheet further contained under the head of "Sundries, 3*l.* 1*s.* 9*d.*," that which was at December 31, 1907, the balance of the exchange cheques account. The balance-sheet to December, 1907, was prepared subsequently to the date of that letter, namely, in September, 1908. These two cheques, as to which there must have existed in the possession of Morison at his office every means of knowledge, either were not traced, which was wrong, or were traced and the defendants were not informed of it, which was worse. On September 28, 1909 (as the evidence shews), Morison received the balance-sheet of the following year, namely, to December 31, 1908. That brought forward as a debit to Abbott the 2929*l.* of the previous balance-sheet and further debited him with 306*l.* 0*s.* 4*d.*, which was on December 31, 1908, the debit of his private account in Morison's books. On September 30, 1909, Morison wrote to the accountants about the deficit in Abbott's name, and the balance on the wrong side. On October 1, 1909, the accountants sent him a copy of Abbott's rivate account as appearing in the firm's books from January 1

to December 31, 1908, and from January 1 to May 22, 1909. Under these circumstances Morison, with all this knowledge and means of knowledge, on November 16, 1909, affirmed Abbott's engagement as his manager upon the terms stated in the letter of that date. The engagement was for the period of their joint lives and ten years after Morison's death during the remainder of Abbott's life, until determined by notice as there mentioned, with a stipulation that Abbott should not incur any liabilities without his previous sanction, except in the ordinary business transactions of the firm, and should not bet, gamble, or speculate, either in his own name, or that of the firm, or otherwise. The balance-sheet of December 31, 1908, was thereby agreed as a basis of the accounts between the parties. Down to the end of 1908, the total of the funds misappropriated which it is sought to recover in this action was 270*l.* 17*s.* 6*d.* After the end of 1908, Abbott misappropriated a further sum of 1614*l.* 6*s.* 3*d.*, and for all these the plaintiff seeks to make the defendants liable.

Quite shortly it seems to me that, assuming as I do that when the cheques, say, in 1907, two in number, were dealt with by the defendants there was enough to put them upon inquiry, the position after (say) the end of 1907 was such that any suspicion which they ought to have had would have been lulled to sleep by the action of Morison himself. Such a sufficient time had then elapsed during which the customer had received back his pass-book and his cheques, and had raised no question as to the validity of the cheques, as that the defendants were entitled to assume that there was no cause for suspicion or inquiry. As from that time no negligence is to be imputed to the defendants because they did not inquire whether the cheques were justified or not. As regards the earlier cheques of a date before such time had elapsed it seems to me that the plaintiff's action was such as to adopt and ratify Abbott's acts in the matter. The fact is that after these proceedings Morison, whose fault or misfortune it is that he has employed a dishonest agent, is seeking to throw the consequences of his dishonesty upon the persons who are not in any way responsible for that dishonesty, persons who dealt with the cheques in the ordinary course of business and, as is admitted, in perfect good faith.

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The principle of *Cocks* v. *Masterman* (1) and of *London and River Plate Bank* v. *Bank of Liverpool* (2) is, I think, applicable. The principle is larger than that in *Holland* v. *Russell.* (3) It is, I think, the case that the bank are not here to be treated simply as agents who paid money to Abbott as their principal before the bank received notice not to pay it. The money here has been received by the defendants in good faith and paid to their customer, Abbott, in good faith. Since its receipt they have altogether altered their position in that they have in good faith paid the money away to Abbott. Under these circumstances, I think the principle of *Cocks* v. *Masterman* (1) applies, and that the defendants cannot be rendered liable for it to Morison.

On these grounds I think this appeal succeeds.

PHILLIMORE L.J. The plaintiff, in my judgment, has made out a prima facie case for recovering in trover against the defendant bank for the conversion of his cheques and to obtain as damages the face value of the cheques. I say his cheques, and I make out his right in the following manner. The cheques as originally drawn were instruments whereby the plaintiff, or a person to whom the plaintiff was bound or desired to pay money, could obtain, out of the moneys standing to the plaintiff's credit with his bank, the sum specified on the face of the cheque. The cheques were the plaintiff's instruments till he chose—or till Abbott on his behalf chose—to issue them to some outside person. As regards two of the cheques, which were open ones and drawn to "bearer," they need never have been further issued than by presenting them to the plaintiff's bank and getting them cashed. As regards the others, no doubt it was in contemplation that they should be issued to the extent of passing through another bank, because they were crossed. And one cheque would require further negotiation, because it was drawn to the order of somebody outside, to wit, the defendant bank. But all of them, till issued, remained the plaintiff's property. Till Abbott took them to the defendant bank they had not

(1) (1829) 9 B. & C. 902. (2) [1896] 1 Q. B. 7.
(3) 4 B. & S. 14.

been issued. In Abbott's hands they were still his employer's property and Abbott could not, and did not, give to the defendant bank any title in them. Therefore, they were the plaintiff's cheques at the time when they came into the possession of the defendant bank. The defendant bank, as the collecting bank, presented them to the plaintiff's bank and collected the proceeds, and did not do this as a bare messenger. The defendant bank was the holder of the cheques which, with the exception of the one of which I have already spoken, were, by the time they reached it, bearer cheques, and it collected the proceeds in its own right, probably settled for them in account with the paying bank, very likely through the Clearing House, and gave its receipt. Therefore, the defendant bank converted the cheques. That the damages for such conversion are (at any rate where the drawer has sufficient funds to his credit and the drawee bank is solvent) the face value of the cheques is established in a series of cases, such as *Bobbett* v. *Pinkett* (1), *Fine Art Society* v. *Union Bank of London* (2), *Bavins* v. *London and South Western Bank* (3), and *Macbeth* v. *North and South Wales Bank* (4): so well established that it is not necessary to inquire into the principle which may underlie the authority. But the principle probably is that, though the plaintiff might at any moment destroy the cheques while they remained in his possession, they are potential instruments whereby the sums they represent may be drawn from his bankers, and, if they get into any other hands than his, he will be the loser to the extent of the sums which they represent. It may be also that any one who has obtained its value by presenting a cheque is estopped from asserting that it has only a nominal value.

Having got so far as determining that the plaintiff has made out a prima facie case, I have now to consider the several defences raised by the defendant bank. But before I enter upon these, there is a preliminary point raised by the plaintiff which, if established, would destroy or seriously affect several of these defences. He contends that these cheques are forgeries—statutory forgeries, as one of his counsel put it. Apart from the statute which I will consider in a minute, this contention cannot

(1) 1 Ex. D. 368.
(2) 17 Q. B. D. 705.
(3) [1900] 1 Q. B. 270.
(4) [1908] 1 K. B. 13.

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be supported. These cheques are real documents which, when they reach their destination, will be honoured and properly honoured by the plaintiff's bank. They have been created for an improper purpose and in fraud of the plaintiff, but they have been created by a person whom the plaintiff had put in his place to create them. How, as was observed in the course of the case, they can be no forgeries when they reach their destination and yet be treated as forgeries while in the hands of other parties during the course of their journey, I fail to see. But it is said that the statute 24 & 25 Vict. c. 98, s. 24, makes it forgery to sign with intent to defraud any bill of exchange by procuration or otherwise for or in the name of or on the account of any other person without lawful authority or excuse, and that this enactment covers the case where a man having authority to sign uses his authority for an improper and fraudulent purpose to the detriment of his principal. This again, I think, is an error. The reason why the words "by procuration or otherwise" were inserted in this statute is well known. It was always forgery to counterfeit a man's signature to certain important documents, unless indeed you had the man's authority to write his name for him; but it was a different thing to append a man's signature with a statement shewing that you were not claiming that it was his hand, but that you signed for him under a supposed power. The point seems to have been mooted in one or two cases, and it was finally decided in *White's Case* (1) not to be a forgery under the law as it then stood, the argument which prevailed being thus summarized by counsel for the prisoner: "The prisoner has counterfeited nothing; the writing is not made as the writing of another, but avowedly as that of the prisoner himself; and though he may have committed fraud in saying that he was authorised to make the indorsement, that is not a forgery, but a mere false pretence." (2) In *White's Case* (1) the prisoner, though at one time a clerk of the man in whose name he signed, had not and never had authority to sign for him. To meet this the section I have quoted was passed. And it has no further application. It does not extend the law to cases where a man, having authority to sign the name of another per pro.,

(1) 1 Den. C. C. 208. (2) 1 Den. C. C. at p. 212.

misuses his authority, just as, I think under the old law, if a man had authority to sign the name of another and misused that authority, he would not be indictable for forgery. I have not, in stating these various propositions, added the phrase " with intent to defraud " which is always an ingredient in the charge of the crime. The words are used to meet the possible though rare case of an innocent forgery; for example, for a wager, or for a joke as suggested by Walton J. in *Rex* v. *Muirhead* (1), where the analogous subject of false pretences was being discussed. I merely say this to guard my propositions. *Rex* v. *Holden* (2) does not decide anything to the contrary of what I have said. There are partnerships which, from the nature of their business, imply an authority in each partner to sign the firm's name to bills, &c. There are others where no such authority is to be implied, and unless it is given in express terms the partner has not got it. Avory J. stated, for the purposes of the point on which the opinion of the Court was to be taken, that the prisoner had no authority, meaning, I take it, no general authority as partner, and then, to stop a possible hole, took the opinion of the jury as to whether or not a particular authority had been given to him. That there was no suggestion that the prisoner had such general authority as partner, or under the partnership articles, appears from the argument of his counsel. They take no such point, but rely upon the general right of a partner to trade in the firm's name, and refer to *Banks* v. *Gibson* (3), and decisions in Chancery to that effect. The Lord Chief Justice has sent for all the papers in the case and a perusal of them confirms this view of the case. The Court, therefore, in *Rex* v. *Holden* (2) only decided that the prisoner, having no authority to sign the name of his firm to bills, could not ride off on the fact that his firm's name was a partnership asset. It comes back to the same principle. Where there is power to sign per pro., a document so signed is not a forgery to the party to whom it is addressed, and who can, or a fortiori must, act upon it, and therefore is not a forgery at all. The misuse by an agent of his power of writing his principal's

(1) (1908) 1 Cohen, C. A. R. 189, at p. 190.

(2) [1912] 1 K. B. 483.

(3) (1865) 34 Beav. 566.

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name either as a simple signature, or by signing per pro., may, however, be indictable as some form of fraud.

I now come to the defences; and the first defence raised is under s. 82 of the Bills of Exchange Act, 1882, which protects the bank which collects a crossed cheque and receives payment for its customer in good faith and without negligence from incurring a liability to the true owner of the cheque. As the plaintiff sues as owner, and as these cheques are not forgeries, the section applies. The good faith of the defendant bank is not questioned. The point left for decision is whether it has received payment for its customer Abbott without negligence.

The learned judge has held that there was negligence. In the appropriate part of his judgment he seems to have rested that negligence on one ground only, namely, that the collecting bank, seeing that the signature was per pro., had thereby notice, under s. 25 of the Act, that the agent had but a limited authority to sign, and was therefore bound at its peril to make due inquiries as to the extent of the authority, and that it made none. A conclusion so sweeping would make cheques signed per pro. and crossed either useless or mere incentives to gambling. I think the true answer is that s. 25 is without relevancy to s. 82. Under s. 25, he who takes a negotiable instrument signed per pro. has notice that he may, when he comes to present it for payment, or when some one else to whom he has negotiated it presents it for payment, find that he or his transferee may fail to get payment because the limited authority of the agent may have been exceeded. It is a question of infirmity of title. But when once the instrument has been discharged by payment, neither the presenter nor his predecessors or successors in title are put under a liability to repay because he or they had originally notice that they might not get their money. If it were otherwise, there would be two objections to the point as a point in favour of the plaintiff: one is that the only person who could avail himself of the right to recover would be the man who discharged the instrument—that is, the plaintiff's bank, not the plaintiff; the other, that if the plaintiff's bank sought to do it, the special rule as to prompt recovery of money wrongly paid to discharge a negotiable instrument laid down in such cases as *London and River Plate*

Bank v. *Bank of Liverpool* (1) and *Imperial Bank of Canada* v. *Bank of Hamilton* (2) would apply. I should here perhaps add that the cases cited in the judgment of the learned judge as authority for the duty of the collecting bank to inquire when it deals with cheques with per pro. signatures are cases of cheques not drawn for the principal by the dishonest agent signing per pro., but cases of cheques in favour of the principal indorsed by the agent per pro., and then paid by him into his own account, a most suspicious proceeding. But though, in the appropriate part of his judgment, the learned judge has apparently relied upon the bare fact of the signature being per pro. as sufficient to make the collecting bank negligent for non-inquiry, he has in another part of his judgment taken another fact into consideration, a fact which, we are told by counsel, he mentioned as impressing him during the course of the trial; and I think we must take this fact into consideration, as it certainly arises upon the evidence. Abbott was a customer of the collecting bank, well recommended, no doubt, but known to be an employee and a manager; and, being a manager and having the power of signing per pro. for his employer, he was placing cheques which he drew for his employer to his private account. If this happened often enough, and with regard to sufficiently large sums, I think it ought to give rise to some suspicion in the breast of the bank manager or the cashier. If it were material, I do not think that I should be prepared to dissent from the conclusion at which, I think, the learned judge intended to arrive—that there was negligence in cashing some of the earlier cheques, cashing them and paying them to Abbott's account without, at least, some inquiry. But as regards all the middle and later cheques, a suspicion which might have been reasonably entertained would with at least equal reason be lulled to sleep. No business man need anticipate that a series of cheques ranging over more than a twelvemonth, for appreciable sums, occasionally large ones, would pass unnoticed, if they had been improperly drawn by an employee. The plaintiff may be under no duty to the defendant bank to examine his pass-book, or check his accounts, or have them vouched or examined; but the defendant bank was entitled to act as a reasonable man of

(1) [1896] 1 Q. B. 7. (2) [1903] A. C. 49.

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business would, and to assume that—duty or not—the employer would in no very great length of time discover that he was being robbed in a mode so easily capable of detection. While inclining, therefore, against the collecting bank as to the few earlier cheques, I decide as far as I am concerned that the collecting bank without negligence collected and recovered payment for Abbott of the bulk of the crossed cheques which are the subject-matter of this action.

I am not impressed by the points made as to special cheques which were drawn to London County and Westminster Bank or bearer, and crossed generally, with the addition of the words "not negotiable account payee," or as to the one cheque which was drawn to defendant bank or order, the cheque forms used being forms with the word "order" printed, and in the one case the word "bearer" not having been substituted. On the assumption that Abbott was justified in paying these cheques to his account, there was nothing objectionable in his bank being the nominal payee; and in the order case the indorsement by the bank would be merely what is called "the necessary dealing with the instrument" in the language of Sir R. Henn Collins M.R. in *Gordon* v. *London City and Midland Bank.* (1)

There are two cheques not crossed. As to these the defence of s. 82 does not apply, and the defendant bank is driven back upon its next line of defence, which, if sound, covers them and the earlier crossed cheques, as to which there may have been negligence, and the later cheques to the end of 1908. It is the defence that the plaintiff ratified the drawing and cashing of these dishonest but genuine cheques. As to this defence, counsel for the plaintiff make two answers. They deny that in fact there was ratification, and they say—and truly say—as the learned judge in the Court below has said, that there can be no ratification without knowledge of what you are ratifying, and they contend that the plaintiff had no knowledge. On the first point, some time in the year 1908, when the balance-sheet for 1907 was being prepared by the accountant, it appeared that Abbott was short of a sum of 5929*l.* odd, for which he gave no account. The plaintiff said he put the matter wholly in the hands of his

(1) [1902] 1 K. B. 242, at p. 276.

accountant, and that he only knew generally from the accountant that this was so, and that Abbott gave some excuse as to unfortunate speculations in the name and on behalf of the plaintiff. The accountant was not called as a witness. In the result, after conference between the plaintiff and the accountant, the shortage was treated in this way: 3000*l.* was debited to goodwill, and for the balance Abbott was treated as a debtor, the item being carried into the balance-sheet as a debt due from Abbott, with some understanding that Abbott was to replace it at some undefined time or times, being warned not to do such a thing again. In 1909 there was a similar shortage of 306*l.* on the balance-sheet of 1908, and it was carried into the balance-sheet as a debt of Abbott's. The amounts collected by the cheques in suit in 1907 and 1908 form part of, or contribute to, Abbott's deficiencies. As the figures shew, they were by no means all. The deficiencies in each year were treated in the lump and debited and dealt with in the way I have mentioned. In my view there was ratification of those acts of Abbott's which depleted the plaintiff's banking account by the use of the cheques in question, as well as of other acts of Abbott which must have swelled the depletion. The plaintiff's remedy against Abbott for his misappropriation was abandoned; as to part without any quid pro quo, except the continuance of Abbott's services; as to the rest by converting him into an ordinary debtor with certain terms as to repayment. And this, I think, makes ratification. As to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is a policy of an ostrich to know no more. I am not sure that in that case we can altogether rely upon the doctrine that for this purpose means of knowledge are not the same as knowledge. It is unnecessary to decide this; for here the plaintiff put the accountant in his place, and we really cannot believe that the accountant did not know that Abbott had been passing per pro. cheques to his private account. Each cheque so passed would bear the stamp of the collecting bank and would either, according to modern practice, be returned by the paying bank to the customer, or would be available at any moment if the customer or his accountant demanded it. Ratification, therefore, covers a gap in

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the defences quoad the uncrossed cheques and any of the early cheques, as to which there may have been negligence. It is not wanted for the later crossed cheques, and on the whole the defendant bank succeeds.

I have not thought it necessary to determine upon the defence of estoppel by negligence, which involves considerations of some difficulty.

I have only to add that two further defences raised for the defendant bank by counsel's speech in reply before us do not seem to me to help it. The doctrine with regard to prompt notice and demand where a negotiable instrument has been discharged in error only applies, as I have already incidentally said, where it is the payer of the instrument who seeks to recover back. And the doctrine that an agent who has in good faith paid to his principal money to which it is subsequently discovered the principal had no right cannot be required to return money which he has so paid over only applies where the action is for money had and received to the plaintiff's use, an action which assumes that there was no wrongful act in receiving the money. In such a case the plaintiff's licence to receive the money is presumed; and therefore the plaintiff cannot complain if it is properly paid over before the licence is revoked. In the present case the plaintiff, though he has in the alternative shaped his case as for money had and received, has a right to sue in trover for the conversion of his cheques, and accordingly would not be defeated by the fact that the defendant whom he sues for the misuse of his temporary dominion of the property claims to be an agent for some one else.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Donald McMillan & Mott; Fraser & Christian.*

A. L.

[IN THE COURT OF APPEAL.]

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1914
April 24.

In re WEBB.
Ex parte THE BOARD OF TRADE.

Bankruptcy—Scheme of Arrangement with Creditors—Approval of Court—"Reasonable security" for payment of 7s. 6d. in the Pound—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-s.* 9.

Where a proposal for a scheme of arrangement of a debtor's affairs is submitted for the approval of the Court, and facts are proved, on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court, by s. 3, sub-s. 9, of the Bankruptcy Act, 1890, "shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

The Court has no discretion to approve the proposal unless it is satisfied that the scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound within a reasonable time. In such a case the fact that the creditors have by the statutory majority accepted the scheme is immaterial.

In re Paine [1891] W. N. 208 and *In re Burr* [1892] 2 Q. B. 467 followed.

Observations of Vaughan Williams J. in *In re Bottomley* (1893) 10 Morrell, 262, discussed.

This was an appeal from a decision of one of the bankruptcy registrars whereby he approved a scheme of arrangement put forward by the debtor, Mr. Matthew R. Webb, and discharged a receiving order which had been made against him.

The debtor was a solicitor and occupied the position of registrar of the Whitechapel County Court, in respect of which office he was in receipt of a salary of 1100*l.* a year.

The receiving order was made on May 8, 1913, the debtor's unsecured liabilities amounting to about 28,000*l.* In June, 1913, a scheme of arrangement was proposed but could not be carried through. In August of the same year a second proposal was put forward by the debtor, and on September 3, 1913, submitted to a meeting of creditors who accepted it by the majority prescribed in s. 3, sub-s. 2, of the Bankruptcy Act, 1890.

The scheme provided that the debtor, who was sixty-four

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years of age, should set aside out of his salary and pay to a trustee for the creditors a sum of 600*l.* per annum, and further that the debtor's brother, Charles W. Webb, should assign to the trustee three fourth parts of his "tenth share of the net proceeds whether cash, debentures, shares, stock or other securities arising from the sale or any other dealings with certain oil-bearing lands in Wyoming U.S.A." specified in three schedules to the proposed scheme. Of these properties that specified in the second schedule was vested in a company called the Fremont Syndicate, Limited, and the scheme further provided that the debtor's brother should, in addition, hand over to the trustee one half of a sum of 1500*l.* debentures issued to him by the syndicate in December, 1913, and three fourths of 3000 1*l.* shares which he was about to receive from the same syndicate.

The way in which the debtor's brother C. W. Webb had acquired his interest in the properties mentioned in the schedules to the scheme appeared to be as follows. In 1907 the debtor had been retained by one Henry Walter to recover and protect his oil-bearing lands in Wyoming, and in consideration of the debtor's services Walter verbally promised to give him a 10 per cent. interest in the net profits from the sale of those lands. On January 7, 1908, the debtor assigned his interest under this contract to his brother C. W. Webb for various considerations amounting to about 2000*l.* The evidence of the transaction between Henry Walter and the debtor consisted mainly of the following letter written on June 9, 1913, by Walter to C. W. Webb:—"I hereby declare that it was agreed between Mr. M. R. Webb and myself in 1907 that in consideration of his services in recovering and protecting the properties as mentioned in paragraph 10 of the agreement of the 12th May, 1908, he was to have a clear ten per cent. (10 %) of the net proceeds of all dealings therewith, accruing to Henry Walter or his assignee or nominee; such properties include the whole of the lands forming the 'Henderson Purchase' viz.: (1.) The 560 freehold acres at Lander. (2.) The 1500 acres surrounding those freeholds. (3.) The freehold square mile at Conant Creek; being the lands referred to in schedules 1, 2 and 3 in

Mr. M. R. Webb's proposed scheme of arrangement with his creditors. Yours faithfully (signed) Henry Walter."

The agreement of May 12, 1908, mentioned in this letter was an exceedingly complicated document the effect of which the Court was unable to ascertain.

The value of C. W. Webb's interest in the properties mentioned in the scheme was estimated by the debtor at a considerable sum, and evidence was adduced to shew that it was worth 100,000*l.*, but it appeared that none of the properties were now in the possession of Mr. Walter but were vested in various companies or syndicates, and that Mr. Walter's interest therein was subject to numerous charges in respect of which there were in existence in America foreclosure proceedings, and that for many years nothing had been received in respect of the properties by Mr. Walter or any other party interested in them.

After the scheme had been accepted by the creditors the debtor applied for the approval of the Court. It was admitted that facts were proved which would have required the Court "to refuse, suspend or attach conditions to the debtor's discharge were he adjudicated bankrupt," so that s. 3, sub-s. 9, of the Bankruptcy Act, 1890, applied. That sub-section provides: "If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

It appeared that in order to pay a composition of 7*s.* 6*d.* in the pound the sum of about 11,000*l.* would be required.

Upon the scheme coming before the registrar, he was of opinion that the creditors in accepting it had not been influenced by any improper considerations, but had thought that it provided a reasonable probability of their getting 7*s.* 6*d.* in the pound. He held that the wishes of the creditors ought not to be lightly disregarded, and upon the evidence he came to the conclusion that the scheme ought to be approved as providing reasonable security for the payment of not less than 7*s.* 6*d.* in the pound upon

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the unsecured debts. He therefore approved the scheme and discharged the receiving order.

The Board of Trade and the official receiver appealed.

Sir S. O. Buckmaster, *S.-G.*, and *E. W. Hansell*, for the appellants. The question in this case is whether the registrar was right in holding that the scheme provided a reasonable security for payment of a composition of 7*s.* 6*d.* in the pound upon the unsecured debts provable in the bankruptcy as required by s. 3, sub-s. 9, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). Apart from the 600*l.* a year to be set apart from the debtor's salary, which is manifestly insufficient to secure a composition amounting to 11,000*l.*, there is really nothing in the nature of a security, for the claim of C. W. Webb, as assignee of the debtor, against Mr. Walter is only a personal one. What is necessary under the section is a reasonable commercial security for payment of the composition within a reasonable time: *In re Paine.* (1) If there is no such reasonable security the Court has no discretion to approve the scheme: *In re Burr.* (2) There are some remarks of Vaughan Williams J. in *In re Bottomley* (3) and *In re E. A. B.* (4) which seem to warrant the suggestion that the wishes of the creditors in the matter are to be regarded. See also *In re Flew.* (5) But that is wrong, for considerations of that kind cannot affect the question of the reasonableness of the security.

Hollis Walker, *K.C.*, and *Woodgate*, for the respondent. It is admitted that the Court cannot approve the scheme unless it is satisfied that it affords a reasonable security for payment of the required composition; but the respondent contends that the registrar has come to a right conclusion upon the facts. Reasonable security is not necessarily such as would be regarded as an absolutely sound security from a commercial point of view.

[No reply was called for.]

COZENS-HARDY M.R. This is an appeal by the Board of Trade and the official receiver raising what is undoubtedly a point of

(1) [1891] W. N. 208.
(2) [1892] 2 Q. B. 467, 476.
(3) 10 Morrell, 262.
(4) [1902] 1 K. B. 457.
(5) [1905] 1 K. B. 278, 284.

general interest and importance in the administration of the bankruptcy law. In this case a receiving order was made against the debtor, Mr. Webb, who is a solicitor, in May, 1913. In June there was a proposal for a scheme of composition: that scheme fell through because part of the security which was offered could not be given, and a second proposal was started in August, 1913. The creditors held a meeting, and in September they approved it by the requisite majority. It then came before the registrar, who approved the scheme and discharged the receiving order.

The question really turns upon s. 3 of the Bankruptcy Act of 1890, and in particular upon sub-s. 9 of that section. In certain events, which I need not particularize, the Court is bound, if the debtor is adjudicated a bankrupt, to refuse, suspend, or attach conditions to the debtor's discharge, and s. 3, sub-s. 9, says, "If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate." Upon whom is the duty imposed of considering and deciding the question whether the proposed scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound? Clearly the Court; and quite clearly the Court cannot sanction the composition or arrangement and annul the bankruptcy proceedings if it is satisfied that the scheme does not provide reasonable security, and it does not matter in the least, under these circumstances, what are the views of the creditors in the matter. It may be, and this is the other alternative, that the Court may be satisfied that the scheme does provide reasonable security for the payment of 7*s.* 6*d.* in the pound: I do not mean "reasonable security" in the sense in which the expression might be applied to trustees' investments or to those of a man who is very strict in his business arrangements. Even if the Court is satisfied that the proposal provides security for 7*s.* 6*d.* in the pound it may still decline to follow the wishes of the creditors or of the majority of them, because it may be satisfied that the creditors have been actuated by other than proper motives, or that if the

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bankruptcy is worked out the creditors will get more than 7*s.* 6*d.* in the pound. But I do not doubt that, if the condition as to the scheme providing reasonable security for payment of 7*s.* 6*d.* in the pound is satisfied, the Court would in most cases listen favourably to the wishes of the creditors, and would give effect to their resolution in favour of accepting the composition. [The Master of the Rolls then considered the proposals contained in the scheme and the nature of the interests in properties comprised therein and continued :]

Counsel for the debtor has argued this case very frankly. He admits that the letter of June 9, 1913, which is really the debtor's root of title, does not create any charge upon the property at all, but merely gives personal rights against Mr. Walter. Is it possible for anybody to say that a security consisting of a personal right against Mr. Walter, who evidently has been a financial speculator to a large and not always a very successful extent, and as to whose financial means and capacity no evidence is forthcoming, can be regarded, in the language of s. 3, sub-s. 9, of the Act, as " reasonable security for the payment of not less than 7*s.* 6*d.* in the pound " ? In my opinion it is really almost ludicrous to treat this matter seriously and it is impossible to say that this security is in any way or from any point of view a " reasonable security for the payment of 7*s.* 6*d.* in the pound."

There are two authorities to which I think I ought to refer. Lord Esher in *In re Paine* (1), the first case to be reported on this point, said this : " The appellants were bound to show that the proposed scheme did provide ' reasonable security for the payment of not less than 7*s.* 6*d.* in the pound.' This did not mean for payment at a distant time, such as a year hence. It meant reasonable security for payment now or within a short time." If that is the law, it is impossible to say that a security on an undivided interest in property like this, which has yielded nothing for years and which exists in the State of Wyoming in America, can be a reasonable security within the meaning of the Act. The next case in point of time is *In re Burr* (2), and this is I think an extremely important case, because it seems to lay down the principles which ought to be followed.

(1) [1891] W. N. 208. (2) [1892] 2 Q. B. 467.

Fry L.J. said at p. 476: "There are two questions to be considered in the present case. First, is the Court bound to refuse to approve the scheme? In my opinion, it is bound to refuse, because the condition which sub-s. 9 imposes has not been satisfied. It has not, in my opinion, been proved that this scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound." Then again at p. 477: "I am of opinion that it is not proved that the scheme will provide reasonable security for the payment of 7*s.* 6*d.* in the pound, and that, consequently, it being admitted that some of the facts exist which are mentioned in sub-s. 8, and which would require the Court, if the debtor were adjudged bankrupt, to refuse, suspend, or attach conditions to his discharge, the Court is bound to refuse to approve the scheme." In my opinion, upon that ground, which is one depending upon the substance of the scheme, this Court is bound to refuse to sanction it.

It is said that in *In re Bottomley* (1), Vaughan Williams L.J., or Vaughan Williams J. as he then was, made some observations the tendency of which was to say that the question was very much one for the creditors to determine, that they understand the position better, and that the Court ought to be slow to interfere with their decision. He said, further, and with this latter part of his judgment I entirely agree, that "reasonable security" does not mean an absolutely good security, but a reasonable security under which the requisite amount of money could probably be recovered. I am sure I am never likely, particularly in bankruptcy matters, to speak otherwise than with the greatest possible respect of Vaughan Williams L.J., who has so recently left this Bench, but I do not think that it is fair to take the language which he uses in that case as being in any way intended to depart from what Fry L.J. said in the prior case, which was not cited to him, or to treat his decision as in any way qualifying that which seems to me to be the necessary consequence of the language of the sub-section.

For these reasons I think the Court is bound, notwithstanding that the creditors have accepted it, to refuse to sanction this scheme of arrangement, and that this appeal must be allowed.

(1) 10 Morrell, 262.

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SWINFEN EADY L.J. I am of the same opinion. It is not disputed that facts have been proved which bring this case within sub-s. 9 of s. 3 of the Act of 1890, and that being so, the sub-section provides that the Court shall refuse to approve the proposal, that is the proposed scheme, "unless it provides reasonable security for payment of not less than 7*s.* 6*d.* in the pound on all the unsecured debts provable against the debtor's estate." That is a condition precedent, and unless it is complied with the Court is bound to refuse its approval of the proposal. It must be remembered that when a debtor intends to make a proposal he arranges his scheme and submits it to a meeting of creditors, and it is only after the proposed scheme has been before the creditors and has been accepted by the statutory majority of creditors that the scheme comes before the Court, and then, if the Court is satisfied that the scheme does not provide reasonable security for the payment of not less than 7*s.* 6*d.* in the pound, it is bound to refuse its sanction. It seems to me that it cannot be contended that it is sufficient for the creditors to have accepted the scheme. That is so in every case where the scheme comes before the Court. It is after the acceptance of the proposal by the creditors that the Court has to decide whether it will or will not approve the scheme.

In the present case is there reasonable security for the payment of 7*s.* 6*d.* in the pound? [The Lord Justice then considered in detail the proposals of the scheme and the nature of the properties comprised in the schedules thereto, and the interests therein a proportion of which the debtor's brother was prepared to assign to the trustee for the benefit of the creditors, and continued:] I am not satisfied that there is any reasonable prospect of anything being realized from any of these oil-bearing properties within a reasonable time, however extended a view be taken of what is a reasonable time. Indeed, having regard to the fact that during the last six years no cash has been received from them I am not satisfied that there is any reasonable prospect that these properties, or the interests which the debtor's brother is prepared to make over, will yield anything, and I am quite satisfied, in the words of the statute, that these interests do not provide any "reasonable security for payment of 7*s.* 6*d.* in the

pound on all the unsecured debts provable against the debtor's estate."

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In these circumstances I am of the opinion that the order sanctioning the scheme is erroneous and should be discharged.

PICKFORD L.J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *Solicitor of Board of Trade; W. J. A. Drake.*

G. A. S.

TEALE *v.* WILLIAMS.

1914 *April* 30.

Streets—Regulations for preventing Obstruction—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 21.

Under s. 21 of the Town Police Clauses Act, 1847, which provides that "The commissioners may from time to time make orders . . . . for preventing obstruction of the streets within the limits of the special Act in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed," the powers of the commissioners are not confined to making orders dealing with extraordinary occasions of obstruction. Where particular streets are normally thronged so that their liability to obstruction is chronic they may make orders for the prevention of obstruction in such streets applicable to every day of the week.

CASE stated by justices of Eastbourne.

An information was laid against the respondent charging that he on November 20, 1913, being a hawker, unlawfully used a street in Eastbourne called Terminus Road between the hours of 10 in the forenoon and 8 in the afternoon for the purpose of selling fruit from a barrow in contravention of an order made under s. 21 of the Town Police Clauses Act, 1847.

The town council of the borough of Eastbourne being the commissioners of the borough within the meaning of the Town Police Clauses Act, 1847, had pursuant to s. 21 of that Act (1)

(1) By s. 21 of the Town Police Clauses Act, 1847, "The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets within the limits of the special Act in all times of public processions, rejoicings, or illuminations, and in any case when

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duly made an order with respect to obstructions and nuisances in certain streets in the borough, which order was in force on November 20, 1913, and the respondent was fully aware of such order. The order so far as is material was as follows:—

"Whereas the streets set out in the schedule hereto are between the hours of 10 in the forenoon and 8 in the afternoon thronged and liable to be obstructed on all days except Sundays, the constables stationed at any of the crossings in the said streets shall direct by word or signal the driver or person in charge of any vehicle approaching any such crossing to stop or to come on, or as to passing any other vehicle.

"Further no costermonger, hawker, or other person shall use the said streets during the said hours for the purpose of selling fruit, vegetables, flowers, musical prints, toys, or other articles from trucks or barrows, and all constables are hereby directed to enforce the provisions of this order."

On November 20, 1913, the respondent, a hawker, in wilful breach of the said order, used Terminus Road, being one of the streets to which the order related, for the purpose of selling fruit from a barrow between the hours of 10 in the forenoon and 8 in the afternoon.

It was contended on behalf of the respondent that the order was ultra vires on the ground that s. 21 only authorized an order being made to deal with extraordinary occasions of obstruction. The justices upheld that contention and dismissed the information.

The prosecutor appealed.

R. M. Montgomery, for the appellant. There is nothing in s. 21 of the Act of 1847 limiting the powers of the council of making orders for the prevention of obstruction as contended for

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the streets are thronged or liable to be obstructed, and may also give directions to the constables for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort, and every wilful breach of any such order shall be deemed a separate offence against this Act, and every person committing any such offence shall be liable to a penalty not exceeding forty shillings.'

by the respondent. Provided that a particular street is normally liable to obstruction they may make an order applicable to every day of the week. Such an order was made in *Dudderidge* v. *Rawlings* (1), and a conviction under it was upheld, though it is true that the present point was not there taken.

Martin O'Connor, for the respondent. The words "in any case" mean in any case of an unusual character like public processions, rejoicings, or illuminations. If "in any case when" means nothing more than "whenever" there was no need to mention the preceding special cases, and the reference to them was entirely superfluous.

AVORY J. The contention before the justices was that the order made by the town council of Eastbourne under the Town Police Clauses Act, 1847, was ultra vires on the ground that the words "in any case" in s. 21 of that Act must be construed as referring to cases ejusdem generis with public processions, rejoicings, or illuminations, and that no general order could be made applying to every weekday and to every hour of the day between 10 A.M. and 8 P.M. Now I wish to say in the first place that I read this order as applying only to the case of costermongers or hawkers who are standing in the streets with their barrows for the purpose of selling fruit and other articles from them, and I read the facts found in this case as being that the respondent, a hawker, on the occasion in question was standing in Terminus Road for the purpose of selling fruit from his barrow. I think the order has no application to the case of a hawker passing like any other of the King's subjects over the highway in the ordinary right of user of it, and this case was not decided, and is certainly not being decided by this Court, on the footing that the hawker was merely passing along this street with his barrow as one of the ordinary passengers. Dealing with the question on the footing that the order applies to persons standing in the street and selling from their barrows and that this particular respondent was in fact so doing, we have to determine whether the town council had jurisdiction under s. 21 to make the order which they did make, after reciting that

(1) (1912) 108 L. T. 802.

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Terminus Road, among other streets, is between the hours of 10 in the forenoon and 8 in the afternoon thronged and liable to be obstructed on all days except Sundays. Now the difficulty in the case which the justices felt was that the section can be construed as being only intended to deal with extraordinary occasions of obstruction. In my opinion it is not right, even if it were possible, to cut down the plain meaning of the words in s. 21. .The section is one of a group of sections which deal with obstructions and nuisances in the streets generally, and s. 21 commences by saying that the commissioners, who now are the local authority, may make orders preventing obstruction of the streets in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed. The question is whether the words "in any case" mean that they may make such an order applicable to any street which is usually thronged or usually liable to be obstructed. In my opinion that is the plain meaning of the words, and they are not intended to be limited to cases of extraordinary occasions of obstruction similar to those of public processions, rejoicings, or illuminations.

ROWLATT J. I must confess that I have felt considerable doubt whether the words "in any case when the streets are thronged or liable to be obstructed," coming as they do after the phrase "in all times of public processions, rejoicings, or illuminations," do not refer to other occasions of a like kind, that is to say, times when something unusual happens to cause the streets to be thronged. However the words are wide, and as my brethren do not feel the difficulty which I feel I do not desire to dissent, especially as their construction is from the public point of view much the more beneficial.

SHEARMAN J. I am of the same opinion. The only question left to the Court in this case is whether the words of s. 21 authorize the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street makes such a regulation necessary in the opinion of the local authority. In my judgment the words are amply wide enough to

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confer such a power. The section begins with a general reference to the regulation of traffic—"The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction." Those are the opening words. Then it goes on to give two or three particular occasions—"in all times of public processions, rejoicings, or illuminations." Having given those three special occasions it then uses the widest possible words "and in any case when the streets are thronged or liable to be obstructed." I cannot entertain much doubt that "in any case" means in any case and not in a few special cases. It appears to me that although the statute is not very aptly worded the intention is merely to give a few examples and then to confer the widest possible power to be exercised by the local authority.

Appeal allowed.

Solicitor for appellant: *H. West Fovargue, Eastbourne.*
Solicitors for respondent: *Blackwell & Co.*

J. F. C.

1914
May 18.

HANS *v.* GRAHAM.

Patent—Patent Agent—Description by Unregistered Person—Offence—"Patent Agency"—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 84.

The Patents and Designs Act, 1907, s. 84, sub-s. 1, provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as a patent agent.

The appellant, who was not a registered patent agent, occupied premises on which were affixed the words "Patent Agency" and "Patents, Designs, and Trade Marks":—

Held, that the appellant had not described himself as a patent agent.

Case stated by a metropolitan police magistrate.

An information was preferred by the respondent, H. H. Graham, the secretary and registrar of the Chartered Institute of Patent Agents, against the appellant, John Hans, for having unlawfully and knowingly described himself as a patent agent in contravention of s. 84 of the Patents and Designs Act, 1907. (1)

At the hearing of the information the following facts were proved or admitted:—

(*a*) The appellant with another carried on the business of a patent agent under the name of J. Hans & Co.

(*b*) The firm occupied premises at 345, St. John Street, London, E.C.

(*c*) The outside of the premises bore the words "Patent Agency" in prominent enamel letters affixed to the window, and the words "Patents, Designs, and Trade Marks" on a plate fixed to the wall next to the said window.

(*d*) Neither the appellant nor any other member of the firm

(1) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 84, sub-s. 1: "A person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act or an Act repealed by this Act."

Sub-s. 3: "If any person knowingly describes himself as a patent agent in contravention of this section he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds."

Sub-s. 4: "In this section 'patent agent' means exclusively an agent for obtaining patents in the United Kingdom."

was registered as a patent agent under the Patents and Designs Act, 1907.

On the part of the respondent it was contended that in these circumstances the appellant was guilty of the offence charged.

On the part of the appellant it was contended that he had not described himself as a patent agent, and that he was not guilty of the offence charged.

The magistrate, being of opinion that the respondent's contention was correct, convicted the appellant.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

The Appellant in person. By affixing the words "Patent Agency" on my premises I did not describe myself as a patent agent; I merely described the kind of work I do, and to do this is not a contravention of s. 84 of the Patents and Designs Act, 1907.

[He was stopped.]

[*Graham* v. *Fanta* (1); *Graham* v. *Eli* (2); *Graham* v. *Tanner* (3); *Bellerby* v. *Heyworth* (4); and *Minter* v. *Snow* (5) were referred to.]

H. L. Tebbs, for the respondent. The magistrate was right in the view he took. In *Royal College of Veterinary Surgeons* v. *Robinson* (6) it was held that the words "veterinary forge" constituted a description stating that the person using them was specially qualified to practise a branch of veterinary surgery within s. 17 of the Veterinary Surgeons Act, 1881. In *Royal College of Veterinary Surgeons* v. *Collinson* (7) it was held that the words "canine specialist" constituted a personal description of the person using them. In *Royal College of Veterinary Surgeons* v. *Kennard* (8) it was held, on the other hand, that the words "canine surgery" did not constitute a personal description of the person using them. That case, following the principle

(1) (1892) 9 Rep. Pat. Cas. 164.
(2) (1898) 15 Rep. Pat. Cas. 259.
(3) [1913] 1 K. B. 17.
(4) [1909] 2 Ch. 23; [1910] A. C. 377.
(5) (1910) 74 J. P. 257.
(6) [1892] 1 Q. B. 557.
(7) [1908] 2 K. B. 248.
(8) [1914] 1 K. B. 92.

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of the decisions in *Bellerby* v. *Heyworth* (1) and *Emslie* v. *Paterson* (2), proceeded upon the footing that the Veterinary Surgeons Act, 1881, and the Dentists Act, 1878, upon which they were decided, merely forbade descriptions of the person as distinguished from descriptions of the acts done by him or of the place where he does them. It is conceded that if the words "Patent Agency" merely describe a place no offence has been committed by the appellant, but it is submitted that they amount to a personal description of the appellant himself. The word "agency" describes, not a place, but the business or calling which is carried on, and when coupled with the word "patent" it means that the person describes himself as a patent agent as defined by s. 84, sub-s. 4.

RIDLEY J. This case is one of some difficulty in view of the very fine distinctions that have been drawn in several of the previous cases. In *Royal College of Veterinary Surgeons* v. *Kennard* (3), to which I was a party, all the members of the Court felt the same difficulty. There we applied the principle of *Bellerby* v. *Heyworth* (1) and *Emslie* v. *Paterson.* (2) In *Bellerby* v. *Heyworth* (1), which was a case under the Dentists Act, 1878, Buckley L.J. in the Court of Appeal said (p. 31): "I cannot find here that there is any description of the person at all as being a dentist or a dental practitioner or a person qualified to practise dentistry. I find here a name and then 'Finest Artificial Teeth.' That means, I suppose, that he either makes them or sells them. He may buy them, sell them, or fit them, but it is some operation or transaction in respect of artificial teeth. Then we have 'Painless extraction'—an act which he does or says he does; 'Advice free'—a statement that he gives advice and makes no charge for it. These are all simply statements of acts done, and not descriptions of the person as a person qualified to do the acts." Later in the same judgment Buckley L.J. said this (p. 32): "The case of *Emslie* v. *Paterson* (2) is one which I think is very pertinent to the present, and with the reasoning of the learned judges there I entirely concur.

(1) [1909] 2 Ch. 23; [1910] A. C. 377.

(2) (1897) 24 R. (Just. Cas.) 77.

(3) [1914] 1 K. B. 92.

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Whether it would be possible out of the words 'American dentistry,' 'Dental Office,' to evolve the idea that it was an office attended by persons who were calling themselves dentists I will not say. If so, the decision might have been different; but the argument did not take that form."

From this passage it appears that the distinction is between a description of the place and a description of the person. The cases of *Bellerby* v. *Heyworth* (1) and *Emslie* v. *Paterson* (2) were under the Dentists Act, and *Royal College of Veterinary Surgeons* v. *Kennard* (3) was decided under the Veterinary Surgeons Act, while the present case arises under the Patents and Designs Act, 1907; but I can find no distinction upon which any reliance can be placed between the material provisions of this Act and those of the other statutes. In *Graham* v. *Eli* (4), which was decided on the section of the Patents Act, 1888, corresponding to s. 84 of the Patents and Designs Act, 1907, Wills J. said that in his opinion the section dealt with nothing except to prohibit an unregistered person from calling himself a "patent agent." In that case the words used by the respondent were not the same as those used by the present appellant; there, on the outside of the premises were the words "Designs," "Trade Marks," and "Patent Office"; on a plate at the entrance were the words "Patent, Designs, and Trade Marks Office"; on the street door were the words "Office for Patents, Designs and Trade Marks—Foreign and Colonial"; and inside the entrance were the words "Patent Office" and "Inventors' Medium." The respondent in *Graham* v. *Eli* (4) did not put up the words "patent agent," and it was held that he had not contravened the section. In the present case the point is taken that the words on the appellant's window, "Patent Agency," do not refer to a place, an office in which the business is carried on, but refer to the art or trade of the person who is carrying it on; that it is more or less of a personal character, and that, therefore, there is a distinction to be drawn between the provisions of the Patents and Designs Act and those of the Veterinary Surgeons Act and the Dentists Act. I cannot

(1) [1909] 2 Ch. 23; [1910] A. C. 377.
(2) 24 R. (Just. Cas.) 77.
(3) [1914] 1 K. B. 92.
(4) 15 Rep. Pat. Cas. 259.

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assent to that argument. It seems to me that this case is like the former ones; I cannot find any distinction. This appellant has not called himself a patent agent any more than in *Kennard's Case* (1) the respondent called himself a veterinary surgeon. What the respondent in that case put up were the words "Canine Surgery," and it might have been said that logically those words did not necessarily mean a place, but it was held that their use did not constitute a contravention of the Veterinary Surgeons Act. In this case I find it impossible to say that by the use of the words "Patent Agency" the appellant was holding himself out as a patent agent, when in *Kennard's Case* (1) we held that to put up the words "Canine Surgery" did not describe the occupier of the house as a veterinary surgeon. That decision is in accordance with the previous decisions, and in my opinion, therefore, the appeal must be allowed.

ROWLATT J. I agree. If the words "Patent Agency," which are affixed to the appellant's premises, describe the work done within, and no more, the appellant does not come within the Act, nor does he come within the Act if the words describe the place where that kind of work is done. "Surgery" is a word which may describe the art or work done or the place where it is done. It is said, however, on behalf of the respondent in this case, that the words "Patent Agency" do not mean either the work done or the place where it is done, but describe the calling of the man by using an allied substantive, "agency," corresponding to the substantive "agent." I am not clear about that. It seems to me that the words may quite as well describe his work or the place as his profession. I am averse to drawing very fine distinctions, and if we were to distinguish this case from those others which have been cited we should be drawing distinctions without a difference. It is to be regretted that a breach of Acts of this kind can be so nearly approached without being actually committed, but that is not for us to consider. In such cases it may be much better to take the view adopted by Wills J. in *Graham* v. *Eli* (2), where he said that a statute which enacts that a person shall not describe himself as a "patent agent" means

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no more than it says; that he must not call himself a "patent agent" because those words are the important words of the provision; and that if he does not use them but uses words such as "patent agency" people will know that is because he cannot call himself, as if he were a registered practitioner, a patent agent. It is not necessary to go as far as that in this case, but that is a broad and intelligible distinction which may ultimately have to be adopted.

SHEARMAN J. I am of the same opinion. With some reluctance I hold that it is impossible to distinguish this case from the previous cases. I can find no substantial distinction between the words of this Act and the words in the Dentists Act and in the Veterinary Surgeons Act. Substantially all these three statutes are, in this matter, on the same lines, and I think the decisions have established two propositions, first, that if a person is merely describing the work he does or the premises where he does it, the case does not come within the Act, and secondly, that if what he says is a description of himself the case does come within the Act. I have hesitated for some time before arriving at the conclusion that a man who puts up the words "patent agency" does not thereby refer to himself as a patent agent, but this result has in principle been arrived at in the previous cases from which we cannot differ.

Appeal allowed.

Solicitors for respondent: *Radford & Frankland.*

J. S. H.

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Revenue—Duties on Land Values—Valuation of Land—Agricultural Land—"Gross Value"—"Total Value"—"Full Site Value"—"Assessable Site Value"—Deductions—Unexhausted Manure and Tillages—Growing Grass—"Structure"—Road—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

In the valuation of land under the Finance (1909-10) Act, 1910, for the purposes of duties on land values the "gross value of land" as defined by s. 25, sub-s. 1, of the Act, and the "total value" as defined by s. 25, sub-s. 3, include any sum attributable to the value of unexhausted manure or tillages performed, and this sum cannot be deducted under s. 25, sub-s. 4 (*d*), in arriving at the "assessable site value" of the land. The "gross value" also includes the value of all unsevered vegetable growths, whether natural or artificial, transitory or permanent, but the value of these vegetable growths must be deducted from the "gross value" in order to arrive at the "full site value" of the land as being "other things growing thereon" within the meaning of s. 25, sub-s. 2.

A road may be a "structure" within the meaning of s. 25, sub-s. 2.

The value of land laid down from arable in grass by the tenant cannot be deducted from the "total value" in arriving at the "assessable site value" as it is not "a matter personal to the occupier" within s. 25, sub-s. 4 (*d*).

Appeal by the Commissioners of Inland Revenue against the decision of a referee appointed under the Finance (1909-10) Act, 1910, upon the appeal of the respondent, Dame Emily Frances Smyth, against an amended provisional valuation of a freehold hereditament known as the Model Farm at Norton Malreward in the parish of Chelwood in the county of Somerset.

The facts of the case as stated in the petition of appeal were as follows:—The above-mentioned hereditaments (hereinafter called the Model Farm) consisted on April 30, 1909, and still consist, of a farmhouse, farm buildings, and land of a total area of 387 acres 2 roods 27 perches, or thereabouts, all, except two, of the fields comprised in such farm being grass fields. The Model Farm included on April 30, 1909, as it still includes, the site of a private macadamized road (hereinafter called the said road) leading from the public high road near Norton Green up

to the farm house and buildings. The respondent claimed to be the owner of the Model Farm.

On April 30, 1909, the Model Farm was in the occupation of Gilbert Court Branch as tenant under an agreement in writing dated March 8, 1894, which provided for certain payments or allowances being made by the landlord or incoming tenant of the Model Farm at the determination of the tenancy in respect (inter alia) of certain of the unexhausted tillages and manures of the two years immediately preceding such termination.

On June 28, 1912, the Commissioners caused to be served on the respondent a copy of their provisional valuation of the Model Farm, and on March 18, 1913, the Commissioners caused to be served on the respondent an amended provisional valuation. In the amended provisional valuation (i.) the gross value of the Model Farm was fixed at 12,741*l.*; (ii.) the deductions from the gross value to arrive at the total value were fixed at 116*l.*, made up of a deduction of 91*l.* in respect of tithe or tithe rent-charge, and a deduction of 25*l.* in respect of public rights of way or user, and the total value was accordingly fixed at 12,625*l.*; (iii.) the deduction from the gross value to arrive at the full site value was fixed at 5091*l.*, and the full site value was accordingly fixed at 7650*l.*; (iv.) the assessable site value was fixed at 7534*l.*, being the said total value after deducting the said sum of 5091*l.*; and (v.) the value for agricultural purposes of the agricultural land comprised in the Model Farm was fixed at 12,475*l.*

The respondent had given to the Commissioners notice of objection to the original provisional valuation and notice of her intention to appeal against the total value and site value fixed on the said provisional valuation, and it was subsequently arranged that the respondent's appeal should proceed on the footing that the appeal was to be treated as an appeal from the amended provisional valuation.

The grounds of objection were as follows :—

That the gross value, the total value, and the assessable site value set out in the provisional valuation were excessive; that the difference between the gross value and the full site value calculated as directed by s. 25, sub-s. 2, of the Finance (1909-10)

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Act, 1910 (1), exceeded the difference set out in the provisional valuation; further, and in the alternative, that no deduction had been made under s. 25, sub-s. 4 (*b*), of the Act for the matters mentioned therein, and that such deduction should amount to 1600*l.*; further, that a deduction of 66*l.* should be made under s. 25, sub-s. 4 (*d*), for a matter personal to the occupier, namely,

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 25: "(1.) For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.

"(2.) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon.

"(3.) The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the thirtieth day of April nineteen hundred and nine, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final.

"(4.) The assessable site value of land means the total value after deducting—

"(*a*) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and . . . .

"(*d*) Any part of the total value which is proved to the Commissioners to be directly attributable to the expenditure of money on the redemption of any land tax, or any fixed charge, or on the enfranchisement of copyhold land or customary freeholds, or on effecting the release of any covenant or agreement restricting the use of land which may be taken into account in ascertaining the total value of the land, or to goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land."

the laying down to grass of twenty-two acres; and that 67*l.* was an insufficient deduction to make for tithe.

The grounds of the respondent's appeal as given in the notice of appeal were that the item numbered 1 in the provisional valuation, namely, the gross value, was excessive, and that the items numbered respectively 2, 5, 12, 13, and 19 in the provisional valuation, namely, difference between gross value and the value of the fee simple divested of buildings, trees, &c., tithe or tithe rent-charge, deductions from gross value to arrive at full site value, works executed, and goodwill or personal elements, were respectively insufficient, such alleged grounds being in effect the grounds mentioned in the notice of objections.

On the hearing before the referee the respondent abandoned her objection to the sufficiency of the amount deducted for tithe.

The decision of the referee was as follows:—

1. That the gross value should be 11,935*l.*

2. That the total value should be 11,819*l.* In this sum the referee included the tenant's interest in the unexhausted manures and tillages; if he had not done so, the gross and total values would each have been decreased by 300*l.*

3. That the full site value should be 4625*l.* In arriving at this figure the referee considered the farm as divested of (*a*) the grass and (*b*) the road from Norton Green to the house and buildings; but he did not consider (*c*) the 490 yards of masonry and dry-stone walls, nor (*d*) the works of water supply not admitted by the respondent to be divested. If he had not considered (*a*) the grass and (*b*) the road as divested, the above figure of 4625*l.* would have been increased by 1332*l.* If he had considered (*c*) the walls and (*d*) the works of water supply not admitted by the respondent to be divested, the 4625*l.* would have been decreased by 510*l.*

4. That the assessable site value should be 4143*l.*, and in arriving at that figure the referee did not make a deduction under s. 25, sub-s. 4 (*b*), in respect of any part of the total value attributable to the expenditure upon agricultural drains and works of water supply not admitted by the respondent to be divested, but he made a deduction of 66*l.* under s. 25, sub-s. 4 (*d*), in respect of the grass laid down by the tenant, and a deduction

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of 300*l.* in respect of unexhausted manure and tillages as parts of the total value attributable to matters which were personal to the owner or other person interested for the time being in the land.

The Commissioners by their petition of appeal contended as follows:—The decision of the referee was erroneous in including in the gross value and the total value respectively the tenant's interest in the unexhausted manures and tillages; the Commissioners contend that upon the true construction of ss. 25, 26, and 41 of the Act the value of such interest, whether arising under agreement or by statute, is not an element relevant to the ascertainment of, and ought not to be included in, either gross value or total value.

The decision was also erroneous in treating the Model Farm for the purpose of arriving at the full site value as divested of (*a*) the grass and (*b*) the said road. The Commissioners contend that the grass upon the Model Farm is not within the meaning of s. 25, sub-s. 2, of the Act, any part of the "growing timber, fruit trees, fruit bushes, and other things growing" on the land, and that the said road is not within the meaning of s. 25, sub-s. 2, either a "structure," or a structure "appurtenant to or used in connection with" any of the buildings on the land, and, therefore, that for the purpose of ascertaining full site value the Model Farm ought not to be considered as divested either of the grass or the said road.

The decision was also erroneous in making for the purpose of arriving at the assessable site value the deductions of 66*l.* and 300*l.* As to the deduction of 66*l.*, such deduction was made by the referee upon evidence adduced before him on behalf of the respondent to the effect that on April 30, 1909, twenty-two acres of the Model Farm were under grass laid down by the tenant without the consent of the landlord, and that the tenant, while not entitled to compensation in respect of such laying down, was free to plough up the grass so laid down. No proof had been furnished to the Commissioners that any part of this total value of the Model Farm was directly attributable to the matter last aforesaid. The Commissioners contend that upon the true construction of s. 25, sub-s. 4 (*d*), of the Act the matter last

aforesaid is not a proper subject-matter of deduction for the purpose of ascertaining the assessable site value, and in any case in the circumstances aforesaid ought not to be deducted. Further, the Commissioners will contend, alternatively, that such deduction is not proper to be made, if upon the true construction of s. 25, sub-s. 2, the whole of the grass growing on the Model Farm ought to be considered as divested for the purpose of ascertaining the full site value of such farm. As to the deduction of 300*l.*, such deduction was made by the referee in respect of the tenant's interest in unexhausted manures and tillages, and the Commissioners contend that such interest does not form part of the total value, and in any case is not a proper subject-matter for deduction from total value under s. 25, sub-s. 4, of the Act.

The Commissioners submit that upon the basis of the figures found by the referee, and upon the footing that the aforesaid contentions of the Commissioners are well founded, the decision of the referee ought to have been to the following effect, that is to say:—

(1.) The gross value of the Model Farm should have been fixed at 11,635*l.*, being the sum of 11,935*l.* fixed by the said decision as the amount of such gross value, less the sum of 300*l.*, being the sum by which, according to the decision, the said sum of 11,935*l.* ought to be decreased if the tenant's interest in the unexhausted manures is not to be included in ascertaining such gross value.

(2.) The total value of the Model Farm should have been fixed at 11,519*l.*, being the sum of 11,819*l.* fixed by the decision as to the amount of such total value, less the sum of 300*l.*

(3.) The full site value of the Model Farm should have been fixed at 5657*l.*, being the aggregate of (*a*) the difference between the sum of 4625*l.* fixed by the decision as the amount of the full site value and the said sum of 300*l.*, and (*b*) the sum of 1332*l.*, the amount by which, according to the findings of the decision, the full site value as fixed by the decision ought to be increased, if, in arriving at such full site value, the Model Farm ought not to be considered as divested of the grass and the said road respectively.

(4.) The assessable site value of the Model Farm should have

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been fixed at 5541*l.*, being the sum arrived at by deducting from the sum of 11,519*l.* (total value) the sum of 5978*l.*, which is the difference between the sum of 11,635*l.* (gross value) and the sum of 5657*l.* (full site value).

Sir Stanley Buckmaster, S.-G., and *Sheldon*, for the appellants. The referee was wrong in including the tenant's interest in unexhausted manures and tillages in order to arrive at the gross value of the land in question for the purpose of s. 25, sub-s. 1, of the Finance (1909-10) Act, 1910. What has to be considered under that sub-section is the gross value of the land, and that means the amount which the fee simple if sold in the open market by a willing seller might be expected to realize. The price of the fee simple would not be increased for this purpose by the amount which an outgoing tenant might be entitled to receive in respect of unexhausted manures, tillages, &c. Assume that a change of tenancy occurred, the new tenant would in the ordinary course pay the value of these things to the old tenant. The "land" which is the subject of valuation is land exclusive of a personal right in respect of its use arising by virtue of cultivation. It is clearly exclusive of crops which the tenant has a right to sever. In that case the tenant takes away the things themselves; in the case of unexhausted manures and tillages he cannot take them away, but he gets their money value paid to him.

The referee was also wrong in considering the land as divested of the grass and of the road in arriving at the full site value under s. 25, sub-s. 2, of the Act. With regard to the road, can it be called a "structure" within the meaning of that expression in the sub-section? It certainly is not a "building." A "structure" is something ejusdem generis with a building, something that has been constructed, and it is not usual to speak of constructing a road. A road is usually said to be "made," because it is made up. If it had been intended that roads should be divested, the obvious method of effecting this would have been to mention them specifically, but that has not been done. As to grass, it is not ejusdem generis with "growing timber, fruit trees, fruit bushes."

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[SCRUTTON J. What do you say is the genus?]

Something which is rooted in the soil, of a permanent nature and of a woody character as distinguished from growths of a fibrous character. A quickset hedge is an instance of a thing ejusdem generis with those specifically mentioned. The doctrine of ejusdem generis was elaborately considered in *Tillmanns & Co.* v. *S.S. Knutsford* (1), where Farwell L.J. pointed out that there is no room for the application of the doctrine unless there is a genus or category. Here, undoubtedly there is a genus or category within which the general words must be confined.

[SCRUTTON J. referred to Lord Macnaghten's judgment in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2)]

The referee was again wrong in deducting for the purpose of arriving at the assessable site value under s. 25, sub-s. 4, the value of grass laid down by the tenant. The referee has deducted that value under clause (*d*) of the sub-section. But an expenditure in laying down grass is not something personal to the owner. The term "goodwill" which is used illustrates what is meant. A thing which is personal to the owner is something coloured or formed by the individuality of the owner; it is not something which other men can do as well as he.

Danckwerts, K.C., and *W. Allen*, for the respondent. Sect. 25, sub-s. 1, enacts that the gross value of land means the amount which the fee simple of the land if sold at the time in the open market by a willing seller "in its then condition," free from incumbrances, &c., might be expected to realize. To arrive at the value of the land "in its then condition," tillages and unexhausted manures must be included inasmuch as they would be taken into account by a purchaser.

In order to arrive at the full site value under sub-s. 2, those things have to be eliminated which cannot be called part of the bare site. The doctrine of ejusdem generis has really no application in construing sub-s. 2. If the last words are read in their natural sense as meaning things for which a purchaser would be willing to pay, things which have a value, there is no difficulty.

(1) [1908] 2 K. B. 385, at p. 402. (2) (1887) 12 App. Cas. 484.

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A purchaser would give something for the grass, and its value must therefore be deducted. As to the road, it is a "structure" within the sub-section. It is quite common to speak of constructing a road.

As to the grass laid down by the tenant and dealt with by the referee under sub-s. 4 (*d*), it was part of the land on April 30, 1909, and its value should be taken off under sub-s. 2.

Tillages and manurial values are things which are enjoyed by the owner of the land for the time being, and therefore they are matters which are "personal" to him within the meaning of s. 25, sub-s. 4 (*d*). [They referred to *Anderson* v. *Anderson* (1); *Parker* v. *Marchant* (2); *Inland Revenue Commissioners* v. *Herbert* (3); *Kauri Timber Co.* v. *Commissioners of Taxes* (4); *Inland Revenue Commissioners* v. *Earl Fitzwilliam.* (5)].

Sir S. O. Buckmaster, *S.-G.*, in reply. Where general words follow special words in an Act of Parliament, the general words, if their meaning is doubtful, must be construed with reference to the special words. The things specifically mentioned in s. 25, sub-s. 2, namely, timber, fruit trees, and fruit bushes, all belong to a class the characteristics of which are a wooded growth and a natural growth which does not start afresh each year or have to be renewed annually by sowing. The general words must possess the same characteristics as the class, and things like grass, wheat, and hops do not do so. Further, before it is necessary to consider whether grass can be deducted from full site value under the general words in sub-s. 2, one must first see whether it does come at all within the definition. For the purpose of arriving at both the gross value and the full site value the Act contemplates the value of the land considered apart from its annual agricultural use. It is impossible that there should be included in that value the value of an annual growth such as grass, for the effect would be that the full site value would vary from month to month according to the extent to which the grass had grown. There would be one value in December and another in May.

(1) [1895] 1 Q. B. 749.
(2) (1842) 1 Y. & C. Ch. 290.
(3) [1913] A. C. 326.
(4) [1913] A. C. 771.
(5) [1913] 2 K. B. 593.

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[SCRUTTON J. referred to Williams on Executors, 10th ed., p. 536, as to what things are included in emblements.]

As to the road, it may be that some roads are structures, but it must be a question of fact in each case and there is no evidence that this road is a structure.

Cur. adv. vult.

Feb. 28. SCRUTTON J. read the following judgment:—This appeal raises certain questions as to the valuation of agricultural land at Norton Malreward in the parish of Chelwood in the county of Somerset, and is intended as a test case. The hearing before the referee occupied four days, but on the hearing of the appeal before me only three questions were raised, as follows: (I.) Whether the referee was right (*a*) in including in the gross value and the total value what he describes as "the tenant's interest in unexhausted manures and tillages," amounting to 300*l.*; (*b*) in deducting the same sum in respect of the same matters from the total value in arriving at the assessable site value. (II.) Whether the referee was right in deducting from the gross value to arrive at full site value (*a*) the value of the grass on the holding, whether natural or sown, amounting to 1150*l.*; (*b*) the value of a certain road, 182*l.* (III.) Whether the referee was right in deducting from total value, to arrive at assessable site value, 66*l.*, being the value of twenty-two acres laid down from arable in grass by the tenant.

The first question arises thus. The value of the land is to be estimated as on April 30, 1909. On that day there was certain manurial value in the land from unexhausted manure; and certain tillages, or preparations for crops, such as ploughing, harrowing, and sowing, had been conducted on the land. If the tenant had terminated his tenancy on April 30, 1909, there would have been payable to him, either by statute, agreement, or the custom of the country, a sum of 300*l.*, in theory payable by the landlord, in practice paid by the incoming tenant. This sum is spoken of as "tenant right," or, as by the referee, "the tenant's interest in unexhausted manures and tillages." The case before the referee was conducted as if this was an interest in the land, and the question was whether it, as such an interest,

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was to be added to the valuation of gross value or not. This way of looking at the question seems quite erroneous. By s. 25 of the Finance (1909-10) Act, 1910, the gross value is the market value of the fee simple of the land "in its then condition" free from incumbrances, and any further burden, charge, or restriction. "Fee simple" is defined in s. 41 as "the fee simple in possession not subject to any lease." The land has therefore to be valued as in the occupation of its owner, free from tenancy; and the question between the parties really was: "Is the land to be valued literally in its then condition, which will include any value due to unexhausted manure or existing tillages, as the subject contends, or, as contended by the Crown, are the annual operations of agriculture, with their changing value, to be disregarded, and the normal value of the land taken?" This latter construction appears to me to give no meaning to the words "in its then condition." Such manurial value, or tillages, must give some additional value to the land. A purchaser will give more for liberally manured land with its virtue unexhausted than for the same land unmanured. He will pay a better price for land on which the preliminary tillage has been done than for land on which he will have to do it himself. And the referee must, in valuing the land "in its then condition," value this particular element in the land. The addition in value may not be the sum an outgoing tenant would receive for it by agreement or statute; it may be more or less than the conventional figure. The referee's language appears to suggest a wrong test, but as this case is not intended to settle particular figures, but to provide a working rule for the future, I do not propose to send the case back to the referee to ascertain whether he would give a different sum, considering the matter in the way I have laid down. It is enough to say that referees in valuing the land "in its then condition" should include in the gross and total value any sums attributable to the value of unexhausted manure or tillages performed.

The second half of the first question is whether, when this increased value has been included in gross value and total value, it can be deducted in arriving at assessable site value. The

referee has held that it can, and as all such deductions must be justified under s. 25, sub-s. 4, he has justified this deduction under sub-head (*d*) as a part of the total value attributable "to goodwill or any other matter which is personal to the owner, occupier, or other person interested in the land." I am quite unable to follow him in this, and indeed Mr. Danckwerts only said he was instructed to argue it, and did so very faintly, if at all. I do not propose at present to discuss what "matters personal to the owner" mean in this connection; it is enough to say that they do not in my opinion mean "works executed by the owner"; any such deduction must be justified if at all under sub-head (*b*), which does not cover this case. I think on this point the referee was wrong, and the deduction cannot be allowed in arriving at assessable site value.

The second point raised was whether certain matters should be deducted from gross value to arrive at full site value. The first of these matters was the grass growing on the farm on April 30, 1909. This undoubtedly raises a question of great general importance, and some difficulty. Counsel for the subject contended that the land should be valued on April 30, 1909, "in its then condition," which would include grass or any other crops, timber, or any other growths then on it. From this gross and full site value they argued there should be deducted under s. 25, sub-s. 2, "all growing timber, fruit trees, fruit bushes, and other things growing thereon." Grass and other growing crops were, they said, "things growing thereon." The Solicitor-General for the Crown, as I understood, met this in two ways. In the first place he contended that in valuing the land for gross and full site value the valuer would disregard the annual temporary operations of husbandry which resulted in sowing and taking away a crop, or in grass growing and withering, and would only value the permanent land. He said, on my questioning him, that, other things being equal, the value of the land in January, when corn or hops were not above the ground, should be the same as in July, when they were nearly ripe, for, being annual and temporary operations, the corn and hops should be disregarded by the valuer. Secondly he contended that, if they were to be valued, they were not to be deducted to arrive at full

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or assessable site value. For, he argued, the words "other things growing thereon" must be construed as ejusdem generis with the preceding words "all growing timber, fruit trees, fruit bushes"—which he said were a genus of vegetable growths where each year's growth did not die down, but remained as a substratum for the next year's growth, and where the vegetable growths had what he called a "permanent woody character." This excluded grass, and (as I think he admitted) hops, which have not these characteristics.

The first question is what must the valuer value? He is to value the land "in its then condition." Certain vegetable growths are, at the time, part of the land. They would pass under a devise of the "land" without more, or a sale of the "land" without more. They are more permanent, as the oak, or more transitory, as the grass. But they may add value to the land whether as timber, or hops ready to pull or strip, a corn harvest ready to reap, or a hay crop ready to cut. Following the words of the Act (which after all are the first thing to be considered) I think the valuer valuing the land "in its then condition" must consider and value the vegetable growths then part of the land. I have had some doubt whether he is not entitled to exclude such vegetable growths as are by law emblements, and which pass on the death of the owner intestate, not to the heir as land or real property, but to the next of kin, as chattels or personal property. I take the description of these "chattels vegetable," as they have been called, from Williams on Executors, 10th ed., pp. 536 to 538: They "are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labour and industry. . . . . The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit, that is produced by labour and manurance; as hemp, saffron, and the like; and melons of all kinds; and hops also, although they spring from old roots, because they are annually manured and require cultivation; and so of potatoes." The temptation to think that the draftsman and the Legislature may not have included these chattels vegetable in "land" is strengthened, when the work cited proceeds: "But the rule does not apply . . . . to fruit growing on trees; nor to the plantation

of trees," for the Act expressly orders to be deducted "all growing timber, fruit trees, and fruit bushes," which are land, under the doctrine of emblements, and pass to the heir on intestacy, and says nothing expressly about growing crops, which are not land on intestacy under that doctrine, and pass to the next of kin. The text-writer continues: "The growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements; because, as it is said the improvement is not distinguishable from what is natural product, although it may be increased by cultivation." Bayley J. in *Evans* v. *Roberts* (1), in 1826, makes the distinction: "Growing grass does not come within the description of goods and chattels, ... ; it goes to the heir and not the executor; but growing potatoes come within the description of emblements, and are deemed chattels, by reason of their being raised by labour and manurance. They go to the executor." But though it is tempting to think that the Legislature was well acquainted with real property law and did not mention growing crops because they were on intestacy, and for the purpose of severance on the death of a tenant, chattels and not land, and therefore not valued, but did mention timber and fruit trees because on intestacy they were land, I think that the fact that for other purposes, devises and sale, the growing crops are "land" prevents me from acting on this view.

I come, therefore, to the conclusion that the referee must, in valuing land "in its then condition," include all unsevered vegetable growths, whether natural or artificial, transitory or permanent, emblements or not emblements.

If so, is there any direction to deduct the value of growing crops, and especially grass, in arriving at the full and assessable site value? There is not, unless they are covered by the words "other things growing on the land," which words do in fact correctly, though generally, describe them.

I have, therefore, to consider the Solicitor-General's contention that the rule of ejusdem generis requires me to limit these general words to "the vegetable growths" preceding, which he describes as of a "permanent woody nature," as opposed to those of an annual growth which die down to the roots, or entirely,

(1) (1826) 5 B. & C. 829, at p. 832.

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each year. It will be seen that this latter class would include all growing crops except fruit on trees and bushes; and the value of corn, hops, strawberries, and hay could not be deducted. If I am right that it was included in the original valuation, this is a strong argument against the Solicitor-General's construction, and it was to meet it that he argued that they should not be included in the original valuation. The first rule of construction in statutes, as in all other documents, is to get at the intention of the parties from the words they have used, read in their ordinary and natural meaning. When this cannot be done, certain artificial rules of construction have been laid down. I take them as stated by Lord Halsbury in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1): "Words, however general, may be limited with respect to the subject-matter in relation to which they are used. . . . . General words may be restricted to the same genus as the specific words that precede them"; and I refer to the recent discussion of the rules by the Court of Appeal in *Tillmanns & Co.* v. *S.S. Knutsford* (2), and the earlier discussion in *Anderson* v. *Anderson.* (3) Endeavouring to apply the rules there stated having regard to the object and words of the Act, I see no ground for limiting the clear general words, to exclude matters which it seems to me the policy of the Act places on an equal footing with the matters that will remain included. The assessable site value is called by Lord Haldane in *Inland Revenue Commissioners* v. *Herbert* (4) the "value of the bare site." I see no reason for adding to it a temporary but valuable covering of its bareness due to cultivation; or anything in the words of the Act pointing to a distinction between coverings which are artificial and natural. Lord Haldane twice groups the matters I have to consider under a compendious etcetera—"divested of all buildings, structures, trees, &c."; "sold with all its buildings, structures, trees, &c." Part of the etcetera is in the words of the Act "other things growing thereon," and I am not able to see why grass, corn, or hops, which come within these words, are to be excluded.

I think, therefore, the referee was right in divesting the land

(1) 12 App. Cas. 484, at p. 490.
(2) [1908] 2 K. B. 385.
(3) [1895] 1 Q. B. 749.
(4) [1913] A. C. 326, at p. 333.

of the grass growing thereon, which he had included in its gross and total value.

The second point on this head was whether the referee was right in deducting from gross value the value of a private road to the farm. He is authorized by sub-s. 2 to deduct buildings or any other structures on, in, or under the surface, which are appurtenant to or used in connection with such buildings. It was agreed that this road was "used in connection with such buildings," and the only question was, is it a "structure"? The referee saw it, and heard evidence about it; and it might be sufficient to say I am not satisfied that his decision is wrong; just as in *Hunter's Case* (1), where the referee saw and heard evidence about two other roads, and found they were not structures, I should have required much persuasion to disturb his decision. But I was invited to give some guidance to referees on this question, which was said to be continually recurring. In my view it is a question of fact in each case; a gravel path though from repeated gravellings it is harder than the surrounding soil would not in my opinion be a structure, while the roads one is familiar with in Switzerland, the Tyrol, and Italy, in parts built up on mountain sides, in parts cut out of solid rock, would I think clearly be structures, as would the elaborate compositions of concrete, wood blocks, and tarmac used for heavy motor traffic at the present day. Between the two there is every variety of degree of solidity and permanence. Again, the modern earth banks of a reservoir, recently erected and continually repaired, may well be a structure; while the huge earthworks, long ago constructed and repaired, but now become part of the original earth and left to weather with it, such as Maiden Castle, Flower's Barrow and Badbury Rings in the county of Dorset, or Grim's Dyke, Offa's Dyke, and Dane's Dyke, as they run through England, have, in my view, long ceased to be structures, and become natural features of the earth. I think a structure is something artificially erected, constructed, put together, of a certain degree of size and permanence, which is still maintained as an artificial erection, or which, though not so maintained, has not become indistinguishable in bounds from the natural

(1) See post, p. 423. The finding of the referee as to the structure of these roads was not referred to during the hearing of Hunter's case.

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earth surrounding. What degree of size and permanence will do is a question of fact in every case. In this case I did not see the road, but was furnished with an agreed plan of its nature, which represented it as a solid mass sharply defined from the surrounding earth, ten feet wide by fourteen inches deep, the fourteen inches being composed of eight inches of rough stones and clinkers, and six inches of metalling, the whole obviously artificial. I refer to the agreed plan. In my personal opinion, this, though very near the line, is a "structure," but a very little change in its character would take it out of that description. I state this view in case it might help referees, though it binds nobody, not even myself. I think, therefore, the referee was right in deducting the value of this road from gross value to obtain full site value.

The third question is whether the referee was right in allowing a deduction from total value to reach assessable site value of 66*l.*, being the value of twenty-two acres laid down in grass by the tenant, but which he could not claim compensation for. This is justified as "a matter personal to the occupier" under sub-s. 4 (*d*). But, as already stated under the second half of the first question, I can see no justification for this, and I think the deduction cannot be allowed.

The result in figures appears to be that the gross value stands at 11,935*l.*, the total value at 11,819*l.*, the full site value at 4625*l.*, and the assessable site value at 4509*l.* (4143*l.* and 66*l.* and 300*l.*).

There is an agreement that I should deal with the costs below. The subject asked that the assessable site value should be well under 2000*l.*, indeed 964*l.* in her original notice of appeal; and in view of this, and that she has failed in some points, I give no costs below to either side. I think the subject substantially succeeds on the appeal, and I give her the costs of it; but she called certain evidence which was of very slight value, and which might have been called before the referee, and I give her no costs of or incidental to or caused by the oral evidence.

There will be leave to appeal, if desired, on all the points raised in the appeal.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Lewin, Gregory & Anderson.*

F. O. R.

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Feb. 24, 25
28.

Revenue—Duties on Land Values—Valuation of Land for Purposes of the Act —Agricultural Land—Value for Agricultural Purposes—Value of Land for Sporting Purposes—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 26, *sub-s.* 1.

In ascertaining the value of agricultural land, under s. 26, sub-s. 1, of the Finance (1909-10) Act, 1910, the value of the land for sporting purposes is not to be included in the "value of the land for agricultural purposes."

APPEAL of the Inland Revenue Commissioners from the award of a referee upon an appeal under s. 33 of the Finance (1909-10) Act, 1910.

The respondent appealed against the determination by the Commissioners under the Finance (1909-10) Act, 1910, of (1.) the value of his land for agricultural purposes, and (2.) the site value of that land. The provisional valuation of the land fixed (1.) the gross value of the land at 11,920*l.*; (2.) the deductions from the gross value to arrive at the total value at 1920*l.*, the total value being accordingly fixed at 10,000*l.*; (3.) the deduction from the gross value to arrive at the full site value at 4620*l.*, the full site value being accordingly fixed at 7300*l.*; (4.) the assessable site value at 5380*l.*; and (5.) the value for agricultural purposes at 9755*l.*

The decision of the referee on the appeal was as follows: "The value for agricultural purposes should include the value of the sporting rights (245*l.*) and the value of the tillages (450*l.*). I find this value accordingly to be 10,000*l.*"

The Commissioners appealed against the decision as to agricultural value upon the ground that it was erroneous in including the value of the sporting rights inasmuch as such rights ought not to be taken into account upon the occasion of the valuation directed by s. 26 (1) of the Act in ascertaining the value of land for agricultural purposes. The Commissioners also appealed

(1) 10 Edw. 7, c. 8, s. 7: "Increment value duty shall not be charged in respect of agricultural land while that land has no higher value than its market value at the time for agricultural purposes only:

"Provided that any value of the land for sporting purposes, or for

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against the decision in respect of tillages, but that question was decided by the learned judge in *Inland Revenue Commissioners* v. *Smyth.* (1) The referee had made an accidental blunder in stating the figures in his award, the original full site value being stated as 9560*l.* instead of 5120*l.*, and when the respondent's solicitors communicated with him on the next day he purported to issue an amended award of the same date stating the correct amount. The Crown refused to accept the amended award, and the respondent appealed in order to have the mistake corrected.

Sir S. O. Buckmaster, S.-G., and *Sheldon*, for the Crown. As to the sporting rights, sub-s. 1 of s. 26, which provides for the valuation of land, enacts that the value of the land "for agricultural purposes" shall be separately shewn. The expression "agricultural land" is to be construed according to the definition of "agriculture" in s. 41. That definition includes the use of the land as, inter alia, "woodland," but that is not with reference to sporting purposes; and it contains no reference to sporting rights, but is confined to agricultural purposes in a strict sense. The cultivation and preservation of game are not agriculture or husbandry; indeed they may be inimical to proper cultivation of the land. Prima facie, therefore, the value of the land for agricultural purposes does not include the value of the sporting rights. If it were included, there would have been no need for the proviso to s. 7, which expressly provides that, for the purposes

other purposes dependent upon its use as agricultural land, shall be treated as value for agricultural purposes only, except where the value for any such purpose exceeds the agricultural value of the land."

Sect. 26, sub-s. 1: "The Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land, and in the case of agricultural land the value of the land for agricultural purposes where that value is different from the site value. . . . . and the value shall be estimated as on the 30th day of April 1909."

Sect. 41: "In this Part of this Act, unless the context otherwise requires,—

"The expression 'agriculture' includes the use of land as meadow or pasture land or orchard or osier or woodland, or for market gardens, nursery grounds, or allotments; and the expression 'agricultural land' shall be construed accordingly."

(1) Ante, p. 406.

of increment value duty, the value of the land for sporting purposes shall be treated as "value for agricultural purposes only" unless it exceeds the agricultural value. That shews that the statute treats the value of sporting rights as something which is distinct from, and may exceed, the agricultural value.

Danckwerts, K.C., and *W. Allen*, for the respondent. Sporting rights do not exist as something separate from the land and occupation of the land. Formerly sporting rights could not be rated separately from the land even when they were separated from the occupation of the land by contract under seal; but by the Rating Act, 1874, the rating authorities were enabled to rate the owner of the sporting rights separately. Apart from that statute, the right of sporting is only a necessary incident and part of the occupation of the land: *Liverpool Corporation* v. *Chorley Union*. (1) The owner of the land in actual occupation, if he is using it as agricultural land, necessarily enjoys the right of sporting which is a natural use of the land in connection with agriculture. The right of sporting is an inherent element in the value of agricultural land: *Eyton* v. *Mold Overseers*. (2)

The values dealt with in s. 25 are all based upon the supposition that the owner in fee simple is in possession. In such circumstances, if he sells, he gives to the purchaser all that he has got. Upon a sale the seller and buyer are to be assumed to sell and buy every advantage which the possession of the land can give, and the right of sporting is such an advantage.

The proviso to s. 7 shews that the value of the land for sporting purposes is an inherent and necessary part of the value of the land for agricultural purposes. The object is to exclude the value for sporting purposes, if it exceeds the value of the land for other agricultural purposes, for the purpose of increment value duty only. The provisions of sub-s. 2 of s. 17 do not throw any light upon this question.

Sir S. O. Buckmaster, S.-G., in reply. The value of sporting rights may be part of the value of the land, but it is not part of its value "for agricultural purposes." That appears from the provisions of s. 7.

Cur. adv. vult.

(1) [1913] A. C. 197.

(2) (1880) 6 Q. B. D. 13.

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Feb. 28. (1) SCRUTTON J. These are two appeals in respect of the provisional valuation of Chell's Farm, Graveley, Hertfordshire. The hearing before the referee took five days, but the points argued before me were few and comparatively simple.

The appeal of the Commissioners raised two points. First, whether the value of certain tillages, mentioned in a letter from Mr. Trustram Eve, dated November 27, 1912, should be included in the gross value, full site value, and value for agricultural purposes, and deducted to arrive at the assessable site value. This is the same point as I have decided in Lady Smyth's appeal, the Norton Malreward case (2); I decide here in the same way and for the same reasons, that the valuer is to include in the gross and total values, and the value for agricultural purposes, such additional value as is given to the land by these tillages, not necessarily the amount that would be paid for tenant right; and that he is not entitled to deduct this sum to arrive at the assessable site value. I do not understand why this point was raised in this case as well as in the preceding case.

The second point on the Crown's appeal is whether, in valuing the land for agricultural purposes under s. 26, sub-s. 1, its value for sporting purposes, 245*l.*, is included. The term "agriculture" is said, in s. 41, to "include the use of land as meadow or pasture land or orchard or osier or woodland, or for market gardens, nursery grounds, or allotments." This definition does not refer to the use of land as arable or for crops, which is apparently treated as the primary meaning of the word "agriculture," which, however, is to "include" the other matters mentioned. Amongst these no mention of "sporting" is to be found, and so far neither the statutory nor the ordinary meaning of "agricultural purposes" appears to include sporting rights. Two sections of the Act are said to throw light on the matter. Sect. 7 is as follows: [His Lordship read the section.] The first clause suggests that sporting value is not included originally in "agricultural purposes only." The proviso appears unnecessary in that form, if sporting is an agricultural purpose. In any case, both the market value at the time for agricultural purposes only and the value for sporting purposes will be determined by other

(1) The judgment was written. (2) Ante, p. 406.

valuations than the one made in this case. Sect. 17, sub-s. 2, the other section cited, does not appear to throw any light on the matter. The result is that sporting is not an agricultural purpose within the definition, and just as the valuer is not to include building value in his valuation of land for agricultural purposes, so it appears to me that he is not to include the value of sporting rights. The decision of the referee on this point was wrong, and the figure of value for agricultural purposes should be 9755*l.* In this case, having regard to the contentions and course of the proceedings below, each party should pay their own costs of the hearing before the referee, and the Crown, who have substantially succeeded on their appeal, must have the costs of the appeal. There will be leave to appeal, if desired, on the question of sporting rights; the other points to be governed by the appeal in the Norton Malreward case.

The appeal of the subject raises a different point, which is, I hope, not likely to occur again. The Crown originally fixed the original full site value at 9872*l.*, and, by amendment, at 7300*l.*: the subject originally put the assessable site value at nil, and did not put it much higher by his evidence. Under these circumstances the referee issued an award, on July 3, that the original full site value was 9560*l.*, much higher than the Crown was contending for. It is agreed now that this figure was a mistake. It arose through some carelessness in the referee's office, including, I am afraid, that the referee signed his award without reading it intelligently. But misfortunes did not stop here. The next day the solicitors for the subject, without communicating with the other side, approached the referee's office orally, and in consequence of what they said he purported to issue an amended award, dated July 3, in which the full site value appears at 5120*l.* instead of 9560*l.* The Crown representatives were unable to accept the amended award in view of the fact that the referee was functus officio, having issued his award, and thereupon the subject appealed to vary the original award. The Crown, being satisfied that the original award was a mistake, do not oppose this appeal, and it is not suggested that any harm has in fact resulted from the action of the subject's solicitors, or that they had any improper motive in taking the course they did. But

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having regard to the fact that the subject's solicitors do not admit that they even committed a technical breach of etiquette (see their letter of July 24, 1913), I think it right to say that the well-known rule that no communication shall be made by one party to a judicial tribunal without the knowledge of the other party is of the greatest importance, and should be strictly observed. This is especially so where the communication leads to the alteration of an existing award, and is made orally, so that no record of what it was exists. While, as I have said, no improper motive is imputed to the subject's solicitors, I think their action was a breach of a well-established rule of great importance, and, as such, most regrettable.

It is clear, also, as stated by the Solicitor-General, that a referee, having once issued his award, cannot issue another without the consent of both parties. If an error is to be corrected, unless the parties assent, it can only be done by the Court on proper evidence, and with proper procedure; and I entirely concur in the remarks which both counsel addressed to me, that it is of great importance that the referees should exercise their important duties in the future, as I have no reason to doubt they have generally done in the past, with strict observance of all rules of judicial procedure.

The appeal will be allowed, and the figure of 5120*l.*, or the proper sum, after allowing for the judgment as to tillages, substituted for the sum of 9560*l.*, on the first, the only proper award of the referee; but under the circumstances it will be allowed without costs.

Appeals allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Lewin, Gregory & Anderson.*

J. H. W.

[IN THE COURT OF APPEAL.]

C. A.

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April 27, 28.
May 5, 12, 28.

THE KING *v.* COMMISSIONERS FOR THE GENERAL PURPOSES OF THE INCOME TAX FOR KENSINGTON.

Revenue—Income Tax—Foreign Possessions—Trade carried on in City of London—Place of Assessment—Jurisdiction to assess at Place of Residence—Prohibition—Grounds of granting Rule—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 106.

Upon a rule to the Kensington Income Tax Commissioners to shew cause why a writ of prohibition should not issue to prohibit them from proceeding on an assessment to income tax under Sched. D whereby the applicant was assessed in respect of profits of foreign property, it appeared that the applicant carried on business in the city of London although he resided in Kensington; and he contended that under s. 106 of the Income Tax Act, 1842, he was liable to assessment in the city of London only:—

Held, reversing the decision of Bray, Avory, and Lush JJ. [1913] 3 K. B. 870, that the grounds of the rule ought to be amended by stating s. 106 of the Income Tax Act, 1842, as a further ground; that under that section the applicant was assessable in the city of London only; and that prohibition would lie.

The grounds of granting a rule nisi for a prohibition, should be stated, according to modern practice, in the rule.

Appeal from a decision of Bray, Avory, and Lush JJ. (1)

Rule nisi to the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington in the county of Middlesex to shew cause why a writ of prohibition should not issue to prohibit them from proceeding on any one of five several assessments to the income tax under Sched. D, one for each of the years ended April 5 in 1908, 1909, 1910, and 1911 respectively, and a further additional assessment for the year ended April 5, 1908, whereby one Felix Avelino Aramayo was assessed in respect of profits of foreign property said to be derived from the firm of Aramayo, Francke & Co., being a firm resident in Bolivia, before the said property was transferred to Messrs. Aramayo, Francke & Co., Limited, a company incorporated in and resident in the United Kingdom at 52, Billiter Buildings, Billiter Street, in the city of London, on the following grounds:—(1.) The property from which such profits were derived

(1) [1913] 3 K. B. 870.

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had been wholly transferred away from the said Felix Avelino Aramayo and such profits had wholly ceased before April 6, 1907, the commencement of the first of the said years of assessment, and no part of the profits on which such assessments purported to be based was received nor was any part alleged to have been received during any of the years of assessment. (2.) The whole of the profits on which such assessments purported to be based were received prior to April 5, 1907, and might have been assessed prior to the commencement of the Finance Act, 1907, and therefore could not legally be assessed later than April 5, 1908. (3.) The whole of the profits on which such assessments purported to be based were profits or gains arising from foreign possessions, and were received in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842 (1), assessable by the Commissioners acting for the city of London and not elsewhere. (4.) The additional first assessment

(1) Income Tax Act, 1842, s. 108: "The duty to be assessed by virtue of this Act in respect of the profits or gains from foreign possessions or foreign securities, or in the British plantations in America, or in any other of Her Majesty's dominions, may be stated to and assessed by the respective Commissioners acting for the respective places hereinafter mentioned, videlicet, London, Bristol, Liverpool, and Glasgow, according to the regulations hereinafter mentioned, as if such duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively; and such duty shall be assessed and charged by the Commissioners acting for such of the said places at or nearest to which such property shall have been first imported into Great Britain"—now by s. 5 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the United Kingdom—"or at or nearest to which the person who shall have received such remittances, money, or value from thence, and arising from property not imported as aforesaid, shall reside . . . . Provided always, that whenever the produce or the profits or gains arising from such possessions or securities as last aforesaid shall have been imported partly into the port of London and partly into any of the outports of Bristol, Liverpool, or Glasgow, or shall have been received by any person partly in the city of London and partly in any of the said outports, within the period of making up the account on which the duty is chargeable by this Act according to the rules herein contained, the whole of the duty chargeable in respect of such produce, profits or gains so imported or received shall be assessed and charged by the Commissioners acting for the said city of London, and not elsewhere, and as if the whole of the said produce or the said profits or gains arising within the said period had been imported into or received in London . . . ."

No. 5780 (No. 5 below mentioned) referred to a notice dated April 29, 1911, signed by the clerk to the said Commissioners, was not made within three years after the expiration of the year of assessment, contrary to s. 23 of the Finance Act, 1907. (1)

Notice of the rule was directed to be given to the surveyor of taxes for the Kensington district as well as to the Commissioners. The rule was obtained on May 26, 1911.

The five assessments above mentioned were all made on the applicant, F. A. Aramayo, and were as follows :—

No. 1. An additional first assessment to the amount of 20,000*l.* under Sched. D of the Income Tax Acts for the year ending April 5, 1908, in respect of "foreign possessions," the income tax payable being 1000*l.*, and the assessment having been signed by the additional Commissioners for the division of Kensington, in the county of Middlesex, on February 25, 1909, and allowed and confirmed by the General Commissioners for Kensington on May 6, 1909.

No. 2. A similar assessment to the above for the year ending April 5, 1909, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on January 20, 1911.

(1) Taxes Management Act, 1880, s. 52: "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties or has been undercharged in the said first assessments, or has obtained or been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorised by the Tax Acts, then . . . .

"(2.) As regards the duties chargeable under Schedule D of the Income Tax Acts, the additional Commissioners shall at any time after the said first assessments have been signed and allowed, but within four months after the expiration of the year to which such first assessments relate, make an assessment on any such person in an additional first assessment in such sum as according to their judgment ought to be charged on such person, subject to objection by the surveyor and to appeal."

By s. 23, sub-s. 2, of the Finance Act, 1907, "the time during which an assessment may be amended or an additional first assessment made under section 52 of the Taxes Management Act, 1880, ... shall be any time within the year of assessment or within three years after the expiration thereof."

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No. 3. A similar assessment to No. 1 above for the year ending April 5, 1910, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on January 20, 1911.

No. 4. A first assessment for the year ending April 5, 1911, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on December 2, 1910.

No. 5. An additional first assessment for the year ending April 5, 1908, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on March 31, 1911, and allowed and confirmed by the General Commissioners on May 25, 1911 (called No. 5780 in ground 4 of the rule).

In each of these assessments the place of abode of the applicant was described as being at 102, Cromwell Road, which was in the parish of South Kensington within the district of Kensington, and the applicant had returned "nil" there in respect of "foreign possessions."

It appeared from the affidavit filed in support of the rule (1) that the applicant, Felix Avelino Aramayo, was and had been for over eight years a partner in the firm of Avelino Aramayo & Co., of 52, Billiter Buildings, Billiter Street, in the city of London, and was the owner of a private residence at 102, Cromwell Road, Kensington. Prior to January 12, 1907, the applicant was also a partner in a firm known as Aramayo, Francke & Co., which owned possessions and carried on trade in Bolivia, and did not own any possessions or carry on any trade in the United Kingdom. On January 12, 1907, the business carried on and all the possessions owned by the said firm of Aramayo, Francke & Co. were transferred to and had since that date been entirely owned by Aramayo, Francke & Co., Limited, a company incorporated in and resident

(1) The affidavit, which was sworn on May 27, 1911, was made by the applicant's solicitor, who stated that he had acquired knowledge of the matters appearing therein by having acted for twenty years as the solicitor for the applicant in relation thereto.

in the United Kingdom, at 52, Billiter Buildings, aforesaid, and the whole of the rights and interest of the applicant in profits derived from the said business and the said possessions had been transferred to and the whole of the receipts therefrom had since January 12, 1907, been received by the said company, and the applicant had received no profits or receipts from the said business nor from the said foreign possessions other than the dividends or shares owned by him in the said company. The company was duly assessed by the General Commissioners for the Purposes of the Income Tax Acts in the city of London in respect of all profits received after January 12, 1907, from the said business and possessions, such assessments being made on the said company for the year ending April 5, 1907, and for each subsequent year of assessment up to and including the year ending April 5, 1911, the assessments being based on the profits earned by the company, and the company had paid all the amounts so assessed and had deducted the correct amount of income tax from the dividends due to the applicant in respect of such shares, and had duly accounted for the same to the Commissioners of Income Tax. On February 23, 1909, the surveyor of taxes for the Kensington district wrote to the applicant stating that a question had arisen as to his liability to assessment for the years 1907-8 and 1908-9 in respect of profits derived by him from Messrs. Aramayo, Francke & Co. prior to possession being given to the said company, and on March 9, 1909, the clerk to the Commissioners of Income Tax for Kensington served on the applicant notice of the additional first assessment in respect of such profits on "foreign possessions" (No. 1 above mentioned). On March 15, 1909, the applicant informed the said clerk by letter that the duty for the period applied for had already been paid to the collector for the district of the parish of Aldgate, in the city of London, on all his income under Sched. D. On May 26, 1909, the said Commissioners for Kensington issued a precept to the applicant requiring him to give particulars of the amount of the remittances to him or on his account to the United Kingdom during each of the three years ended respectively on April 5, 1905, April 5, 1906, and April 5, 1907, in respect of profits, interest,

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and partners' drawings from the business formerly carried on under the name of Aramayo, Francke & Co.; and subsequently the three assessments for the years ending April 5, 1909, April 5, 1910, and April 5, 1911, respectively (numbered 2, 3, and 4 above mentioned), were made upon the applicant, as appeared from a letter of February 8, 1911, from the surveyor of taxes for Kensington. Upon April 29, 1911, the clerk to the said Commissioners issued a notice of the additional first assessment (No. 5 above mentioned) for the year ending April 5, 1908, being in addition to the assessment No. 1 above mentioned. In December, 1910, a distress was levied for the sum of 1000*l.* in respect of the assessment (No. 1 above mentioned) for the year ending April 5, 1908, and this sum was paid under protest. The affidavit further stated that "the whole of the profits from such foreign possessions are and have always been received in the city of London and not elsewhere, and to the best of my information and belief it has not been alleged by any person, nor is it the fact, that the said Felix Avelino Aramayo has received any profits from foreign possessions nor any other profits on which such assessments could be based since January 12, 1907."

The applicant did not appeal to the General Commissioners against any of the above assessments. In his original return to the Kensington Commissioners the applicant had returned "nil" in respect of "foreign possessions."

The affidavit of the surveyor of taxes for the parish of South Kensington, in which 102, Cromwell Road was situated, stated that it came to his knowledge in the course of his official duties that the said firm of Aramayo, Francke & Co. sold their business carried on in Bolivia and elsewhere as from May 31, 1906, to the above-mentioned limited liability company, whose capital then was 500,000*l.* divided into 50,000 shares of 10*l.* each, and that of the consideration paid by the company for such business the applicant received fully-paid shares to the value of 138,380*l.*, the sale being completed and the transfer effected (as appeared from the affidavit in support of the rule) on January 12, 1907; that the first balance-sheet of the company filed with the Registrar of Companies and issued in June, 1908, shewed that a profit of over 125,000*l.* had been made for the year; that from

the size of the business taken over by the limited liability company the profits up to the date of transfer could not have been ascertained and remitted at once, but that such ascertainment, realization, and remitting must have taken considerable time; and that he was satisfied that this was a case for an additional first assessment, and the additional Commissioners accordingly made the assessment (No. 7 above mentioned) for the year ending April 5, 1908, in the sum of 20,000*l.* in respect of profits and gains arising from "foreign possessions"; the affidavit also stated that from some other information and in view of the fact that the applicant had not denied the receipt of income from foreign possessions, but had merely stated that the duty had been paid in the city of London on all his income under Sched. D, it appeared to the surveyor that the applicant was still in receipt in the United Kingdom of profits and gains from foreign possessions, and the additional Commissioners accordingly made the assessments (Nos. 2, 3, 4, and 5) upon him in respect of remittances from foreign possessions.

The affidavit of the surveyor of taxes for the district of the city of London, in which 52, Billiter Buildings was situated, for the period from July 16, 1907, to November 1, 1909, stated that in consequence of a communication from the surveyor of taxes for South Kensington in April, 1909, stating that the applicant alleged that he had paid income tax to the Aldgate collector on all his income under Sched. D, he made inquiries and found that the only assessments for some years had been assessments under Sched. D each year on the said firm of Avelino Aramayo & Co. in respect of their profits, and also in the year ending April 5, 1908, an assessment under Sched. E on the applicant in respect of his fees as a director of Aramayo, Francke & Co., Limited, and one on the said limited company under Sched. D for the said year ending April 5, 1908, in respect of their profits, and that there were no assessments on the applicant individually except the said assessment under Sched. E; and so far as he could ascertain no payments had been made other than in respect of the above-mentioned assessments, and he reported the fact to the said surveyor at Kensington; and he was unable to discover that

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any returns had been made by the applicant in respect of foreign possessions.

The Divisional Court refused to give Aramayo leave to amend the rule by specifying s. 106 of the Income Tax Act, 1842, as a further ground for it, and they discharged the rule.

Aramayo appealed.

After hearing arguments on both sides and reserving judgment their Lordships gave leave to amend the grounds of the rule by inserting s. 106 and heard further arguments on that point. In view of the course taken by the Court of Appeal it is not considered necessary to repeat the arguments on the points decided by the Court below.

G. M. Edwardes Jones and *K. E. Chalmers*, for the appellant. The appellant is not confined to the grounds stated in the rule. By a slip s. 106 (1) was not mentioned, but it is impossible to argue the case properly without referring to s. 106. There was no obligation on him to state any grounds, although a custom to do so has grown up recently. "It is not necessary that the grounds for issuing it should appear in a rule or order for a prohibition": Shortt on Informations, Mandamus, and Prohibition, p. 488; *Eversfield* v. *Newman*. (2) *Still* v. *Booth* (3) does not contain the passage which counsel in *Eversfield* v. *Newman* (2) purported to quote from it. There is no Crown Office rule on the subject. If the grounds of the rule are not to be amended the appellant asks for leave to file further affidavits: Rules of the Supreme Court, 1883, Order LVIII., r. 4; *Spencer* v. *Ancoats Vale Rubber Co.* (4); Short and Mellor's Practice of the Crown Office, 2nd ed., pp. 13, 226, 488; *Swinfen* v. *Swinfen*. (5)

The Commissioners have exceeded their jurisdiction; prohibition will lie—Earl of Halsbury's Laws of England, vol. x., pp. 142—144—and it is the most convenient remedy. The fact that there is a right of appeal does not take away the right to prohibition: Short and Mellor's Practice of the Crown Office, 2nd ed., p. 256: *Elston* v. *Rose* (6); *Chabot* v. *Lord Morpeth* (7);

(1) See note on p. 447, post.
(2) (1858) 4 C. B. (N.S.) 418.
(3) (1850) 1 L. M. & P. 440.
(4) (1888) 58 L. T. 363.
(5) (1857) 26 L. J. (C.P.) 97.
(6) (1868) L. R. 4 Q. B. 4.
(7) (1850) 15 Q. B. 446.

Charleton v. *Alway* (1); *Reg.* v. *Judge of County Court of Lincolnshire.* (2)

As a general rule a trader is to be assessed by the Commissioners of the place where his trade is carried on: s. 106 of the Income Tax Act, 1842; Earl of Halsbury's Laws of England, vol. xvi., p. 665; *Sulley* v. *Attorney-General.* (3) Read in connection with s. 3 it is clear that s. 106 was meant to be exhaustive: *Colquhoun* v. *Brooks.* (4) There is no other section which says where a trader is to be chargeable, but s. 106 does not make a person chargeable who is not so otherwise: *Sulley* v. *Attorney-General.* (5) Sect. 108 does not give an alternative course. This trade is carried on outside the United Kingdom and profits derived from it are presumed to be received, if at all, in the city of London by the appellant, and by s. 106 he cannot be assessed except in the City: *Colquhoun* v. *Brooks.* (6) The appellant made the necessary declaration that he was chargeable in the city of London and he cannot be charged in two places: s. 100, 1st and 2nd cases, r. 5, of the Act of 1842; *Rex* v. *General Commissioners of Taxes for Clerkenwell* (7); *Reg.* v. *Local Government Board.* (8) The appellant was not too late in making the application for prohibition: *Denton* v. *Marshall* (9); *Jones* v. *Owen* (10); *Rodger* v. *Comptoir d'Escompte de Paris.* (11)

Sir J. Simon, A.-G., Sir S. O. Buckmaster, S.-G., and *W. Finlay,* for the Crown. The point now before the Court is whether s. 106 provides that the appellant shall not be assessed in the place of his residence. The Crown does not consent to the amendment on the grounds of the rule, but does not now object to it provided the rights of the Crown are not prejudiced. The scheme of the Act is important. The appellant carries on trade in the city of London but resides in Kensington. By s. 110 he is bound to deliver statements in both places if required, although he cannot be charged twice; so the Kensington Commissioners

(1) (1840) 11 Ad. & E. 993.
(2) (1887) 20 Q. B. D. 167.
(3) (1860) 5 H. & N. 711.
(4) (1889) 14 App. Cas. 493, 506.
(5) 5 H. & N. 711, 715.
(6) 14 App. Cas. 493.
(7) [1901] 2 K. B. 879, 894.
(8) (1882) 10 Q. B. D. 309, 321.
(9) (1863) 1 H. & C. 654.
(10) (1848) 5 D. & L. 669.
(11) (1871) L. R. 3 P. C. 465.

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had a right to ask him for a return. That provision is not rendered meaningless by s. 106. By s. 171 the Commissioners may grant relief against double assessments, which shews that people may be assessed in more places than one. It is no answer to the additional Commissioners exercising their powers of assessment under s. 111 to say that an assessment has already been made elsewhere. By s. 47 general notices and by s. 48 particular notices have to be given; but the powers of the Crown do not depend on the particular notices being given, and persons making default are liable to be assessed. The result of the Act is that every trader can be assessed where he resides as well as where he trades. By s. 52 every person chargeable under the Act shall, if required, make a general statement of profits in the form given in s. 190, Sched. G, r. 15. Penalties are provided for by s. 55. By s. 113 the additional Commissioners may make an assessment. Under s. 110 the Commissioners for the district in which a man resides can assess him, and a man can be assessed in two places though double charges can be relieved from under s. 171 and s. 60 of the Taxes Management Act, 1880. Sect. 106 of the Act of 1842 has not made all these provisions useless nor taken away the right to be assessed at the place of residence. The remedy of the appellant was by appeal, not by prohibition: *Rex* v. *General Commissioners of Taxes for Clerkenwell.* (1) He is not entitled to prohibition. The question is whether there was absence or excess of jurisdiction on the part of the Commissioners so as to give ground for prohibition. It is the duty of the Commissioners to collect taxes in due course, and mistakes in the circumstances of the case do not affect their jurisdiction. They have to assess people without knowing all the facts; and that is the only way in which taxation can be enforced. The appellant has declined to communicate with the surveyor or to appeal and he is not entitled to prohibition.

A. M. Bremner, for the General Commissioners for Kensington, If a person is residing in a particular place there is jurisdiction to assess him in that place. It may be that the appellant ought not to be made to pay income tax on this foreign property, but, if so, he ought to have appealed. The jurisdiction is not affected;

(1) [1901] 2 K. B. 879, 894.

and it is for the Commissioners to decide whether he has in fact received anything which is taxable.

Edwardes Jones replied.

Cur. adv. vult.

May 28. SWINFEN EADY L.J. This is an appeal from the Divisional Court discharging a rule nisi obtained by Felix Avelino Aramayo for a writ of prohibition to prohibit the General Commissioners of Income Tax for Kensington from proceeding on any one of five several assessments to the income tax under Sched. D in respect of profits or gains from foreign possessions.

The rule nisi sets forth the grounds on which it was granted, the third ground being as follows: "(3.) The whole of the profits on which such assessments purport to be based were profits or gains arising from foreign possessions, and were received in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842, assessable by the Commissioners acting for the city of London and not elsewhere."

Thus the point taken is that on the facts stated the taxpayer could only be assessed by the Commissioners for the City. The appellant need not have referred to any particular section of the Act; the ground would have been quite sufficiently stated if the words of the rule had been "and were by virtue of the Income Tax Act, 1842, assessable by the Commissioners acting for the city of London and not elsewhere." The sections really governing the matter are ss. 106 and 108, and both should have been mentioned in the rule if it was wished to particularize the material sections. The appellant applied in the Court below for leave to amend this slip by mentioning s. 106 as well as s. 108, and in my opinion this leave to amend should have been given by the Divisional Court. We gave the leave to amend by adding s. 106 to the third ground, so as to enable the point to be fully argued. No further costs were occasioned by the amendment; no new fact was involved or put in issue; in any case the Court in construing the statute must have had regard to s. 106 as well as s. 108, and unless we had allowed the real point to be raised and argued, the appellant's claim would have been defeated by the merest technicality. Again, the true construction of the two

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sections 106 and 108 raises a question of much general importance, and one which ought to be decided.

If the assessments in question were made by Commissioners who had not jurisdiction to make them, the question arises whether prohibition will lie, and whether it is an appropriate remedy.

In the case of *Reg.* v. *Local Government Board* (1) Brett L.J. said: "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

In *Rex* v. *General Commissioners of Taxes for Clerkenwell* (2) a writ of prohibition was only refused because the Commissioners had not gone wrong in the finding of any fact preliminary to giving themselves jurisdiction. It may be gathered from all the judgments in that case that the rule would have been made absolute if the Commissioners had acted without jurisdiction. I entertain no doubt, notwithstanding what was said in the Divisional Court, that if the Kensington Commissioners have acted without jurisdiction, prohibition will lie and is an appropriate remedy.

The question then is whether, according to the true construction of the Act of 1842, the Kensington Commissioners had jurisdiction to assess the appellant in respect of gains or profits from foreign possessions.

The Act provides for the appointment of Commissioners for general purposes, of additional Commissioners, and of Commissioners for special purposes, and determines their respective functions; it provides for the appointment of assessors and collectors (s. 36); for serving and delivering notices to persons, requiring them to make out and deliver lists, declarations and statements; and (by s. 52) every person chargeable is required to prepare and deliver a statement of the annual value of all lands

(1) 10 Q. B. D. 309, at p. 321. (2) [1901] 2 K. B. 879.

and tenements in his occupation, and the amounts of the profits or gains arising to such person from every source chargeable under the Act, with a declaration that it is estimated on all the sources contained in the several schedules. The foregoing are general provisions.

The rules under which the particular duties are to be assessed and charged begin with s. 60. As to Sched. A: by that section it is provided, by No. IV. "Rules and Regulations respecting the said duties," first: "All properties chargeable to the duties in Schedule (A) shall be charged in the parish or place where the same are situate, and not elsewhere, except as hereinafter is excepted." And then follow certain exceptions, which it is not necessary to follow up. Sched. B is dealt with by s. 63, rr. Nos. VII. and VIII., and provisions dealing with both Scheds. A and B begin with r. No. IX.

Sect. 64 provides that upon every account of the annual value of the several properties to be charged under Scheds. A and B the assessor shall make an assessment. Sect. 74 provides that the respective assessors shall make their assessments on all lands, tenements, and hereditaments within the limits of those places for which they are to act.

Sched. C is dealt with by s. 88 and following sections. These duties are assessed by special Commissioners, and the "Rules for assessing and charging the duties under Schedule (C)" so provide.

The special provisions with regard to Sched. D begin with s. 100. Sect. 106 provides for the districts in which every person is to be charged or chargeable to the said duties in Sched. D. Every person engaged in any trade (which is the case of the appellant) shall be chargeable by the respective Commissioners acting for the parish or place where such trade should be carried on.

The section then proceeds: "And in order that the place where the said last mentioned duties are to be charged may be ascertained," every person is required on delivering a list or statement to deliver a declaration in writing signed by him "declaring in what place he is chargeable."

In my opinion this s. 106 determines where, and where alone, a person may be assessed to the duties in Sched. D, subject only

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to the alternative provisions of s. 108, which give an option to the person liable to assessment.

It was urged by the Attorney-General that in whatever parish or place a taxpayer is liable to be assessed for any income tax, there he is also liable to make returns in respect of the whole of his income from every source, and to be assessed in respect of the whole of his income. In my opinion, this contention cannot be supported so far as regards assessment. The statute provides, by the sections to which I have already directed attention, where, and where only, the taxpayer is to be charged in respect of the duties granted. However wide the power of requiring returns or statements, the taxpayer can only be assessed and charged where the statute provides that he is to be charged or is chargeable. Sect. 110 provides for the delivery of statements in various places, and also that the taxpayer shall not be liable to any double charge by reason thereof. This means that although he may be required to deliver statements in more places than one, or in many places, he shall not, by reason thereof, be liable to any double charge or to be charged except in "the parish or place where such person ought to be charged." As regards Sched. D, this parish or place is determined by s. 106. Sects. 111 and 113 confer particular powers on the Commissioners, but must be read as applying to the Commissioners in their respective districts. Sect. 171 enables the Commissioners to correct errors or mistakes and put the matter right.

The conclusion at which I have arrived is in accordance with the view expressed by Stirling L.J. in *Rex* v. *General Commissioners of Taxes for Clerkenwell* (1), where he said, speaking of a trade partly carried on in the United Kingdom and partly abroad, "That assessment must be made by the persons designated by s. 106 of the Income Tax Act of 1842—that is, the Commissioners for the place where the trade is carried on within the United Kingdom; if not made by them the person carrying on the trade would escape taxation in respect of the portion of the trade carried on abroad." The result is that the appellant succeeds in his contention that the

(1) [1901] 2 K. B. 879, at p. 894.

Commissioners for Kensington had not any power to assess him in respect of gains and profits from foreign possessions, and the rule for prohibition must be made absolute, except in respect of the first year, where the Commissioners have obtained payment, and there are not any further proceedings to prohibit.

Upon the view of the case which I have taken, the other matters discussed before the Divisional Court do not arise.

Having regard to the course which the case has taken, and to the form in which the rule was expressed, the justice of the case will be met if each party is left to bear his own costs here and below.

PICKFORD L.J. The appellant in this case obtained a rule nisi for a prohibition to the General Commissioners of Income Tax for the district of Kensington to prohibit them from further proceeding on any one of five assessments to the income tax under Sched. D.

This rule was discharged by the Divisional Court, and their decision is reported in [1913] 3 K. B. 870, where the facts are fully set out. From that decision this appeal is brought.

The rule nisi stated several grounds on which it was granted, but it is only necessary to mention ground 3, which was in these words: "The whole of the profits on which such assessments purported to be based were profits or gains arising from foreign possessions, and were received in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842, assessable by the Commissioners acting for the city of London, and not elsewhere."

On the argument before the Divisional Court, the appellant wished to argue that by virtue of s. 106 of the Income Tax Act, 1842, the only persons who had the power to assess him were the Commissioners for the city of London. He contended that it was not necessary to state the grounds on which the rule was granted, and that he was not confined to those grounds, but could support the rule on any grounds justified by the facts stated in the affidavits. He also contended that the grounds were sufficient to cover his proposed argument and finally asked for an amendment.

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The Divisional Court refused the amendment. There seems to have been some uncertainty in former times as to whether the grounds of granting a rule nisi for prohibition should be stated in the rule, but on December 14, 1909, in a Divisional Court of the King's Bench Division, Lord Alverstone C.J., sitting with Ridley J. and Darling J., gave a general direction that in all cases the grounds on which the application is made (and this must mean made and granted) should be indorsed on counsel's brief, and that no order should be drawn up unless that was done. The form of the rule is taken from this indorsement, and from the date of that direction the grounds have been stated in every rule nisi. The practice is convenient, as rules are often refused on some of the grounds of application, and granted on others; and I think that in the absence of amendment the applicant should be confined to the grounds stated in the rule.

I think ground 3 did not cover the proposed argument under s. 106. It stated certain facts which it was contended, by virtue of s. 108, made the Commissioners of the city of London the only persons who had jurisdiction to assess the appellant, while the proposed argument was that the appellant, as a person trading in the city of London, was only assessable there by reason of s. 106, apart altogether from the effect of s. 108. In my opinion the two grounds were entirely different. The Divisional Court refused the amendment as they thought the point a purely technical one, but this Court decided to allow it. Such amendment was merely formal. It did not require the consideration of any new facts, and s. 106 would necessarily be considered by the Court in connection with the grounds as originally stated. This Court therefore did not consider that it was right that it should be prevented from giving a decision upon the effect of a section which it would have to consider, because the appellant, either from not having at first realized the importance of the point, or from a mistake in stating the grounds of the rule, had omitted to mention that particular section. The argument therefore proceeded before us upon the rule as amended.

The first point to consider is one rather raised by the Divisional Court than by the respondents to the rule, namely, whether prohibition will lie at all in a case of this kind. In *Rex* v,

General Commissioners of Taxes for Clerkenwell (1) and other cases it has been assumed that prohibition would lie, though on the facts it was refused. It is true that the point was not argued, but I could hardly have been overlooked by the Court; and I think we ought to take the same view as that taken there, which in my opinion was the right one.

In the Divisional Court the main points argued were (1.) that under s. 52 of the Taxes Management Act it is not enough for the surveyor to think that certain profits have been omitted but that in order to give him jurisdiction it must be actually proved that in fact such is the case; and (2.) that under s. 108 of the Income Tax Act, 1842, it is necessary that in the facts there stated the assessment should be by the Commissioners of the city of London, and that the section does not give the person to be charged an option only to have them so assessed.

It is not necessary, in the view I take of the other point, to decide these questions, but I see no reason to dissent from the decision of the Divisional Court.

There remains, therefore, only the point raised by amendment, namely, whether the jurisdiction to assess the appellant is confined to the Commissioners of the city of London, and therefore the Commissioners for Kensington acted without jurisdiction. On this point I think the appellant is right. He resided in Kensington and carried on in the city of London a business conducted partly within and partly without the United Kingdom, and the question is where he should be assessed. Sects. 47, 48, and 52 of the Income Tax Act, and others of the earlier sections, lay down general rules as to the notices to be given and the returns to be made in respect of income liable to tax; and other sections deal with taxes under different schedules; but until s. 106 is reached there is no section stating specifically in what district the duties are to be charged under Sched. D.

Sect. 106 deals with four classes of persons: first, householders not engaged in trade or other employment or vocation; secondly, persons engaged in trade, &c.; thirdly, persons not householders or engaged in trade, &c., but having a place of ordinary residence; and fourthly, persons not hereinbefore

(1) [1901] 2 K. B. 879.

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described; and in each case it is stated where the duties are to be charged.

In the case of persons engaged in trade it is enacted that they shall be chargeable by the Commissioners acting for the place where such trade shall be carried on, whether such trade shall be exercised wholly or in part in Great Britain.

Pickford L.J.

I think that, subject to modification, if any, by subsequent sections, this means that these Commissioners are the only persons who ought to charge persons engaged in trade. The expression used with regard to them is "shall be chargeable," while with regard to the other classes of persons the expression is "shall be charged"; but I cannot think that makes any difference, although I do not know the reason of the change of language. Assessments upon persons in respect of profits arising from foreign possessions may, under s. 108, be made by the Commissioners of four named ports; but as I have already stated, I agree with the Divisional Court that this merely gives an option to the person to be assessed, and it does not affect this case. Sect. 110, however, is said to give the right to the Commissioners of the place where a trader has his ordinary residence to assess him. It provides that every person carrying on any trade in any place different from the place of his ordinary residence shall deliver at each such place the like lists as he is thereby required to deliver in the parish or place where such person ought to be charged, but shall not be liable to any double charge by reason thereof; and it was argued for the Crown that this must give a power to the Commissioners of the place of residence to assess. I do not think it does. I do not think "shall not be liable to any double charge" means "may be assessed twice but only made to pay once." I think it means shall not be liable to have more than one charge made upon him, and that the reference to the place where he ought to be charged relates to the provisions of s. 106 which point out that place.

Sect. 171 in my opinion confirms this construction of the Act. It provides that where any person has been assessed to any of the duties granted by the Act, whether charged on him on his own account or otherwise, and shall by any error or mistake be again assessed, it shall be lawful for him to apply to the

Commissioners for the place for which he shall have been assessed by error or mistake to be relieved from such double assessment, and such Commissioners shall, on proof to their satisfaction, vacate such assessment. One method of proof is stated to be a certificate of the assessment made on him under the hands of the Commissioners by whom he shall rightly have been assessed. A later part of the section provides for repayment where double payment has been made. This section seems to me to shew that the Act only contemplates a second assessment as possible by error or mistake, and only one place where the person can rightly be assessed, which is inconsistent with the contention of the Crown that under the combined effect of ss. 106 and 110 a trader may be assessed both where he trades and where he lives, though he can only be made to pay once. Sect. 60 of the Taxes Management Act, 1880, is to the same effect, and confirms the view that charge means assessment and not payment.

Sects. 111 to 117 do not, I think, throw any light on the matter, as they merely deal with the powers of the Commissioners in the districts within which they ought to act.

I think, therefore, that the appellant could only be assessed by the Commissioners of the city of London, and that the Kensington Commissioners had no jurisdiction, and that the prohibition must go except as to the assessment on which payment has been made and there are no further proceedings to be taken.

Under all the circumstances, however, and considering that much trouble and expense would possibly have been saved if the appellant had had his rule in proper form in the first instance, I think there should be no order as to costs either here or below.

COZENS-HARDY M.R. I agree. The appeal will be allowed, and the rule made absolute for prohibition except as to the first assessment.

Appeal allowed.

Solicitors: *Dale & Co.; Solicitor of Inland Revenue; Shepheards & Walters.*

NOTE.—Income Tax Act, 1842, s. 106. "And be it enacted, that every person being a householder (except persons engaged in any trade, manufacture,

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adventure, or concern, or any profession, employment, or vocation) shall be charged to the said duties contained in Schedule D. by Commissioners acting for the parish or place where his dwelling house shall be situate; and every person engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, shall be chargeable by the respective Commissioners acting for the parish or place where such trade, manufacture, adventure, or concern shall be carried on, or where such profession, employment, or vocation shall be exercised, whether such trade, manufacture, adventure, or concern shall be carried on, or such profession, employment, or vocation shall be exercised, wholly or in part only in Great Britain, or whether such person shall be engaged in one only or more of such concerns, except where the same person shall be engaged in different concerns, and a loss from one concern shall be set off or deducted from the profits of another concern; and every person not being a householder, nor engaged in any trade, manufacture, adventure, or concern, nor in any profession, employment, or vocation, who shall have any place of ordinary residence, shall be charged by the Commissioners acting for the parish or place where he shall ordinarily reside; and every person not herein-before described shall be charged by the Commissioners acting for the parish or place where such person shall reside at the time of beginning to execute this Act in each year by giving such general notices as are herein mentioned, or shall first come to reside after the time for giving such general notices; and every such charge made in such parish or place shall be valid and effectual, notwithstanding the subsequent removal of the person so charged from the parish or place; and in order that the place where the said last mentioned duties are to be charged may be ascertained, every person is hereby required, on the delivery of any list or statement as aforesaid, at the same time to deliver a declaration in writing signed by him declaring in what place he is chargeable, and whether he is engaged in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation, or not, and if he shall be so engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, also declaring the place where the same shall be carried on or exercised, and every particular concern, profession, or employment in which he shall be engaged in such place in Great Britain, whether wholly in Great Britain, or in part only, as aforesaid; provided that where any trade shall be carried on in Great Britain by the manufacture of goods, wares, or merchandize, the assessment thereon shall be at the place of manufacture, although the sales of such goods, wares, or merchandize shall be elsewhere; Provided always, that every person not being engaged in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation, having two or more houses or places at which he shall be ordinarily resident, shall be charged at such of the parishes or places wherein the dwelling house is situate in which he shall be ordinarily resident at the time of beginning to execute this Act in each year in manner aforesaid, or in which he shall first come ordinarily to reside after giving such general notices as aforesaid: Provided always, that the duty to be assessed by virtue of this Act, in respect of the profits or gains arising from possessions or securities in Ireland, upon any person resident in Great Britain as aforesaid, may be

stated to and assessed by the respective Commissioners acting for the respective places where the persons receiving or entitled unto the same shall reside; and if the same shall be received by any agent, attorney, or factor, such agent, attorney, or factor shall make such return of the name and place of abode of the person entitled thereto as is herein required to be made of other persons of full age resident in Great Britain, and if the person entitled thereto shall not be of full age, or not resident in Great Britain, such agent, attorney, or factor shall be answerable for doing all acts, matters, and things required by this Act to be done in order to the assessing such profits to the said last mentioned duties, and paying the same."

H. C. R.

HUMBER CONSERVANCY BOARD *v.* BATER
(SURVEYOR OF TAXES).

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June 12.

Revenue—Income Tax — Humber Conservancy — Statutory Payments to, whether taxable—Profits of "inland navigation"—"Annual profits and gains"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. A, No. III., r.* 3; *s.* 100, *Sched. D., Sixth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.—Humber Conservancy Act*, 1907 (7 *Edw.* 7, *c. xcvii.*).

The Humber Conservancy Board were the lessees of certain foreshores and the bed of the river Humber, but they possessed no docks or wharves. They exercised under their statute the ordinary conservancy duties, their receipts consisting of shipping and registration dues and certain statutory contributions amounting in the aggregate to 4300*l.* per annum payable to them by four railway companies and a canal company. The Board admitted that all their income other than the contributions from those five bodies fell to be included in the income tax computation of their profits:—

Held, that the contributions in question were also liable to income tax as being either profits from "an inland navigation," within s. 60, Sched. A, No. III., r. 3, of the Income Tax Act, 1842, or as being "annual profits and gains" within s. 2, Sched. D, of the Income Tax Act, 1853.

CASE stated by Special Income Tax Commissioners.

The Humber Conservancy Board (hereinafter called the appellants) were incorporated by the Humber Conservancy Act, 1907 (7 Edw. 7, c. xcvii.), and all the rights, powers, liabilities and duties previously vested in the Humber Conservancy Commissioners were transferred to the appellants.

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The river Humber is an arm of the sea and is tidal for a distance of seventy miles from Hull, namely, as far as Torksey above Gainsborough. The appellants had paramount conservancy jurisdiction up to Gainsborough.

The appellants, who possessed no docks, wharves, or other artificial works of any kind, were the lessees for a long term of years of certain foreshores and the bed of the river Humber. All the lighthouses and the buoyage store, together with the freehold or leasehold lands whereon the same were situate, the lightships, buoys, beacons, together with the cottages and other buildings used in connection therewith, were also vested in them.

The appellants' duties consisted in the maintenance and improvement of the navigation of the Humber and the estuary thereof from the confluence into the same of the rivers Ouse and Trent, including the dredging of the river, the removal of shoals, the lighting, buoyage, and beaconage of the river, the maintenance of lifeboats, and the removal of wrecks.

The appellants' receipts consisted principally of shipping and registration dues, foreshore and jetty rents, fees for gravel and sand licences, and contributions amounting in the aggregate to 4300*l.* per annum, payable to the appellants, by virtue of s. 77 of the Humber Conservancy Act, 1907, by the following bodies and in the following amounts :—

Great Central Railway	£1000
Aire and Calder Navigation	600
North Eastern Railway	2000
Hull and Barnsley Railway	400
Lancashire and Yorkshire Railway . . .	300
	£4300

The appellants' expenditure consisted mainly in the maintenance of lighthouses, lightships, buoys, the removal of wrecks, the cost of surveys and inspection of the river, the maintenance of lifeboats, cost of dredging, salaries and establishment expenses.

The appellants admitted that all their income other than the

contributions from the five bodies above mentioned, amounting to 4300*l.*, fell to be included in the income tax computation of their profits.

The appellants contended that the contributions in question were not taxable on the following grounds:—

1, that they were in the nature of taxation; 2, that they were statutory, and so not within the term "annual payments" referred to in s. 102 of the Income Tax Act, 1842; and 3, that they were not "profits or gains" within the meaning of the Income Tax Acts.

The respondent contended that the contributions in question were taxable as they were included in the appellants' accounts by virtue of ss. 79 and 80 of the Humber Conservancy Act, 1907, in a common fund under the head of "Receipts" in the same manner as other undisputed items of receipt, and that in arriving at the balance of profit all admissible expenses had been deducted; and that if the contributions did not fall within s. 60, Sched. A, No. III., r. 3, they came within s. 100, Sched. D, sixth case.

The Special Commissioners were of opinion that the contributions must be regarded for income tax purposes as forming part of the gross revenue of the appellants, and fell to be included in the computation of their profits under s. 60, Sched. A, No. III., r. 3, of the Income Tax Act, 1842, or alternatively under s. 100, Sched. D, sixth case, of the same Act, and fell within the general charge of "annuities and other annual profits and gains" mentioned in s. 2, Sched. D, of the Income Tax Act, 1853.

The question for the opinion of the Court was whether the Special Commissioners were right.

H. F. Dickens, K.C., and *A. M. Latter*, for the appellants. There are no words in s. 60, Sched. A, No. III., r. 3, under which the appellants are taxable. No. III. provides for charging certain kinds of lands, tenements, and hereditaments, and r. 3 deals with "ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any

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lands, tenements, hereditaments, or heritages." It has been suggested that the appellants' property comes within the words "inland navigations," but this suggestion is not well founded. The Humber is an arm of the sea like the Bristol Channel or the Wash and is not an inland navigation. But even assuming it could be termed an inland navigation, the section is directed to taxing persons carrying on an inland navigation or a concern of the like nature, and the appellants do not carry on such a concern.

Nor are the appellants liable in respect of these contributions under s. 100, Sched. D, sixth case, of the Income Tax Act, 1842, or s. 2, Sched. D, of the Income Tax Act, 1853, as "annual profits and gains." These contributions are in substance a local tax and are therefore not assessable. The payments are made for the benefit of the community of the Humber; they are paid for keeping the waterway safe for navigation in the same way as a highway rate which is raised for the purpose of keeping highways open and safe: see *Attorney-General* v. *Black*. (1) The decision of the Court of Session in *In re Glasgow Corporation Waterworks* (2), where it was held that the Corporation of Glasgow were not chargeable for income tax as on profits of waterworks for money received from compulsory district water rates, is precisely in point. There the Lord President said (p. 49): "It is not within the contemplation of Schedule D of the Income Tax Act to charge any portion of a local rate raised for such a purpose as profit or as anything else falling within that Schedule D." In the subsequent case of *Glasgow Corporation Water Commissioners* v. *Miller* (3) the corporation were, however, held liable in respect of surplus revenue derived from supplying water beyond the area of compulsory supply. [*Mersey Docks and Harbour Board* v. *Lucas* (4) was also referred to.]

Sir Stanley Buckmaster, *S.-G.*, and *W. Finlay*, for the respondent. Having regard to the character of the contributions in question, and the bodies from whom they are exacted, it is impossible to suggest that there is any analogy between these

(1) (1871) L. R. 6 Ex. 308, at pp. 309, 310.
(2) (1875) 1 Tax Cases, 28.
(3) (1886) 2 Tax Cases, 131.
(4) (1883) 8 App. Cas. 891.

payments and a rate imposed upon the inhabitants of a locality. By ss. 79 and 80 of the Humber Conservancy Act, 1907, these payments go into the appellants' revenue account, and they are exactly on the same footing as the other branches of the appellants' revenue as to which it is admitted that the appellants are liable to income tax.

[SCRUTTON J. Under what sections do you say these contributions fall to be taxed ?]

They come within s. 60, Sched. A, No. III, r. 3, as being profits received from an "inland navigation" or a concern of the like nature. By virtue of their admission that their other revenue is taxable as "tolls" the appellants must be taken as carrying on an inland navigation or a concern of the like nature. If, however, these contributions do not come within Sched. A, they certainly fall within s. 100, Sched. D, sixth case, of the Act of 1842, or s. 2, Sched. D, of the Act of 1853, as "other annual profits and gains." There is nothing in the character of the contributions which takes them out of the category of profits and gains, "gains" being, as was pointed out by the Earl of Selborne in *Mersey Docks and Harbour Board* v. *Lucas* (1), what is gained, for whatever purposes it is used whether for the benefit of the community or for the benefit of individuals. *In re Glasgow Corporation Waterworks* (2) is not an authority in this case. There no profits were made. The Lord President pointed out (p. 48) that "the citizens of Glasgow have undertaken, through this water corporation as their representatives, to assess themselves . . . . to obtain a good supply of water for the city. In so assessing themselves they had not in view certainly to make profit by the undertaking. On the contrary, what they have distinctly in view is, to pay money in order to obtain this particular benefit"; and (at p. 49) he said this: "It is not within the contemplation of Schedule D. of the Income Tax Act to charge any portion of a local rate raised for such a purpose as profit or as anything else falling within that Schedule D. The case is entirely different from those that have been cited, which have been decided in the Court of

(1) 8 App. Cas. at p. 905. (2) 1 Tax Cases, 28.

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Exchequer in England, because in those cases the statute which gave the right to levy the assessment did not impose it upon the citizens of the particular burgh or locality which obtained the Act. It was not an authority to the citizens of a particular locality to assess themselves." That case is very different from this. If the five contributories could ask for division among themselves of any of the money not expended by the appellants, the contributions, it might be said, were not taxable; for the position would then be similar to that in *New York Life Insurance Co.* v. *Styles* (1), where it was decided that the surplus of premiums over expenditure which were returned to members of a mutual insurance company as bonuses was not taxable. That, however, is not the position here. [They also cited *Attorney-General* v. *Black*. (2)]

Dickens, K.C., in reply. Reliance is placed by the respondent on the fact that these five contributions appear in the appellants' revenue account, but, as was pointed out by Lord Davey in *London County Council* v. *Attorney-General* (3), "it is difficult to see how any account-keeping by the debtor could alter the rights of the Crown." The appellants are required by their Act to enter these contributions in their accounts and no argument can be based upon the fact. It was further contended that the appellants carry on an "inland navigation" or a concern of the like nature within Sched. A. As to that, it is to be noticed that r. 3 is dealing with profits from the various classes of property. The appellants have no tenements or hereditaments apart from those otherwise taxed, and what they receive is solely by virtue of the statute. The contributions do not therefore fall within Sched. A; nor do they fall within Sched. D as being in the nature of profits or gains, the contributions arising from a rate analogous to a highway rate.

SCRUTTON J. In this case the Humber Conservancy Board appeal against an assessment to income tax, and the question is whether they are liable to pay income tax on certain contributions paid under statutory authority by four railway companies

(1) (1889) 14 App. Cas. 381. (2) L. R. 6 Ex. 308.
(3) [1901] A. C. 26, at p. 46.

and a canal company who are interested in the navigation of the Humber, the contributions amounting in all to 4300*l.* a year.

The Humber Conservancy Board, who succeeded an earlier body, have the ordinary conservancy duties of keeping the river clear for navigation, of lighting and buoying it and removing wrecks and obstructions. As is usual with such authorities, they have power to levy dues on shipping using the river, and in this way they are provided with the major part of their income. They admit that they are liable to be taxed upon all their income except this 4300*l.*, and they make that admission because they say that the greater part of their revenue comes within the word "tolls." But they contend that the compulsory payments in question are not tolls and are not taxable. The Crown say the contributions are taxable under Sched. A or under Sched. D. Sect. 60, Sched. A, No. III., provides that "the annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom," and r. 3 sets out a list of things all of which have some connection with land. That list includes the word "tolls," under which word, as I have said, the appellants admit that the greater part of their income is taxable. The contributions in question in this case not being tolls, the question is whether they are profits arising from any of the other things mentioned in the rule. It must be borne in mind that the schedule is dealing with property in lands, tenements, or hereditaments; r. 3, after enumerating a number of specific matters, concludes with the words "and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages." The whole classification is directed to profits in some way arising out of land or interests in land. The tolls on which the appellants admit they pay under Sched. A must arise out of land. For the Crown it is suggested that the appellants may be an "inland navigation" or a concern of the like nature to an inland navigation within r. 3. I think this rule as regards inland navigations is directed to inland navigations which own the property over which the navigation takes place so that the profits arise out of lands or hereditaments. The appellants, as appears from the case, have some interest in

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the soil of the Humber, and I think therefore that they may come within the rule as being an "inland navigation," and, if so, they would be taxable under Sched. A. But if they are not taxable under that schedule I think they are taxable under s. 2, Sched. D, of the Income Tax Act, 1853, the relevant words being "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act." If the proper view is that these sums do not come within Sched. A, it seems to me that, subject to the point taken by Mr. Dickens, they are profits and gains, subject to the expense of collecting them, and come within the words I have just read "other annual profits and gains" and would be assessed under the sixth case. But it is said by Mr. Dickens on behalf of the appellants that these contributions cannot be included either as profits under Sched. A or as annual profits and gains under Sched. D because they are in the nature of a tax. In support of this contention he cited *In re Glasgow Corporation Waterworks.* (1) That case related to sums received by the Glasgow Corporation in respect of compulsory district water rates, and it was held that sums derived from that source from the ratepayers could not be treated as profits, although in the subsequent case of *Glasgow Corporation Water Commissioners* v. *Miller* (2) it was decided that as regards sums derived from the supply of water outside the district the corporation must pay income tax on the profits. In the case relied on by Mr. Dickens the Lord President said (p. 49): "Now, it seems to me, that it is not within the contemplation of Schedule D of the Income Tax Act to charge any portion of a local rate raised for such a purpose as profit or as anything else falling within that Schedule D"; and it is suggested that the decision would be the same as to a highway rate. I am not concerned to dispute the principle laid down in the Scottish case, and it may be, as suggested by the Solicitor-General in this case, that the principle there laid down is the same as in the case of a mutual insurance society which, having received certain sums from its members, returns the surplus to them because it is a mutual society. That may be the explanation and

(1) 1 Tax Cases, 28. (2) 2 Tax Cases, 131.

justification for profits received from a rate levied on a district not being treated as profits for the purpose of income tax. But I am quite unable to see how contributions from five named bodies, who have a local interest but who are not all the inhabitants, can be said to be a rate falling upon all the inhabitants of the district. I cannot treat these contributions as analogous to a rate, or say that they come within the principle laid down in *In re Glasgow Corporation Waterworks.* (1) The result is that the appellants have received certain sums, and, having incurred certain expenses, are left with a balance in hand which, so far as not composed of these contributions, is admittedly liable to pay income tax, and I see nothing in the Acts to exempt them from liability to income tax also on the contributions in question. They come within either Sched. A or Sched. D; they cannot come under both; but I am inclined to think that they come within Sched. A. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 1 Tax Cases, 28.

J. S. H.

C. A.
1914
May 12, 13.

[IN THE COURT OF APPEAL.]

VELAZQUEZ, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Act—Agreement—Debts owing by Persons resident Abroad—"Property locally situate out of the United Kingdom"—Ad valorem Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

An agreement was made and executed in England for the sale of a business, carried on at Buenos Aires in Argentina, and its assets, which included certain book debts owing by persons resident in Argentina to the vendor of the business:—

Held, that the book debts were not property "locally situate out of the United Kingdom" within the meaning of the exception in s. 59, sub-s. 1, of the Stamp Act, 1891; and that ad valorem duty was, therefore, payable on the apportioned consideration for the sale of the book debts.

Decision of Scrutton J. [1914] 2 K. B. 404 affirmed.

The decision of the Court of Appeal in *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245 has not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217.

Appeal from a decision of Scrutton J. (1) upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891, in the following circumstances:—

On March 7, 1913, an instrument was presented on behalf of the appellants, Velazquez, Limited, a company incorporated under the Companies (Consolidation) Act, 1908, and having its registered office at 16, Southampton Street, Bloomsbury Square, in the county of London, to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was an agreement and the parties thereto were Herbert Velazquez, of Evelyn House, 62, Oxford Street, in the county of London, John Nunn Huxter, of 26, Reddons Road, Beckenham, in the county of Kent, and the appellants. The parties duly executed the agreement in England on March 5, 1913.

(1) [1914] 2 K. B. 404.

Previous to the date of the instrument Herbert Velazquez had carried on business at Buenos Aires, in the Republic of Argentina and the agreement embodied in the instrument was an agreement for the sale of the business so carried on and its assets. Among the assets sold under the agreement were debts which accrued due to Herbert Velazquez in the course of carrying on the business. The apportioned purchase price attributable to these debts and payable under the agreement was 8439*l.* 16*s.* 7*d.*

The Commissioners were of opinion that the debts in question were not within the exception in sub-s. 1 of s. 59 of the Stamp Act, 1891, in favour of "property locally situate out of the United Kingdom," and that the agreement was as to such debts within the charge imposed by s. 59; and they accordingly assessed it as liable to the same ad valorem duty as if it were an actual conveyance on sale of the debts agreed to be sold, namely, the duty of 84*l.* 10*s.*, that being the duty payable under the heading "Conveyance or Transfer on Sale" in the First Schedule of the Stamp Act, 1891, as amended by s. 73 of the Finance (1909-10) Act, 1910, on a consideration of 8439*l.* 16*s.* 7*d.*

Scrutton J. held that the book debts were not property "locally situate out of the United Kingdom" within the exception in s. 59, sub-s. 1, of the Act, and that ad valorem duty was payable on the apportioned consideration for the sale of the book debts.

Velazquez, Limited, appealed.

R. W. Turner, for the appellants. A book debt is "property" within the meaning of the Stamp Act, 1891. It is a chose in action which is universally recognized as local. It is in this case "property locally situate out of the United Kingdom" and is exempted from taxation by the exception in s. 59, sub-s. 1, of the Act. It has been held that the goodwill of a business may be property locally situate out of the United Kingdom: *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (1), which, it is submitted, overruled the decision in *Smelting Co. of Australia* v. *Inland Revenue Commissioners* (2) that a patent, the operation of which was confined to New South Wales, was not property locally situate out of the United Kingdom. The status of a debt is

(1) [1901] A. C. 217. (2) [1896] 2 Q. B. 179; [1897] 1 Q. B. 175.

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determined for the purposes of the Stamp Act by reference to the debtor's position and credit. These book debts cannot be rendered effective in this country; the machinery for getting them in exists only in Argentina.

Goodwill was sold as a separate entity from the land in *West London Syndicate* v. *Commissioners of Inland Revenue* (1), but in *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine* (2) the goodwill of a business in Germany by reason of its attribute of locality was held to be "property locally situate out of the United Kingdom." The decision of the House of Lords in that case was subsequent to the decision of the Court of Appeal in *Danubian Sugar Factories* v. *Commissioners of Inland Revenue* (3), which was not noticed by the House of Lords and which, so far as it is inconsistent with their decision, cannot now stand.

A debt has an attribute of locality because in assigning a debt a right to a remedy is really what is assigned, and in estimating its value the debtor's credit has to be ascertained, and that is done by making inquiries in the country where he carries on his business. A debt is a personal remedy attached to the place where the debtor is: Foote's Private International Jurisprudence, 3rd ed., pp. 222, 223.

This case is not covered by *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (3) because that case only decided that a personal right under an executory contract had no locality; but a book debt has, it is submitted, an attribute of locality sufficient to bring it within *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2), and the effect of the decision of the House of Lords in that case is that if a chose in action has an attribute of locality outside the United Kingdom, then it is not within the decision in *Danubian Sugar Factories* v. *Inland Revenue Commissioners*. (3) In *Smelting Co. of Australia* v. *Inland Revenue Commissioners* (4) Rigby L.J., taking the probate cases as a guide, came to the conclusion that that case was within *Attorney-General* v. *Bouwens* (5) and not within *Attorney-General*

(1) [1898] 2 Q. B. 507.
(2) [1901] A. C. 217.
(3) [1901] 1 K. B. 245.
(4) [1897] 1 Q. B. 175.
(5) (1838) 4 M. & W. 171.

v. *Dimond* (1), and *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2) affords authority for saying that the probate cases may be looked at. These book debts have an attribute of locality, and the Court is invited to follow the analogy of the cases decided under the Probate Acts and the Finance Acts and say that these debts are situate out of the United Kingdom: *Inland Revenue Commissioners* v. *Maple & Co. (Paris)* (3); *Rex* v. *Lovitt* (4); *In the goods of Ewing* (5); *In re Maudslay, Sons & Field.* (6)

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the Crown, were not called upon.

COZENS-HARDY M.R. I have listened with interest to the very able argument of Mr. Turner, who has sought to persuade us that the judgment of Scrutton J. is wrong on the point, which I can express in a very few words. An agreement was entered into in England for the sale of a business carried on in the Argentine and the assets of that business. The assets included certain book debts owing by persons resident in the Argentine to the vendor of the business, and the point which was decided by Scrutton J. was that the book debts were property within the taxing section, but that they were not property locally situate out of the United Kingdom.

If the matter had come before us for the first time I should certainly have thought Mr. Turner's able argument deserved mature consideration and should have listened to what the Solicitor-General and Mr. Finlay had to say on the other side. But there is one rule by which, of course, we are bound to abide—that when there has been a decision of this Court upon a question of principle it is not right for this Court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law.

(1) (1831) 1 C. & J. 356.
(2) [1901] A. C. 217.
(3) [1908] A. C. 22.
(4) [1912] A. C. 212.
(5) (1881) 6 P. D. 19.
(6) [1900] 1 Ch. 602.

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In my view this question has really been decided by this Court in *Danubian Sugar Factories* v. *Inland Revenue Commissioners*. (1) Stirling L.J. gave a written judgment which was approved by the other members of the Court, in which, dealing with this particular section, he says: "In the present case the subject-matter of the agreement is a personal right against a person resident abroad; but the former of these two cases" —that is the case of *Smelting Co. of Australia* v. *Inland Revenue Commissioners* (2)—"shews that such a right is, nevertheless, not locally situate out of the United Kingdom. The right is also to have certain acts done with reference to land situate in a foreign country. Still, it is a mere personal right; and it does not appear to me that it is so attached to land as to give it a local situation and thus bring it within the decision in *Muller & Co.'s Margarine* v. *Inland Revenue Commissioners*." (3)

Muller & Co.'s Margarine v. *Inland Revenue Commissioners* (3) went to the House of Lords. The *Danubian Case* (1) was referred to in argument by the appellant's counsel. So far from overruling *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1) there is not one word found about that case in the speeches of any of the noble Lords in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine*. (4) That being so, I do not think it would be respectful or right that I should say more than that I think we are bound to follow the decision in *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1) and give leave to the appellant if so advised to present the interesting argument we have heard to the House of Lords.

In my opinion the appeal must be dismissed with costs.

SWINFEN EADY L.J. I am of the same opinion. The question which arose in *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1) was whether a contract was liable to stamp duty. It is the same question here. An ad valorem duty is payable except when the contract relates to property locally situate out of the United Kingdom. In *Danubian Sugar Factories*

(1) [1901] 1 K. B. 245.
(2) [1897] 1 Q. B. 175.
(3) [1900] 1 Q. B. 310; [1901] A. C. 217.
(4) [1901] A. C. 217.

v. *Inland Revenue Commissioners* (1) the agreement was for the sale of the benefit of a contract. The contract related to land in Roumania—not specified land—which was to be acquired, and it related to acquiring that land for the cultivation of beetroot, and for supplying beetroot to a sugar factory. The benefit of that agreement was the subject-matter of the sale, and it was held that ad valorem duty was payable. Stirling L.J. pointed out that the subject-matter of the agreement was a personal right against a person resident abroad. It is precisely the same here.

Mr. Turner sought to draw a distinction between *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1) and the present case by saying that in that case the contract was an executory contract, something to be done, whereas here it is an agreement for the sale of book debts in respect of which the contract is executed, the debts have been incurred and are now owing, and this is an agreement for the sale of these debts. But in each case the subject-matter of the agreement is a personal right against a person resident abroad, and, that being so, I am of the opinion that this case is completely covered by *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1), by which this Court is bound. Much reliance was placed upon *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine*. (2) The case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1) had, however, already been disposed of in the Court of Appeal when *Muller's Case* (2) was argued in the House of Lords, and that decision was cited during the course of the arguments in *Muller's Case* (2) in the House of Lords and did not meet with any disapproval. But the ground upon which all the learned judges proceeded in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2) was that it was a case of goodwill. Lord Macnaghten said: "For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality." Lord Davey dealt with it in the same way, and so did Lord Brampton; and Lord Lindley says (3) "I am not aware of any case in which goodwill, as property, has been treated as having no locality

(1) [1901] 1 K. B. 245.
(2) [1900] 1 Q. B. 310; [1901] A. C. 217, 224.
(3) [1901] A. C. 217, 237.

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for legal purposes." With regard to that case it was dealt with in the House of Lords in the same way as it was dealt with in the Court of Appeal: it was dealt with as a case of goodwill under the circumstances of that case having a local situation. Cases of goodwill really are of no assistance in the present case, nor, I think, are the cases on probate duty. For the purposes of probate, simple contract debts owing from persons abroad are not covered by the probate, and the value of them is not included in the probate stamp. But the ground of that decision is, as was pointed out in the judgment of the Privy Council in *Commissioner of Stamps* v. *Hope* (1), that "the general words in the statute 'personal estate'"—on which duty is payable—"must be read as limited to such estate as the grant of probate confers jurisdiction to administer, and the appellant therefore, in order to establish the liability he alleged, must make out that the asset is one existing within the local area of the limited jurisdiction created by the Act." Then the judgment refers to the different classes of debts, simple contract debts and debts by specialty or secured by deed, and with regard to simple contract debts it says "the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature and depending upon the movements of the debtor." Otherwise with regard to a specialty debt or a debt under seal, "it was bona notabilia where it was conspicuous, i.e., within the jurisdiction within which the specialty was found at the time of death." I really do not think that the probate cases are of much assistance in determining the present case.

For the purpose of the Stamp Act, which we are considering, the debt cannot be said to be locally situate out of the United Kingdom. We are governed by *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (2), which is indistinguishable from the present case, and all we can do is to follow it.

(1) [1891] A. C. 476, 481. (2) [1901] A. C. 217.

PICKFORD L.J. I am of the same opinion. It seems to me this case is clearly covered by the principle laid down in the case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (1), and I take that principle to be as stated most clearly by Stirling L.J., that where the subject-matter of the agreement is a personal right, it is not locally situate out of the United Kingdom merely by reason of the fact that the person against whom the right is given is a foreigner abroad. But in order to make it locally situate out of the United Kingdom it must be in some way attached to something that has a local situation outside the United Kingdom, as in the case of goodwill. In the case of *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (2) it was held that goodwill was attached to the land and the business premises at which the business was carried on, in connection with which the goodwill existed. It seems to me that if the matter is to be considered as to whether what is stated in the probate cases ought to govern matters under this section it is a matter which cannot be considered in this Court, as this Court is governed by the case of *Danubian Sugar Factories* v. *Inland Revenue Commissioners*. (1)

I agree therefore that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Stileman & Neate; Solicitor of Inland Revenue.*

(1) [1901] 1 K. B. 245. (2) [1901] A. C. 217.

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[IN THE COURT OF APPEAL.]

INLAND REVENUE COMMISSIONERS *v.* CLAY.
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Revenue—Increment Value Duty—Sale of Fee Simple—Gross Value—Sale in "Open Market" by willing Seller—Special Adaptability to Needs of particular Purchaser—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

Sect. 25, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

The fee simple of a house to persons desirous of using it as a private residence was worth not more than 750*l.* and the provisional valuation fixed the gross value at that sum. The house, however, adjoined a nurses' home the trustees of which desired to extend their premises, it was advantageous to them to pay at least 1000*l.* for the house in question, and they in fact actually purchased it for that amount.

On the occasion of the sale the valuation gave 1000*l.* as the gross value of the house for the purposes of the above sub-section. The referee and Scrutton J. held that on both valuations the gross value ought to be 1000*l.* and site value 200*l.* :—

Held (affirming the decision of Scrutton J. [1914] 1 K. B. 339), that on a sale in an "open market" it must be assumed that intending purchasers were aware of the fact that the nurses' home was prepared to give a high price for the house, and that its value would thereby be increased; that it could not be assumed that the nurses' home would only have to make one bid beyond the 750*l.*; and that, whether the vendor were in fact a "willing seller" or not, the existence of a willing seller must be assumed for the purposes of the sub-section.

APPEALS from a decision of Scrutton J. (1)

The appeals in both these cases were heard together, both having reference to the same dwelling-house and garden, No. 83, Durnford Street, East Stonehouse, Plymouth, the fee simple of which was bought by Clay and others on September 29, 1910, from Mrs. Buchanan for 1000*l.*

(1) [1914] 1 K. B. 339.

On January 24, 1911, a provisional valuation of the house was made which shewed the following items:—Original gross value, 750*l.*; original total value, 750*l.*; difference between the gross value and the value of the fee simple divested of buildings, trees, &c., 560*l.*; original full site value, 190*l.*; and original assessable site value, 190*l.*

The conveyance of the house by Mrs. Buchanan to Clay and others being an "occasion" under and by virtue of s. 2, sub-s. 2, of the Finance (1909-10) Act, 1910, particulars as provisionally determined of the values on the occasion were, on February 21, 1911, duly made and served by the Commissioners' valuer. Those particulars shewed as follows: Value of land on the occasion, 1000*l.*; difference between gross value and value of the fee simple divested of buildings, trees, &c., 560*l.*; site value on the "occasion," 440*l.*

Notices of appeal were duly given against the total site value fixed in the provisional valuation, and against the provisional determination of the site value on the "occasion."

At the hearing of the appeals by the referee evidence was called on both sides. The evidence called by the Commissioners shewed that the gross value of the land on the occasion did not exceed 750*l.*; the evidence called on the other side did not dispute that, apart from one special circumstance, the gross value was fairly fixed at 750*l.* The special circumstance was that the purchase by Clay and others from Mrs. Buchanan was a purchase by them as trustees on behalf of a nurses' home (1), who occupied the house next door to the house in question, and they, being desirous of extending their premises, were prepared to give and did give 1000*l.* for the house now in question. It was contended that that circumstance constituted a special adaptability of the house in question, enhancing its value and rendering 1000*l.* a proper value to be fixed.

The referee in the appeal against the provisional valuation (Clay's case) gave his decision as follows: "The decision on the appeal in respect of which the annexed notice of appeal

(1) The description in the report of the case in the Court below is "nursing home," but it was in fact a house where nurses resided, and no patients were admitted.

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has been given, is that items numbered 1, 2, and 12 in the provisional valuation are insufficient, and that the amounts of these should be as follows:

1. Gross value		£1000
Deductions from gross value		
2. Difference between gross value and value of fee simple of land divested of buildings, trees, &c.	£800	
Full site value	£200	£1000
Deductions from total value		
12. Deductions from gross value to arrive at full site value (as above)		£800
Assessable site value		£200"

In the other appeal (Buchanan's case) the referee's decision was as follows:

"The decision of the appeal in respect of which the annexed notice of appeal has been given is that the site value on the occasion of the sale to and purchase by the appellants is not correct, and that the amount should be as follows:

Value of land on the occasion	£1000
Deductions to arrive at site value on the occasion.	
Difference between gross value and value of fee simple of the land divested of buildings, trees, &c.	£800
Site value on the occasion	£200"

The Commissioners appealed in both cases, contending that the evidence shewed that the fee simple, sold in the open market by a willing seller, would not have fetched more than 750*l*., and that the price that one particular purchaser might, owing to special circumstances, be prepared to give was not the measure of the market value of the house.

At the hearing before Scrutton J. oral evidence was given and his Lordship found the following facts: (1.) No. 83, Durnford Street was an old well-built house, needing some expenditure on

the roof, but otherwise in good repair, and could not be rebuilt for less than 1200*l.* (2.) In view of the declining prosperity of the neighbourhood, and the nature of the accommodation in the house to people who wanted to use No. 83 as a private residence, having regard to the other houses offering, it was not worth more than 750*l.*, which was the utmost such people could be expected to give. The owner had bought it in 1902 for 700*l.* (3.) To the nurses' home, which owned the neighbouring house and needed further accommodation near, No. 83 was so adjacent and offered such suitable accommodation that it would be advantageous to them to pay at least 1000*l.*, probably more, for it; and the 1000*l.* actually paid was a profitable business transaction to the nurses' home and not a fancy price. It was not worth any one else's while to pay a sum substantially larger than 750*l.*, except in the hope of reselling to the nurses' home, to which the house was obviously of considerable value and a likely subject of purchase.

His Lordship affirmed the decision of the referee, and the Commissioners appealed.

Sir S. O. Buckmaster, *S.-G.*, and *W. Finlay*, for the appellants. It is not disputed and it has been found as a fact that this house is worth only 750*l.* to anybody except the nurses' home, and there is no dispute about the deductions to be made. It is submitted that the fact that the nurses' home were so anxious to get the house that they were prepared to give a fancy price for it ought not to be taken into consideration in arriving at the gross value. The special needs of any particular person ought to be disregarded. The gross value means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realize: Finance (1909-10) Act, 1910, s. 25, sub-s. 1. If the anxiety of the nurses' home is to be considered at all it cannot be assumed that they would have had to do more than make one bid, e.g., 25*l.* beyond the 750*l.*, and the Crown do not object to that. But the value to a purchaser has really nothing to do with it; the value has to be ascertained as on a sale by a willing seller, and Mrs. Buchanan was not a willing seller. This sale cannot be

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taken as a test: *Orchard* v. *Simpson*. (1) The price at which a property is sold is not for this purpose the measure of its gross value: *Lumsden* v. *Inland Revenue Commissioners*. (2)

It has to be assumed that the sale was in the open market, that means a market to which everybody has access, but not necessarily a sale by auction. It must not be assumed without evidence that the needs of the nurses' home were known to anybody but the seller. As a matter of fact after their first offer was refused they built an extension of their premises, and no one could have expected such an increase of their work as led to the eventual purchase of the house. The whole question is a matter of hypothesis under s. 25, sub-s. 1. A willing seller does not mean a person who is willing to sell for any price however inadequate, or who is under compulsion, but one who will not insist on a fancy price. The valuation must not be increased because the vendor is unwilling to sell; but the test is the value to him, not to the purchaser: *In re Lucas and Chesterfield Gas and Water Board*. (3) Anybody who puts his house in the hands of a house agent to be sold without special restrictions is a willing seller in an open market. The question is simply what this house could have been expected to fetch on April 30, 1909, if Mrs. Buchanan had put it in the books of a local house agent with a view to a sale: *Glass* v. *Inland Revenue Commissioners*. (4)

Freeman, *K.C.*, and *W. Allen*, for Mr. Clay and Mrs. Buchanan. It may be conceded that open market means a sale in which everybody has a right to take part; not a sale to a class, as for instance to members of a particular family. The finding of the referee on such a question ought not to be disturbed unless it can be shewn that he has committed a blunder. The vendor would know that there was somebody anxious to buy the property and would do his best to run him up, and would tell his agent about it; and property brokers would give an increased price with a view of reselling the property to the anxious purchaser. So it would be absurd to assume that he would only have to make one additional

(1) (1857) 2 C. B. (N.S.) 299.
(2) [1913] 3 K. B. 809.
(3) [1909] 1 K. B. 16, 29.
(4) Valuation Appeal Court, Scotland, March 20, 1914.

bid. The expression "a willing seller" precludes the idea of a forced sale or one under compulsion of law as under the Lands Clauses Act. Every detail must be taken into consideration in fixing the value: *Inland Revenue Commissioners* v. *Herbert* (1); *Commissioners of Inland Revenue* v. *Earl Fitzwilliam.* (2) Whether Mrs. Buchanan was a reluctant seller or not is immaterial, for the hypothesis of s. 25, sub-s. 1, assumes that she was willing.

Sir S. O. Buckmaster, S.-G., replied.

Cur. adv. vult.

May 28. COZENS-HARDY M.R. This appeal—for I take the two as really one appeal—raises an important question under s. 25 of the Finance Act of 1910. That section provides that the "gross value" of land means the amount which the fee simple of the land if sold at the time in the "open market" by a "willing seller" in its then condition (subject to certain deductions) might be expected to realize. The facts are not in dispute. Mrs. Buchanan was owner and occupier of No. 83, Durnford Street, East Stonehouse, having purchased it in 1902 for 700*l.* In September, 1910, she sold it to Clay and others for 1000*l.* The purchasers were the trustees of a nurses' home, No. 84, who wanted the house for the purpose of extending their home. In 1908 they had offered Mrs. Buchanan 850*l.*, which she declined. Negotiations were resumed in 1910, and after some bargaining she agreed to sell for 1000*l.* The trustees would have been prepared to give 1100*l.* Regarding No. 83 solely as a residence for private occupation, its value was not more than 750*l.* The referee found the gross value as on April 30, 1909, to be 1000*l.*, and Scrutton J. has upheld that view. The contention on the part of the Crown is that the gross value is 750*l.* only.

The contest before us has turned mainly upon the words "open market" and "willing seller." I think the view ultimately taken by counsel for the appellants, and also for the respondents, as to the meaning of "open market" is correct. "Open market" includes a sale by auction, but it is not confined to that. It would include property publicly announced in the

(1) [1913] A. C. 326.
(2) [1913] 2 K. B. 593; affirmed in H. L. April 6, 1914.

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usual way by insertion in the lists of house agents. But it does not necessarily involve the idea of a sale without reserve. I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else. The house or the land may immediately adjoin one or more landowners likely to offer more than the property would be worth to anybody else. This is a fact which cannot be disregarded. The Solicitor-General ultimately admitted that some regard must be had to the fact. But he urged that we ought only to consider first what an outside purchaser would give, say 750*l.*, and then allow the adjoining owner one more bid—in other words, something very small beyond the 750*l.* We had our attention called to the valuable judgments of Lords Johnston and Salvesen in the recent Scotch case of *Glass* v. *Commissioners of Inland Revenue* (1), and I accept their view of the meaning of the words "open market." The price at which the property was sold in 1910 is not the test of the gross value in April, 1909, but it cannot be disregarded.

I adopt the language of Scrutton J.: "He" (the referee) "was right in this, not because of the sale for 1000*l.*, but because of the reasonable expectation that a willing seller could get 1000*l.* or more from the nurses' home." (2) An "open market" sale of property "in its then condition" presupposes a knowledge of its situation with all surrounding circumstances. To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd. If the landowner does not at the moment buy, land brokers or speculators will give more than its purely agricultural value with a view to reselling it at a profit to the landowner. It is for the referee, whose competence is not challenged, to arrive at a figure. The Court ought not, as a rule, to review his decision on what is in truth a question of fact. I see no ground for supposing that there has been any misdirection in point of law.

(1) Valuation Appeal Court, Scotland, March 20, 1914.
(2) [1914] 1 K. B. at p. 350.

The other point is as to the meaning of "willing seller." It is urged that Mrs. Buchanan never was a willing seller; that she never wished to vacate the house in which she was living, and that it was only after pressure from the trustees that she agreed to sell for 1000*l.* I am disposed to think that a willing seller is a person who is a free agent and cannot be required by virtue of compulsory powers to sell, and that Mrs. Buchanan was a willing seller when, in 1910, she voluntarily agreed to accept 1000*l.* If, however, contrary to my view, she was not a willing seller, the problem still remains, for the existence of a willing seller, whether Mrs. Buchanan or not, must be assumed for the purpose of the section.

In my opinion, the judgment of Scrutton J., affirming the decision of the referee, was correct, and this appeal must be dismissed with costs.

Swinfen Eady L.J. This is an appeal from the decision of Scrutton J. reported in [1914] 1 K. B. 339, where the facts are fully stated.

The Solicitor-General has contended that in arriving at "the gross value of land," pursuant to the provisions of s. 25, sub-s. 1, of the Finance (1909-10) Act, 1910, and in ascertaining the amount "which the fee simple of the land, if sold at the time in the open market by a willing seller . . . . might be expected to realise," we must disregard the fact that the property has a special value to one particular person, who would be willing to give substantially more than any other person, and also disregard the influence upon the market which the knowledge of this fact would create.

He further urged that at most there could only be allowed some slight increase on what he contended would otherwise be the market value of the land, so as to represent the amount of one bid at an auction which the particular person would probably make over all other persons to secure the property—say 50*l.* extra, or the like.

The house in question, 83, Durnford Street, East Stonehouse, Plymouth, has been valued in the provisional valuation as on April 30, 1909, as altered and settled by the referee, at 1000*l.*,

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and, deducting 800*l.*, the assessable site value is fixed at 200*l.* On the occasion of the sale, the amounts as altered and settled by the referee are the same, so that no increment duty is payable.

The appellants claim that the original amount in the provisional valuation, namely, 750*l.*, should be restored, as that figure represented the market value of the house irrespective of the wants of the nurses' home next door. On September 18, 1908, Mrs. Buchanan refused an offer of 850*l.* made by the nurses' home for the house. On March 2, 1910, it was reported to the nurses' home that Mrs. Buchanan would not take less for the house than 1100*l.*, and in August, 1910, they determined to offer 1100*l.*, if it could not be obtained for less; but on September 29, 1910, it was agreed to be sold by Mrs. Buchanan to Dr. Clay and others on behalf of the nurses' home for 1000*l.*

The referee found that the value, both on April 30, 1909 and on September 29, 1910, was 1000*l.* This was less than the nurses' home had determined to give, and was prepared to offer, if they could not obtain the property cheaper. The house could not be rebuilt so as to give the same accommodation as at present for less than 1200*l.* The learned judge below found as a fact (1) that "as a private residence, and having regard to the other houses offering, No. 83 was not worth more than 750*l.* which was the utmost such people could be expected to give," but that "to the nurses' home, which owned the neighbouring house, and needed further accommodation near, No. 83 was so adjacent, and offered such suitable accommodation, that it would be advantageous to them to pay at least 1000*l.*, probably more, for it, and the 1000*l.* actually paid was a profitable business transaction to the nurses' home and not a fancy price. It was not worth any one else's while to pay a sum substantially larger than 750*l.*, except in the hope of reselling to the nurses' home, to which the house was obviously of considerable value and a likely subject of purchase." That is prefaced by this line: "After listening to the evidence I find the following facts," and then he states what I have read.

The Solicitor-General contended that as the section said "if

(1) [1914] 1 K. B. at p. 348.

sold at the time in the open market," the price which only one particular buyer was prepared to pay must be excluded from all consideration; it might possibly be a fancy price which had no relation to market price; that a reference to open market shewed that the statute referred to a current market price of land, a price which one or more valuers might determine to be the market value of the land.

In my opinion this contention is unsound. A value, ascertained by reference to the amount obtainable in an open market, shews an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realize if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale. It scarcely needed evidence to inform us—it is common knowledge—that when the fact becomes known that one probable buyer desires to obtain any property, that raises the general price or value of the thing in the market. Not only is the probable buyer a competitor in the market, but other persons, such as property brokers, compete in the market for what they know another person wants, with a view to a resale to him at an enhanced price, so as to realize a profit. A vendor desiring to realize any land would ordinarily give full publicity to all facts within his knowledge likely to enhance the price. The local conditions and requirements, the advantages of the situation of the property for any particular purpose, and the names of the persons who are probable buyers, would ordinarily be matters of local knowledge to the property brokers and agents and speculators. In order to arrive at the amount which land might be "expected to realise," all these matters ought to be taken into consideration. "Expected" refers to the expectations of properly qualified persons who have taken pains to inform themselves of all the particulars ascertainable about the property, and its capabilities, the demand for it, and the likely buyers. The price actually realized by a sale

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is not necessarily the price which it might have been expected to realize, but if the valuer be competent, and has taken proper pains in the matter, there ought to be little difference between the two figures. The fact that No. 83 had a potential value, by reason of its proximity to the nurses' home, and the very rapid increase of the work of that institution, pointing to a necessary extension at an early date, ought properly to be taken into consideration in arriving at the value it might be expected to realize. The Solicitor-General urged that after the addition of the new wing to the old building, which followed upon the refusal by Mrs. Buchanan of the offer of 850*l.* on September 18, 1908, this element of value disappeared. This is not the case in fact. The report of the institution for 1908-9 shows the leaps and bounds by which the work was increasing, and points to a further extension of premises being necessary in the near future, and this extension indeed became extremely urgent in the following year.

It was then urged by the Solicitor-General that if the probability of this special buyer purchasing, above the price, which but for his needs would have been the market price, could be taken into consideration at all, then only one further point or bid could be allowed, and it must be assumed that this special buyer would have become the purchaser upon making this one extra bid. Such an assumption would ordinarily be quite erroneous. The knowledge of the special need would affect the market price, and others would join in competing for the property with a view of obtaining it at a price less than that at which the opinion would be formed that it would be worth the while of the special buyer to purchase.

It was then urged that the vendor in the present case was not a willing seller, as she had to be persuaded to sell at the sum of 1000*l.* It appeared, however, that her son-in-law was consumptive, and that his wife did not think Durnford Street quite the right place for him to live in, and that was one motive for her yielding to the solicitations of Dr. Clay on behalf of the home. She was a willing seller at 1000*l.* A sale by a willing seller is distinguished from a sale which is made by reason of compulsory powers, where the vendor frequently obtains an addition

to the price by reason of being under compulsion to sell. It does not mean a sale by a person willing to sell his property without reserve for any price he can obtain. Mrs. Buchanan was a willing seller when she accepted 1000*l.* The fact that she was persuaded or induced to agree voluntarily to sell at that price did not make her any the less a willing seller. There was no evidence of any compulsion; there was friendly bargaining, some discussion, some higgling about price, and then an agreement come to. This is the normal course of most private contract sales. She was none the less a willing seller because she had not previously put the property into the hands of an agent for sale. She was willing to sell at a price, she was offered a price, less than the maximum which the intending purchasers were willing to give, and she took it.

There was a considerable body of evidence reheard before Scrutton J., and the sum of 1000*l.* was arrived at because that was the sum which the land if sold at the time in the open market in its then condition might have been expected to realize. It happens also to be the price actually realized, but the figure was not arrived at on the latter ground.

I agree with the judgment of Scrutton J., and also with the reasons given in the judgments of Lord Johnston and Lord Salvesen in the Court of Session in the case of *Glass* v. *Commissioners of Inland Revenue* (1), of which shorthand notes have been furnished to us.

I think this appeal should be dismissed.

Pickford L.J. This was an appeal from Scrutton J. relating to the gross value of premises in Stonehouse, under the Finance (1909-10) Act, 1910. The facts are fully stated in the judgment of the learned judge, and it is only necessary here to state them shortly.

The premises were known as No. 83, Durnford Street, and were next to premises used as a nurses' home at No. 84 in the same street. The house was bought by the respondent in 1902 for 700*l.*, and its value as a private dwelling-house only was 750*l.* The trustees of the nurses' home, however, had been for

(1) Valuation Appeal Court, Scotland, March 20, 1914.

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some years anxious to buy No. 83 for the purpose of extending their home, and in 1908 had offered 850*l.* for it, which the respondent refused. They then built a new wing to the home on other land adjoining No. 83, but they still wished to buy that house, and negotiations were renewed between them and the respondent. She was not anxious to leave the house, but after some persuasion from the trustees was induced to sell it to them at 1000*l.* The trustees were willing at that time to have given 1100*l.* if necessary. Whether they would have given still more does not appear. Upon this state of facts, the referee and Scrutton J. fixed the gross value at 1000*l.* The appellants contended that the gross value should be 750*l.*, and a small sum which I will mention later.

The case turns upon the application to the facts of s. 25, sub-s. 1, of the Finance Act, 1910, by which the gross value is defined as "the amount which the fee simple of the land, if sold at the time in the open market by a willing seller . . . . might be expected to realise."

It was argued for the appellants that the respondent was not a willing seller as she was only tempted by an exceptionally high offer, and that the market value to a willing seller was not to be measured by the price given by the trustees of the nurses' home in consequence of their special wants.

I think that "sold in the open market" means sold in such a way that any one wishing to purchase was able to do so, e.g., by auction or by putting the house into the hands of an agent to sell, and I think a willing seller means one who is prepared to sell, provided a fair price is obtained under all the circumstances of the case. I do not think it means only a seller who is prepared to sell at any price and on any terms, and who is actually at the time wishing to sell. In other words, I do not think it means an anxious seller.

In this case the house was only worth 750*l.* if it were sold as a dwelling-house, and, unless there were some other elements to be considered, that would be its value. But there was another element here, i.e., the fact that the trustees of the nurses' home wished to buy the house, and were willing to give more than its value as a dwelling-house for it, although it was

not known to what price they would go, and the exact amount of knowledge of their intentions amongst those persons who were likely to buy houses was not clearly shewn.

It is, however, impossible to suppose that the wish of the trustees to buy the house was entirely unknown to those interested in property sales, and if the sale took place, either by auction or through an agent, the willing seller would be careful to see that that fact was made known.

I assume that the gross value is not to be measured necessarily by the price given by a buyer who is peculiarly in need of the particular piece of property, but it seems to me clear that the fact of there being such a person in the market must have an influence on the value in the open market. I think the position is well expressed by Lord Johnston in the Scotch case of *Glass* v. *Commissioners of Inland Revenue* (1) to which we were referred. The learned judge says: "Where a public body is expected in the near future to require certain property, there are generally found, and must be assumed to be, people who are prepared to trade on that fact, and prepared to bid up to a point to which they think they may safely go and leave themselves a chance of profit in turning over the property to the Commissioners. That point will doubtless be below the value to the public body, but where, as here, the public body has no compulsory powers, all depends upon how near a certainty it is that the Commissioners must acquire, if indeed the acquisition by the public body of compulsory powers or the adoption of some other course of obtaining their end is feasible. The phrase 'willing seller' is not to receive a restricted meaning. He is only hypothetically willing if he gets the advantage of all surrounding circumstances, and this is implied in the further expression 'in its then condition.'" Substituting the trustees of the nurses' home for Commissioners, I think this applies to this case.

It is not denied by the appellants that the wish of the trustees to buy the house is a fact to be considered, but it is said that the only effect to be given to it is that a small sum is to be added to the value of 750*l.* to represent a final bid

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made by the trustees in order to acquire the property. This seems to me to be a fallacy, and to ignore what is common experience. It assumes that the dwelling-house value, 750*l.*, having been reached, everybody except the trustees will decline to make any further offer, and allow the trustees to become the purchasers by a single offer, which exceeds that amount in however small a degree.

It is not uncommon that where a person or public body is known to be very anxious to purchase a piece of property, speculators will run the price up on the chance of buying it at a price to which the person or body is not prepared at that moment to go, hoping that their needs will eventually oblige them to buy from the speculator at a profit. I do not think that the effect of the needs of a probable purchaser can be confined to the amount of the one bid which will take the offer above the bare dwelling-house value. The effect on the market of such a probable purchaser is a matter to be estimated by the referee. I agree with Scrutton J. that the referee is not bound to take the actual figure given, and should not do so arbitrarily, but should consider all the circumstances and estimate what he considers the value in the open market. Here he has done so, and has come to the conclusion that under all the circumstances the amount this house might be expected to realize in the open market would be 1000*l.*, an amount, it is to be noticed, less than the trustees were in fact willing to give, if compelled. I do not see that he has applied any wrong principle, and I do not see my way to say that he and Scrutton J., who also had evidence before him and came to the same conclusion, were wrong. He would have applied a wrong principle if he had said that he was limited to the dwelling-house price, plus one bid of a small sum by the trustees.

The appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Lewin, Gregory, & Anderson, for S. J. Lawry, Plymouth.*

H. C. R.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1913 *Nov.* 28; *Dec.* 1, 2. C. A. 1914 *Jan.* 12, 13, 14, 15, 19, 21; *April* 8.

THE KING *v.* ISLINGTON ASSESSMENT COMMITTEE. *Ex parte* LONDON COUNTY COUNCIL.

Rates—Poor Rate—Metropolis—Rating—Reduction of Value of Tramways through Competition of Motor Omnibuses—Provisional List—Mandamus to Assessment Committee to appoint Valuer—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47.

The London County Council sent a requisition to the Islington overseers requiring them to send forthwith to the assessment committee a provisional valuation list for the parish containing the hereditament mentioned in the schedule to the requisition, namely, their tramway undertaking within the parish, on the ground that it had been reduced in value within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, owing to the competition of motor omnibuses. The requisition came before the assessment committee, whose determination thereon as stated in a letter from their clerk, was as follows: "My committee having fully considered and taken advice upon the matter have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section and therefore decline to accede to the Council's request." The London County Council thereupon obtained a rule nisi for a mandamus directed to the assessment committee requiring them to make a provisional list, and they filed affidavits in which it was stated that since September 30, 1911, there had been a continuous reduction in each half-year of the gross receipts from the tramways in the parish and a great reduction in the receipts per car mile. An affidavit was filed on behalf of the assessment committee in which it was stated that the receipts from the tramways in the parish shewed an increase in the two years 1910-11 and 1911-12 over those in 1909-10, the year in which the quinquennial valuation list was made, and a decrease in 1912-13, which decrease, however, left the receipts in that year higher than those in 1909-10; and that in each year there was a continuous increase in car miles:—

Held by the Court of Appeal (Kennedy and Swinfen Eady L.JJ., Vaughan Williams L.J. dissenting), reversing the decision of the Divisional Court, that no prima facie case of a reduction in value resulting from a cause of a permanent as distinguished from a temporary or fluctuating nature had been made out, and that therefore the assessment committee were right in declining to accede to the council's request.

Held, further, that the words "increased or reduced in value" in s. 47 meant increased or reduced in value in the course of the year as compared with the value of the hereditament appearing in the quinquennial valuation list, or in that list as revised by a supplemental

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list, and not with the value as at the commencement of the year, and that upon this ground also no prima facie case had been made out for a provisional list.

Per Kennedy L.J.: The assessment committee, before appointing a person to make a provisional list upon the requisition of a ratepayer who alleges a reduction in value of his hereditament from a cause within the meaning of s. 47, are bound to inquire whether there is a prima facie case for the existence of such reduction in value as a condition precedent to the exercise of their jurisdiction under the section; and the Court ought not to interfere with the conclusion of the assessment committee upon matters of fact unless it is satisfied that they have gone wrong in point of law or that they have misunderstood or misjudged on material points the evidence before them.

Per Swinfen Eady L.J.: The question whether the ratepayer has placed before the assessment committee such facts as constitute a prima facie case for a provisional list under s. 47 is to be decided in the first instance by the assessment committee, and the Court will not readily review their decision unless it involves some mistake in law. Sect. 47 does not, however, make their decision on the question of fact absolutely conclusive, so that it cannot be questioned or overruled.

ORDER NISI to the Islington Assessment Committee to shew cause why a writ of mandamus should not issue commanding them to appoint a person to make a provisional list for the parish of Islington pursuant to s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869 (1), containing the gross and rateable values of the portion of the tramways of the London County Council within the said parish as reduced since the making of

(1) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:—

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

"(2.) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list . . . ."

the last quinquennial list, on the ground that the values had been reduced within the meaning of the section by reason of the competition of motor omnibuses.

In affidavits filed on behalf of the London County Council in support of the order (1) it was stated that in the valuation list then in force the London County Council were assessed in respect of the portion of their tramway undertaking, including tramways, car sheds and power stations, situate in the borough and parish of Islington as follows: Gross value 57,330*l.*, and rateable value 36,030*l.*; that in the course of the years 1912 and 1913 the business done upon that portion of the undertaking had suffered a serious diminution, due mainly to the competition of motor omnibuses; that the following table shewed the total gross receipts earned upon the said portion in the half-years ending respectively September 30, 1911, March 31, 1912, September 30, 1912, and March 31, 1913, together with the average amounts of gross receipts earned per car mile run in such half-years:—

Half-year ending	Total Gross Receipts. £	Gross Receipts per Car Mile. *d.*
September 30, 1911	104,974	11·42
March 31, 1912	102,645	11·11
September 30, 1912	98,329	10·58
March 31, 1913	89,989	9·05

It was further stated that during the year ending March 31, 1913, the fall in the receipts per car mile was greater on the routes in Islington than on the tramway system as a whole; that the frequency of the motor omnibus services in the county of London in general and in Islington in particular had increased very rapidly in the year ending March 31, 1913; that in spite of the fact that tramcars were run more frequently in order to counteract the effect of the motor omnibus competition, not merely the average gross receipts per car mile but the total gross receipts earned by the tramway undertaking in Islington shewed a grave diminution, and that such diminution constituted an alteration of a permanent and substantial character

(1) The affidavit which gave the figures relied upon by the London County Council was that of Mr. Bird, the deputy clerk of the council, dated July 30, 1913.

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in the value of such portion of the undertaking as was situate in the parish of Islington. It was further stated that on April 4, 1913, a requisition was addressed to and served upon the corporation of the borough, acting as the overseers of the parish, requiring them to send forthwith to the assessment committee a provisional valuation list in respect of the said portion of the tramway system, shewing a reduction in the gross and rateable values to 1*l.* respectively; that the overseers on April 16 declined to accede to that requisition; and that the assessment committee on an application being made to them (1) wrote by their clerk to the solicitor of the London County Council a letter dated July 16, 1913, in the following terms:—

"Dear Sir,

"Valuation (Metropolis) Act, 1869.

"London County Council Tramways.

"Referring to the correspondence which has taken place between us with regard to the Council's request that my assessment committee should appoint a person to make a provisional valuation list in consequence of a reduction in value in the Council's tramways alleged to have taken place within the meaning of s. 47 of the above Act, I have now to inform you that my committee, having fully considered and taken advice upon the matter, have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section and therefore decline to accede to the Council's request.

"I am, yours faithfully,

"(Signed) Wm. F. Dewey,

"Clerk to the Assessment Committee."

An affidavit, dated October 21, 1913, was made in opposition to the order by Mr. W. H. Eve, a surveyor and rating valuer, who acted on behalf of the assessment committee of the borough in ascertaining the proper assessment of the London County Council tramways in the borough, in which he stated, in paragraph 4, that he had carefully inspected the returns of the

(1) The correspondence is more fully referred to in the judgment of Vaughan Williams L.J.

London County Council with reference to the revenue accounts of their tramway undertaking in the county of London for the four years ending March 31, 1913; that the London County Council had not ascertained the earnings of their tramways in the parish of Islington for the year ended March 31, 1911, and he had therefore to estimate the receipts of the tramways in the parish (which was co-terminous with the borough) for that year from the figures of the whole tramway undertaking; that as regards the other three years the said council supplied him with figures shewing their apportionment of receipts in respect of the tramways in Islington, which he had accepted; and that the following table gave the result of his investigation:—

	1909-10.	1910-11.	1911-12.	1912-13.
Car miles	3,747,605	4,231,986 (estimated)	4,423,503	4,973,550 (estimated)
RECEIPTS.				
Traffic	£182,103	£200,335	£207,619	£197,857
Advertisements	2,186	2,468	2,211	2,272
	£184,289	£202,803	£209,830	£200,129

He further stated that, as would be seen from the above table, the receipts from the tramway undertaking within the parish of Islington shewed a considerable increase for the years ending March 31, 1911, and March 31, 1912, over the receipts for the year in which the quinquennial valuation list was made, namely, that ending on March 31, 1910; that no increased assessment was made by the assessment committee on the tramway undertaking in Islington either because of such increased receipts or because of the increased value of the tramways owing to the alteration in many parts of Islington of the lines from horse to electric traction; that it would be seen that for the year ending March 31, 1913, the receipts were considerably greater than those in the quinquennial year; that the diminution in the receipts for the year ending March 31, 1913, as compared with those for the previous year might be partly accounted for because the summer and autumn of 1911 were particularly fine and the same periods of the year 1912 were unusually wet and inclement; that the diminution of the receipts for the year

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ending March 31, 1913, was, he believed, a fluctuation in receipts to which all such undertakings were subject, and that there was ample reason to presume, from various facts stated by him, that the diminution was temporary only and would be partly recovered in the present year and wholly recovered in the succeeding years of the quinquennium.

In a supplemental affidavit, sworn on October 24, 1913, Mr. Eve set out figures shewing the net receipts per car mile of the whole tramway undertaking of the London County Council for each of the four years ending March 31, 1913, and applying the average net receipts per car mile for the whole undertaking to the car miles run in Islington he arrived at figures which he said shewed the net receipts in Islington for each of those four years. The figures so set out shewed that the net receipts per car mile for the whole undertaking were 4·901*d.* for 1909-10; 4·709*d.* for 1910-11; 4·695*d.* for 1911-12; and 3·691*d.* for 1912-13. The net receipts for the tramways in Islington for the same years "divisible between landlord and tenant and for rates" were 76,529*l.*, 83,035*l.*, 86,535*l.*, and 76,489*l.*

In an affidavit by Mr. Bird filed on behalf of the London County Council in reply on November 19, 1913, it was stated, in paragraph 2, that as regards the year 1909-10, although the car miles run by electric traction in Islington were 3,747,605, and the actual gross traffic receipts earned therein amounted to 182,103*l.*, as stated in the table given in paragraph 4 of Mr. Eve's first affidavit, those figures did not afford a correct basis of comparison with the figures of subsequent years, because certain lines in the borough were during the year converted from horse to electric traction, and that therefore it was necessary to estimate the number of car miles which would have been run and the amount of gross traffic receipts which would have been earned in Islington in that year if those lines had been operated by electric traction throughout the year. Upon this basis the car miles were estimated at 4,021,768, and the gross traffic receipts were 193,772*l.*, which with 2128*l.* for advertisements amounted to 195,900*l.* As regards the year 1912-13, new lines of tramways were opened for electric traction

in the borough, and in order to obtain a correct basis of comparison the car miles run and the gross receipts earned on those lines should be excluded, and if that were done the car miles run would amount to 4,617,050, and the gross traffic receipts to 188,318*l.*, which with advertisements (2116*l.*) would amount to 190,434*l.* (1)

The order nisi was obtained at the instance of the London County Council.

1913. Nov. 28; Dec. 1, 2. *E. B. Charles, K.C.*, and *Arthur Page* shewed cause. This case turns upon the proper meaning and effect of s. 47 of the Valuation (Metropolis) Act, 1869. Under that section, if in the course of any year the value of any hereditament is from any cause reduced, the overseers must on the written requisition of any ratepayer send to the assessment committee a provisional list with the value as so reduced of such hereditament. When the matter comes before the assessment committee for consideration, the effect of the section is that a ratepayer who claims a reduction in the value of his hereditament must first give prima facie evidence of diminution in value when compared with the first year of the quinquennial valuation; then he must shew that the diminution arises from some cause recognized by the statute, and that from such a cause there is a continuous and permanent reduction in value. If the assessment committee consider the whole matter and come to the conclusion that there is no such prima facie evidence of reduction in value, this Court has no power to interfere with that decision, or at any rate will not do so unless the case is exceptional: *Camberwell*

(1) In a third affidavit by Mr. Eve, dated January 19, 1914 (sworn after the decision of the Divisional Court herein and read by leave of the Court of Appeal), he stated that the figure of 182,103*l.*, which was given by him in paragraph 4 of his first affidavit as the gross receipts of the tramways in Islington for the year 1909-10, was supplied to him by Mr. Harper, the then statistical officer of the London County Council, in a letter of May 26, 1910, as being the receipts allocated to the borough during the year, though he (Mr. Harper) added that the checking of the figure had not been finally completed. He also added that from the reports of the Highways Committee of the London County Council it appeared that the receipts of their tramways in London had increased each week since the week ending July 23, 1913, down to the end of November.

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Assessment Committee v. *Ellis.* (1) Here, after full and proper consideration, the committee decided as a question of fact that there was no prima facie case, and the Court cannot go behind that finding. It must be admitted in this Court that the competition of omnibuses may be a cause of reduction of value within the statute: *Rex* v. *Southwark Assessment Committee.* (2) But any comparison of earnings, for the purpose of shewing a reduction, must be made with the earnings in the year of the quinquennial assessment and not with the earnings of the preceding year or years: *Reg.* v. *Poplar Union Assessment Committee* (3); *Camberwell Assessment Committee* v. *Ellis.* (1)

Ryde, K.C., and *Konstam*, in support of the rule. For the purpose of ascertaining whether there has been a reduction in value of a hereditament the figure for the year in question must be compared with the figure for the preceding year, not with that for the year in which the quinquennial valuation was made. This is clear if regard is had to the sections immediately preceding s. 47. Sect. 46 deals with the supplemental list, as to which it is expressly enacted that it is to shew "all the alterations which have taken place during the preceding twelve months." See also *Reg.* v. *Poplar Union Assessment Committee.* (3) It would reduce matters to chaos if a different rule were to be applied in the case of the provisional list. In *Camberwell Assessment Committee* v. *Ellis* (1) Vaughan Williams L.J. took the view for which the Council contend; he there said at p. 74 of the report in the Court of Appeal: "Provisional valuation deals with the alteration by increase or decrease in value of a particular hereditament 'from any cause' during the twelve months."

[BRAY J. We are satisfied that the increase or decrease contemplated by s. 47 is, as you contend, an increase or decrease during the twelve months. But the question then is, how far you are concluded by the determination of the assessment committee as stated in their letter of July 16?]

If a prima facie case has been made out of an alteration in value, the duty of the assessment committee is to appoint a valuer: per Lord Alverstone C.J. and Walton J. in *Rex* v.

(1) [1900] 1 Q. B. 68; [1900] A. C. 510.

(2) [1909] 1 K. B. 274.

(3) (1884) 13 Q. B. D. 364.

Southwark Assessment Committee. (1) In that case the determination of the assessment committee, which was very similar to the determination in this case, was treated by Bigham J. as the determination of a matter of law. This Court has power to inquire whether a prima facie case has been made out, notwithstanding the finding by the assessment committee that in fact no such case has been made out: see per Farwell L.J. in *Rex* v. *Shoreditch Assessment Committee.* (2)

BRAY J. In this case the London County Council ask us to make absolute a rule which was granted to shew cause why a writ of mandamus should not issue directed to the assessment committee of the borough and parish of Islington commanding them to appoint a person to make a provisional valuation list for the parish pursuant to s. 47 of the Act of 1869, containing the gross and rateable value of certain tramways.

On s. 47 a point has been raised which, in my opinion, practically governs this case; it is this: Is the increase or the reduction referred to in s. 47 an increase or reduction during the twelve months preceding the requisition, or is it an increase or reduction between the value at the beginning of the quinquennial period and the value at the end of the year in respect of which the requisition is made? Mr. Charles for the assessment committee, has argued that it is the latter; and the first point, therefore, I propose to consider is whether that contention is sound or not. It is necessary to look at the preceding sections in order that we may construe s. 47. Sect. 43 provides that the valuation list, subject to certain conditions, is to remain in force for five years, and by s. 46 provision is made for altering it from time to time by a supplemental list. Sect. 45 says: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein . . . ."; and then s. 46 provides for the revision of the valuation list. It says: "Every valuation list shall be revised in manner directed by this Act, and such revision in every period

(1) [1909] 1 K. B. 274. (2) [1910] 2 K. B. 859.

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of five years . . . . shall be conducted as follows: (1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations," and if no alteration has taken place there is to be a certificate to that effect, and then in the fifth year the overseers are to make a new valuation list. Then it is provided that the supplemental list and the old valuation list are to be combined, that is to say, where the value in the original valuation list has become altered and there has been a supplemental list containing the alteration, the valuation list together with and as altered by the supplemental list shall be the valuation list for the particular year, and then it is enacted that the new valuation list when it comes into force is to supersede the valuation list which was in force during the fifth year of the quinquennial period. I now come to s. 47, which is as follows: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." Does that mean increased beyond or reduced below what I may call the quinquennial value, or does it mean increased or reduced during the course of the year from what it was at the commencement of the year? We have to construe this section according to the natural meaning of the words, and it seems to me that the words "if in the course of any year the value is increased" mean "increased during that year." The increase is from the beginning of the year to the end of the year. That seems to be the natural interpretation of the words, and this appears to me to be even plainer when regard is had to the provision in s. 46, which says that the supplemental list "shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list." Therefore, apart from any authority, I should come to the conclusion that the increase or reduction which is necessary in order to put in motion the machinery provided by s. 47 is an increase or reduction

during the preceding twelve months; but it seems to me, if I had any doubt about it, that the matter is really concluded by the authority of *Reg.* v. *Poplar Union Assessment Committee.* (1) There the very question arose. In that case the Court quashed the order of the sessions and directed the assessment committee to make a further examination and have a further hearing. In that case it appeared that there had been a continuous reduction in receipts of tonnage rates on vessels for some six or seven years, and it was argued that the ratepayers, the dock company, were entitled to a reduction equivalent to the reduction during practically the whole of that period, or at all events for a considerable part of it. On the other hand it was argued that although it might be quite right to look at the whole of that period in order to see whether there was a permanent cause, yet when it had been established that there was a permanent cause, the figures had to be calculated according to the reduction in the particular year. Brett M.R. said at p. 370:—"The meaning of the Act is, I think, that the existing valuation unappealed against should be taken to be correct, and that what you have to do is, treating the existing list as correct, to see whether what has occurred since has altered that which was the rateable value before. If that be true it seems to me that the gross rateable value in the supplemental list is also to be ascertained by assuming that the value in the list then in force is correct at the commencement of the year, and by adding to or taking from such value the addition or diminution, as the case may be, arising from the alteration during the year. When the alteration has been thus ascertained the value as altered is to be entered in the supplemental list." Bowen L.J. at p. 371 said: "The second matter to be considered is what is the exact correction which the Act requires to be made if some alteration is shewn to exist. Is the whole matter open and the quinquennial list to be set aside, or is only such correction to be made in the figure in the existing list as represents the alteration which is shewn to have taken place in the rateable value during the twelve months? The Solicitor-General has truly pointed out that the quinquennial list is a

(1) 13 Q. B. D. 364.

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substantial part and basis of the Act." Then the learned Lord Justice said this, after reading s. 46: "Now what is it you want to get upon the supplemental list? The Act does not say you are to get upon it the real actual rateable value, but that the list shall shew the alterations, and limited by this, that they must be alterations which have taken place during the preceding twelve months. It is true, as Sir Hardinge Giffard has pointed out, that what is in the supplemental list is not a notice that there has been an alteration, but a figure which represents the alteration. This figure, however, does not shew an alteration unless it bears some relation to such alteration. To my mind the words of the section mean this (though I do not say so confidently, for I think they are very obscure), that the supplemental list must shew the figure to which the rateable value should be altered, so as to shew the alteration that has occurred during the preceding twelve months. Therefore it must be assumed that the existing list was correct at the commencement of the twelve months, and what has to be done is only to make such alteration as will shew the alteration in the rateable value during this limited period." It is quite true that the Court was there dealing with the supplemental list and not with the provisional list, but, as was pointed out by Mr. Ryde, it would be a remarkable thing if one set of rules applied to the provisional list, which only subsists till the supplemental list takes its place and comes into force, and if another set of rules applied to the supplemental list. I think the same rules have to be applied whether you are dealing with s. 47 or s. 46. If that is so, it seems to me that *Reg.* v. *Poplar Union Assessment Committee* (1) is a binding decision, and we must act upon it. For myself I think that, apart from authority, the matter is reasonably clear; I think the construction I have put upon s. 47 is that which its language requires.

Therefore, what has to be considered in this case is this: Has there been an increase or reduction during the twelve months, and from a cause within the meaning of s. 47? With regard to the latter point, we have the decision in *Rex* v. *Southwark Assessment Committee* (2) that the competition of tramways,

(1) 13 Q. B. D. 364. (2) [1909] 1 K. B. 274.

omnibuses, and tube railways as affecting the rateable value of a railway is a "cause" within s. 47 if it be shewn that such competition has caused a decrease of the receipts of the railway of a permanent nature, and it decides that such competition may be of a permanent nature. Of course, in this case, we have to inquire whether the decrease is of a permanent nature, and therefore it is necessary to look not merely at the reduction that has taken place during the year preceding April 5, 1913, but we must go back a little further. In reference to that, we have the figures given in the affidavits. I am dealing now merely for the moment with the question whether this is a permanent cause. We all know about the vast increase of motor omnibuses, and speaking for myself, I should be surprised if that had not produced a very considerable effect upon the receipts of tramways running along the same routes. In an affidavit filed on behalf of the London County Council the total gross receipts as at September 30, 1911, and for the three subsequent half-years are set out; and, leaving out the odd figures, they are 104,000*l.*, 102,000*l.*, 98,000*l.*, and 89,000*l.* Then the gross receipts per car mile are stated as 11·42*d.*, 11·11*d.*, 10·58*d.*, and 9·05*d.* The total reduction during the period is, therefore, more than $2\frac{1}{4}d.$ per car mile. One can only draw the inference that that must have an effect upon the profits, because the more car miles run the greater, prima facie, must be the expense. I think, therefore, that sufficient continuity is shewn. It is not a mere fluctuation; it is apparently a permanent cause. Therefore I think that we must hold that the cause, whatever it was, is a cause within s. 47.

But something more has to be shewn, this, namely, that there has been this reduction during the twelve months. Upon this point arises the difficulty as to whether the assessment committee have found as a matter of fact that there has been no such reduction, and, if they have so found, how far we are bound by it. Two cases have been cited to us on this question, *Rex* v. *Southwark Assessment Committee* (1) and *Rex* v. *Shoreditch Assessment Committee*. (2) The judges in those cases have not altogether proceeded upon the same grounds; but for myself I

(1) [1909] 1 K. B. 274. (2) [1910] 2 K. B. 859.

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rather agree with the judgments of Walton J. in the *Southwark Case* (1) and Farwell L.J. in the *Shoreditch Case*. (2) It would seem to me, however, that it is for this Court to say whether the condition precedent has been fulfilled, because there is nothing in s. 47 to shew that the assessment committee are to decide that point. They are to appoint a valuer, and the whole of this is mere machinery in order to see whether in fact there has been that increase or reduction, because the valuer is not bound by what we say to-day; he has to look at the matter independently. I am inclined to think that the weight of authority shews that what we have to do is to see whether there is in fact prima facie evidence of the reduction from the specified cause, and if the Court sees that there is it can overrule the assessment committee. That is stated very clearly by Cozens-Hardy M.R. in *Rex* v. *Shoreditch Assessment Committee*. (2) At the foot of p. 875 he said this: "In my opinion, the assessment committee have not a discretion if the requisition states a prima facie case. If it does not state a 'cause' from which the value has been reduced they are not bound to appoint a person. If it states a 'cause' which they think insufficient, having regard to the decisions, and they refuse to act, then, if the Court of King's Bench agrees with them, no mandamus will be issued. If, however, the Court does not agree with them, a mandamus ought to be issued. Moreover, I do not assent to the view that there was no mistake in law in the present case, for reasons stated below." It seems to me that that is an excellent working rule.

If we apply that rule to the present case it seems to me not only that there was prima facie evidence, but it is clear to my mind also that the assessment committee have gone wrong upon a matter of law. The facts are those which I have pointed out, namely, the great reduction in the gross receipts, and the great reduction in the receipts per car mile. It seems to me necessarily to involve a loss of profit, but that even is not left in doubt, because there is an affidavit of Mr. Eve, filed on behalf of the assessment committee, in which, dealing with the whole of London, he sets out figures which shew that there has been a very large decrease in the profits per car mile. For 1909-10

(1) [1909] 1 K. B. 274. (2) [1910] 2 K. B. 859.

the net receipts per car mile were 4·901*d.*; for 1910-11 they were 4·709*d.*; for 1911-12 they were 4·695*d.*; and for 1912-13 they were 3·691*d.*—a very large reduction—more than 1*d.* per car mile, and when he comes to the net receipts in the parish of Islington, they are reduced from 86,535*l.* in 1911-12 to 76,489*l.* in 1912-13; the profits, in other words, shew a reduction of not less than 10 per cent. There seems to me, therefore, abundant prima facie evidence. But, further, it seems to me that the assessment committee must have gone wrong in law when with those facts before them they pronounced their decision to be that which is contained in the letter of July 16: "My committee having fully considered what has taken place in the matter have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section." It is argued that they have decided only a question of fact. But I can only come to the conclusion, though I do not think it necessary to come to that conclusion, that they have gone wrong upon a point of law. The question whether there is *any* evidence seems to me to be a question of law. Therefore on these grounds it seems to me that the London County Council are entitled to have this rule made absolute.

LUSH J. I agree, and I will state as briefly as I can my reasons for coming to this conclusion. There are two questions, both of them important and of some difficulty, which we have to decide. The first is, What is the true meaning of the words in s. 47 of the Valuation (Metropolis) Act, 1869, "increased or reduced in value"? Does the section mean that, if in the course of any year the value of any hereditament has risen from, or has gone down below, the value shewn in the quinquennial list, a provisional list is to be made? In other words, is the comparison that one has to make a comparison between the present value of the hereditament and the original value as fixed in the quinquennial list, or is the real meaning of the section this, that if in the course of any year the value of the hereditament has gone up above the value it bore at the beginning of the year or has gone down below the value at the beginning of the year, a provisional list is to be made? Those are two very

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different things. The second question we have to decide is, assuming that there has been an alteration or prima facie evidence of an alteration in the course of any year from the value of the hereditament either as fixed in the quinquennial list or at the beginning of the year, in which case the powers conferred upon the overseers, the ratepayers, and the assessment committee are to come into operation, what tribunal is to ascertain whether or not there has been such an alteration in value?

With regard to the first question, if one starts with the not unnatural notion that the object of the provisional list is to ascertain the true rateable value of the hereditament, then, prima facie, one would have thought that the words "increased or reduced in value" point necessarily to an increase or reduction in the value which the hereditament now bears compared with the value which the hereditament bore at the time the quinquennial list came into operation, and I confess that, until Mr. Ryde convinced me to the contrary by his very cogent and clear argument, I was disposed to think that the meaning of the words in s. 47 must be "if there has been an alteration from the original quinquennial valuation." I was disposed to come to that conclusion for this reason, that if that is not the true meaning of the section, one must in many cases be forced to say that the object of the provisional list is not to ascertain the real rateable value of the hereditament at all, but to ascertain some artificial or conventional increase or diminution in value. Take an illustration I put during the argument: supposing there is a hereditament, which was valued at a certain figure when the quinquennial list was made out, but which has gone up in value during the first year, no alteration having been made in the figure in the quinquennial list, and it goes down again in the second year, then if you are to contrast the value at the end of the second year with the value at the beginning of the second year, which is not the true rateable value of the hereditament as it appears in the quinquennial list, you must arrive at a wrong conclusion as to the value of the hereditament at the time when the provisional list is made out. That seemed to me to be a very formidable argument in favour of the view

that Mr. Charles put before us on behalf of the assessment committee, but Mr. Ryde pointed out that when one looks at the preceding sections of the Act one finds this, that the value in the quinquennial list is to be conclusive evidence of the value of the hereditament, and he also pointed out that when you consider the machinery for making what is called the supplemental list, provided for in the preceding sections, it is manifest that the increase or reduction in value which is provided for in those sections is an increase or reduction to be ascertained, not by comparing the value in the quinquennial list with the present value, but by comparing the value at the beginning of the year with the value at the end of the year. In fact, sub-s. 1 of s. 46 speaks in terms of the alterations which have taken place during the preceding twelve months, and Mr. Ryde quoted *Reg.* v. *Poplar Union Assessment Committee* (1) in support of his contention. That case, no doubt, was a case referring not to the provisional list but to the supplemental list; but assuming for the moment that the two lists are in pari materia, it was expressly decided there by the Court of Appeal that the alteration that one has to consider is not an alteration having regard to the original value in the quinquennial list, but an alteration in the value from the beginning of the year to the end of the year. That was an express decision as to what the alteration in the value of the hereditament is that is spoken of in s. 46. Is the supplemental list in pari materia for this purpose with the provisional list provided for in s. 47? Apart from authority, Mr. Ryde pointed out the difficulties that would ensue if one were to hold the contrary. The supplemental list is the list that is to be made out if necessary at the end of each of the years, the first, second, third, and fourth, and it is the list which shews the alteration that takes place from time to time in the rateable value of the hereditament. If you were to have a supplemental list made upon that basis, but the provisional list, which provides for an alteration in the middle of one of the years, made upon a different basis, you must arrive at what Mr. Ryde called chaos as the result. If authority is needed in support of Mr. Ryde's contention it will be found in *Rex* v. *Southwark Assessment Committee* (2),

(1) 13 Q. B. D. 364. (2) [1909] 1 K. B. 274.

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where Lord Alverstone said at p. 291, when referring to the *Poplar Case* (1) and *Reg.* v. *New River Co.* (2): "They were both cases of supplemental lists, and are useful upon the point of view put forward in argument that the same rule applies to a provisional list as to a supplemental list"; and Vaughan Williams L.J. when the case was in the Court of Appeal, said at p. 298: "In my opinion, for the purposes of the question whether there has been such a change of circumstances as is essential in order to bring a case within the words of s. 47, there is no difference whatever between a provisional and a supplemental list." Therefore, both from the section itself and having regard to the authorities, it seems to me that we are forced to say that there is no difference between the two lists, and that if the supplemental list contemplates an alteration that happened during the course of a year from the beginning to the end, the provisional list must of necessity do the same. That being so, I can come to no other conclusion than this, that the condition precedent which is mentioned in s. 47, upon which rest the powers of the ratepayer, the overseers, and the assessment committee, is that there must be at all events prima facie evidence that during a year there has been an alteration in the value which the hereditament bore at the beginning of the year as compared with the value it bears at the time the provisional list is applied for.

Now comes the second question, which to my mind is at least as difficult as the one with which I have just dealt. That there is a condition precedent is plain, I suppose, beyond controversy. Something must have happened before the assessment committee can be asked to appoint a valuer. What is it that must happen before the requisition can be sent in by the ratepayer? It is that a prima facie case must be established that there has been such an alteration as I have just mentioned in the value of the hereditament. More than one view may be taken as to how that question is to be solved. One view is that the duty of the assessment committee is merely ministerial—that they have no function at all for the purpose of ascertaining whether there has been an alteration or not, but that as soon as the ratepayer

(1) 13 Q. B. D. 364. (2) (1879) 4 Q. B. D. 309.

sends in his requisition stating the facts from which one would assume that there has been an alteration, they are bound, without ascertaining anything, to appoint the valuer for the purpose of the provisional list being made. That is one view. Another view is that the assessment committee are not merely ministerial, but that they have a function to perform in the nature of a judicial function, namely, to ascertain for themselves whether as a matter of fact such an alteration in the value of the hereditament has taken place, and that when they have ascertained that fact (assuming, of course, they have ascertained it without applying any wrong principle of law, and assuming also that there is evidence both ways before them upon which they could come to the conclusion), then their decision is final, and that this Court cannot interfere with it. The third view is that, although the assessment committee have jurisdiction to ascertain whether the prima facie case has been established or not, this Court has also jurisdiction to say whether they agree with them, and that if they do not agree with them, then the ascertainment of the fact by the assessment committee does not in the least degree hamper this Court, or prevent the Court from granting a mandamus if they think that the true view of the facts is that such an alteration has taken place. Those are the three views. It seems to me that Walton J. in the *Southwark Case* (1) and Farwell L.J. in the *Shoreditch Case* (2) both took the first of those three views, and both thought that the duty was ministerial. That that view was not shared by the other members of the Court is perfectly plain, and I feel therefore at liberty to express my view with regard to it. Kennedy L.J. in his judgment in the *Southwark Case* (1) certainly did not take that view, and I do not think the other members of the Court of Appeal did either in the *Southwark Case* (1) or in the *Shoreditch Case*. (2) It seems to me that it is very difficult to say that the duty of the assessment committee is ministerial, because if you look at sub-s. 1 of s. 47, it contemplates that the overseers themselves may, and shall, if certain conditions are fulfilled, make out the provisional list, and inasmuch as they cannot do it unless there has been an alteration in the value, it seems to me to follow of

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necessity that the overseers, at all events, have something more than a ministerial duty; they have the duty of ascertaining for themselves whether the condition precedent has been fulfilled. Applying the same rule to the assessment committee, who have only to act if the overseers do not make out the list, it seems to me that it follows that the assessment committee likewise have not merely a ministerial duty to perform, but have the duty of ascertaining whether the alteration has taken place.

Then, is their finding of fact, assuming there has been no mistake in law, binding where there has been evidence both ways before them? Again, as to that, there has been a very considerable difference of judicial opinion. I do not think that the Master of the Rolls decided in the *Shoreditch Case* (1) that this Court has power to differ from the assessment committee if there was evidence before the assessment committee and if there was no mistake on their part in applying the law, because although it is quite true that at the beginning of his judgment the Master of the Rolls used language that my Lord has just read, it is to be observed that on p. 877 he expressly stated that he thought that the action of the assessment committee in that case involved a mistake in law, and he added this: "It is not a case in which there is evidence on both sides the weight of which would have to be considered"; and a little lower down he says: "If I had arrived at the conclusion that the mistake of the assessment committee did not involve a mistake in law, I might have been obliged to consider how far the dicta of Bigham J. and Kennedy L.J. in *Rex* v. *Southwark Assessment Committee* (2) ought to be followed, but I am relieved from that necessity." Those dicta were, if I understand them rightly, to the effect that where the assessment committee have decided the question of fact without any mistake of law, their finding is a finding within their jurisdiction, and is a finding which ought not to be disturbed. The Master of the Rolls seems to me to have left that point open. Kennedy L.J. at p. 888 in the *Shoreditch Case* (1), after quoting Bigham J.'s view in the *Southwark Case* (2), said this: "Speaking for myself, I see no reason to alter the opinion which I said in the course

(1) [1910] 2 K. B. 859. (2) [1909] 1 K. B. 274.

of my judgment in the *Southwark Case* (1) that I was disposed to adopt, and which Lord Mersey (then Bigham J.) had still more definitely asserted when that case was before the Divisional Court, that, if an assessment committee, in dealing with an application under s. 47, sub-s. 2, comes, upon evidence, to a conclusion of fact, their decision ought not to be reviewed upon an application for a mandamus to compel them to do something which would only have been justified by their having arrived at an opposite conclusion of fact. But, of course, in so saying, I assume that there is some evidence upon which the finding of fact can be supported." It seems to me that if the section contemplates that the assessment committee are to exercise a judicial function and ascertain whether a prima facie case has been made out and have not gone wrong upon law, and have not acted without evidence, that conclusion of fact would have been binding upon us, and that we ought not to grant a mandamus.

In the present case it is not necessary to say whether that is the right view or not, for this reason, that the only decision that we have before us of the assessment committee is that in their view, having, as they say, fully considered and taken advice upon the matter, they have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section. I agree that that is not a finding of fact; it is a finding of law, and the very same finding was said to be a finding of law in the *Southwark Case*. (1) We are, therefore, not hampered by the fact that there has been any adjudication by the assessment committee as to a matter within their jurisdiction. There has been none. They have found a matter of law and not a matter of fact, and inasmuch as, therefore, there has been no finding by them which can in any way fetter this Court, we have only to consider for ourselves whether a prima facie case has been established. I agree with what my Lord has said about that. Once assume that the alteration spoken of in the section is an alteration that has taken place between the beginning of the year and the middle of the year, then the facts deposed to in the affidavit before us shew a prima facie case that such an alteration has

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taken place, that is to say an alteration not merely by some fortuitous circumstances, some fluctuating change in the value of the profits that the tramways have made, but an alteration brought about by a cause, something which the Court has already held to be a cause of a permanent character, namely, the competition of the motor omnibuses. Therefore I think that it is for us to say whether a prima facie case has been made out. I think it has been made out, and, therefore, that the mandamus ought to go.

Order absolute.

J. S. H.

The Islington Assessment Committee appealed.

1914. Jan. 12, 13, 14, 15, 19, 21. *Sir R. B. Finlay, K.C.*, and *E. B. Charles, K.C.* (*Arthur Page* with them), for the assessment committee. The first point which the appellants desire to make is that the mere competition of motor omnibuses is not a "cause" of reduction in value of the tramways undertaking within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. That point, however, has been decided in this Court against the appellants in *Rex* v. *Southwark Assessment Committee* (1) and is not open here.

In order to shew a reduction in value within s. 47 there must have been such a continuous fall in the receipts, as distinguished from a mere temporary or fluctuating fall, as to shew that the value of the hereditament has been reduced: *Reg.* v. *Poplar Union Assessment Committee* (2); *Rex* v. *Southwark Assessment Committee*. (1) In such a case a tenant will not pay so high a rent for the hereditament as before. The alteration must also be from a cause special to the particular hereditament, and it is not sufficient to shew an alteration in the value of the hereditament from a cause which affects the value of all hereditaments: *Camberwell Assessment Committee* v. *Ellis*. (3) The affidavits here

(1) [1909] 1 K. B. 274.

(2) 13 Q. B. D. 364. The figures are given in 11 Q. B. D. at p. 725, where the case is reported sub nom. *Reg.* v. *East and West India Docks Co.*

(3) [1900] 1 Q. B. 68; [1900] A. C. 510.

shew a mere temporary fluctuation in receipts, and not a falling off from a cause of a permanent nature. Mr. Eve's affidavit shews that there was a rise in the receipts in 1910-11 and in 1911-12 followed by a fall in 1912-13, in which latter year they were still above the receipts in 1909-10, the year in which the quinquennial valuation list was made; and Mr. Eve's third affidavit shews that the receipts for the year 1913-14 have continued to rise. The case of the London County Council breaks down upon this question of fact.

Next, the Divisional Court were wrong in holding that the increase or reduction in value of the hereditament referred to in s. 47, which will justify the making of a provisional list, is an increase or reduction in value as compared with the value at the commencement of the year, i.e., by s. 4, the twelve months ending on April 5. In order to bring the section into operation there must be an increase or reduction in value "in the course of the year," that is to say, in order to comply with the condition precedent to the application of the section the value of the hereditament must have been increased or reduced during the year, but for the purpose of seeing whether a provisional list shall be made the value of the hereditament must be compared with its value as appearing in the quinquennial valuation list or that list as brought up to date by a supplemental list. The value of a hereditament may have risen in the year following the quinquennial valuation year, and may have fallen again in the next year to the same value as appeared in the quinquennial valuation list. In such a case there would be a reduction in value in the course of the year, but not such a reduction as would require a provisional list to be made, because the value would be the same as that in the quinquennial valuation list. It is clear that under s. 46, which deals with a supplemental list, the comparison must be with the quinquennial valuation list or that list as revised by a supplemental list. The same is true of s. 47. The same rule, as to comparison of periods, applies to a provisional list as to a supplemental list. In each case the ratepayer has to shew an alteration in value "during the preceding twelve months" or "in the course of the year," as the case may be, and if there has been such an alteration then the

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altered value has to be compared with the value in the quinquennial list to see if there has been an alteration within the meaning of the section requiring a supplemental or provisional list. This is apparently the view taken by the Divisional Court in *Reg.* v. *New River Co.* (1), by the Court of Appeal in *Ellis* v. *Camberwell Assessment Committee* (2) and by the House of Lords in the same case, *Camberwell Assessment Committee* v. *Ellis* (3); see especially the observations of Lord Halsbury L.C. at p. 518.

To ascertain therefore whether or not there has been an alteration in the course of the year justifying a provisional list, comparison must be made with the quinquennial valuation list. The learned judges in the Divisional Court relied upon some observations of Brett M.R. and Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee* (4), but they misconceived the nature and object of those observations. They were addressed to the argument that, upon an alteration in value being shewn within s. 46 so as to entitle the ratepayer to have a supplemental list made, the whole rateable value of the hereditament was opened up. The Court decided against that view and held that the quinquennial valuation list must be taken to be correct. As Brett M.R. said (at p. 370), "The meaning of the Act is, I think, that the existing valuation unappealed against should be taken to be correct, and that what you have to do is, treating the existing list as correct, to see whether what has occurred since has altered that which was the rateable value before."

That being so, the figures here shew that, though the receipts for 1912-13 were less than those for 1911-12, they were higher than those for 1909-10, the year in which the quinquennial valuation list was made. There was therefore no case made out for a provisional list.

Further, it was for the assessment committee to say whether a prima facie case was made out of such a continuous fall in the receipts as to shew a reduction in value of the hereditament from a cause of a permanent nature. That is a question which the assessment committee had to determine as a question of fact. The opening words of s. 47 constitute a condition precedent to

(1) 4 Q. B. D. 309.
(2) [1900] 1 Q. B. 68.
(3) [1900] A. C. 510.
(4) 13 Q. B. D. 364.

the exercise of jurisdiction under the section. The duty of the assessment committee is not merely ministerial, namely, to appoint a valuer upon a prima facie case being put before them in the requisition; their duty is to inquire whether the statement is or is not well founded. This is the opinion of Bigham J. in *Rex* v. *Southwark Assessment Committee* (1) and of Kennedy L.J. in *Rex* v. *Shoreditch Assessment Committee* (2), and is to be preferred to the contrary opinions of Walton J. (3) and Farwell L.J. (4) They are not bound by the statements in the requisition; they have to inquire whether the statements are correct. Their duty of ascertaining whether the condition in s. 47 is fulfilled is in the nature of a judicial duty, though when that is answered in the affirmative their duty to appoint a valuer becomes ministerial. As Lord Coleridge C.J. said in *Reg.* v. *Assessment Committee of St. Mary, Islington* (5), "they"—the assessment committee—"may decide either in favour of or against the applicants upon the question of reducing the assessment, but I think they must decide it." The question which the assessment committee have to decide is a question of fact preliminary to their jurisdiction, and no Court will interfere with their finding, except where perhaps the Court is of opinion that their finding is obviously wrong or where they have gone wrong in law. The assessment committee here had evidence before them which entitled them to find that no case had been made out for a provisional list, and their finding was a finding of fact and not of law, and this Court will not interfere. [*Reg.* v. *Overseers of St. Mary, Bermondsey* (6) and *Metropolitan Water Board* v. *Phillips* (7) were also referred to.]

Ryde, K.C., and *Konstam*, for the London County Council. By s. 43 of the Valuation (Metropolis) Act, 1869, the quinquennial valuation list is to come into operation at the beginning of the year (commencing on April 6) succeeding that in which it is made; and by s. 45 the list is conclusive evidence of the gross and rateable values, and it continues to be conclusive evidence of such values until altered by a supplemental list under s. 46. It is

(1) [1909] 1 K. B. at p. 292.
(2) [1910] 2 K. B. at p. 885.
(3) [1909] 1 K. B. at p. 293.
(4) [1910] 2 K. B. at p. 879.
(5) (1887) 19 Q. B. D. 529, at p. 532.
(6) (1884) 14 Q. B. D. 351.
(7) [1913] A. C. 86.

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conclusive evidence of value, even though that value is demonstrably wrong. Under ss. 46 and 47 it is admitted that the only alteration which can be taken into account is an alteration during the preceding twelve months in the one case, and in the course of the year in the other case. That alteration in the case of a provisional list must be compared with the value of the hereditament at the beginning of the year and not with the value as it appears in the quinquennial valuation list or in that list as revised by a supplemental list. It is clear that under s. 46 the increase or reduction in value is to be ascertained by comparing the value at the end of the year with the value at the beginning of the year, because the section provides that the supplemental list shall shew "all the alterations which have taken place during the preceding twelve months." So too under s. 47 there must be the same standard of comparison. The quinquennial valuation takes account of the probable fluctuations in value of the hereditament during the succeeding quinquennial period, and the value is to be deemed to be conclusive in each subsequent year of that period subject to any alteration made under ss. 46 and 47. *Reg.* v. *Poplar Union Assessment Committee* (1) is conclusive of this case. Brett M.R. (at p. 370) said that "the gross rateable value in the supplemental list is also to be ascertained by assuming that the value in the list then in force is correct at the commencement of the year"; and from Bowen L.J.'s judgment it is apparent that the antecedent years can only be looked at as illustrating the nature of the alteration, that is, whether it is from a temporary or a permanent cause. In *Reg.* v. *Overseers of St. Mary, Bermondsey* (2) there was no evidence of any change in the value of the hereditament. In *Camberwell Assessment Committee* v. *Ellis* (3) the sole question was whether the premises ought to have been included in the supplemental list at all, and no question was raised as to the amount at which they should be assessed if they were properly in the list.

Next, the affidavits shew that the competition of the motor omnibuses is not of a fluctuating but of a permanent nature, and that in consequence thereof the receipts of the tramway

(1) 13 Q. B. D. 364.
(2) 14 Q. B. D. 351.
(3) [1900] 1 Q. B. 68; [1900] A. C. 510.

undertaking have been permanently affected. No doubt the gross receipts have increased during the last year (1), but that is owing to a very much larger number of car miles being run at a greater expense in order to meet the competition. The receipts have fallen per car mile, and this has continued to the end of 1913. The receipts per car mile are a surer test than gross receipts. The mere fact of the gross receipts having risen does not shew that the rateable value of the undertaking has not decreased. The hypothetical tenant from year to year will not give the same rent for it if he has to expend more to earn the same amount. The decisions in *Rex* v. *Southwark Assessment Committee* (2) and *Rex* v. *Shoreditch Assessment Committee* (3) are in point. It is not necessary that there should be a long series of years in which there has been a fall in receipts in order to shew a "cause" of reduction in value within the meaning of s. 47.

The decision of the assessment committee under s. 47, sub-s. 2, is not final and can be reviewed in the High Court. The assessment committee's decision upon a question of fact preliminary to their jurisdiction can be reviewed: *Rex* v. *Bradford*. (4) It may be that the true view is that the duty of the assessment committee in this respect is purely ministerial, and this view derives support from the observations of Walton J. in *Rex* v. *Southwark Assessment Committee* (5) and of Cozens-Hardy M.R. and Farwell L.J. in *Rex* v. *Shoreditch Assessment Committee* (6); or it may be that they have a judicial duty to make some inquiry and their decision is open to review on mandamus. Their decision is on a question of law or of mixed law and fact. The question whether there is prima facie evidence of an alteration in value from a "cause" within s. 47 is a question of law or of mixed law and fact. The order of the Divisional Court was therefore right. [*London United Tramways* v. *Brentford Union* (7) was also referred to.]

(1) It is stated by Swinfen Eady L.J. in his judgment that the increase of receipts for the year down to December 31, 1913, of the whole of the London County Council's tramways amounted to 18,102*l*.

(2) [1909] 1 K. B. 274.
(3) [1910] 2 K. B. 859.
(4) [1908] 1 K. B. 365.
(5) [1909] 1 K. B. at p. 293.
(6) [1910] 2 K. B. at pp. 875, 879.
(7) (1907) 71 J. P. 249.

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Sir R. B. Finlay, K.C., in reply. The receipts per car mile are a fallacious test of the value of the tramway undertaking, as all the establishment charges remain the same, though there may be some increased expense in running the extra cars. With regard to the question of comparison, s. 45 of the Act of 1869 only makes the quinquennial valuation list conclusive for certain purposes, such as rates and taxes.

Cur. adv. vult.

April 8. The following written judgments were delivered :—

VAUGHAN WILLIAMS L.J. (1) This is an appeal from the Divisional Court, making absolute a rule to shew cause why a writ of mandamus should not issue directed to the assessment committee of the borough and parish of Islington, commanding them to appoint a person to make a provisional valuation list for the said parish, pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, containing the gross and rateable value as increased or reduced of the London County Council's tramways.

Sub-s. 1 of s. 47 provides that " The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament." Then sub-s. 2 provides that " A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list."

Sects. 43 and 45 are also of importance in this case, and run as follows. Sect. 43 : " The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come

(1) This judgment was read by Kennedy L.J.

into force at the beginning of the year (commencing on the sixth of April) succeeding that in which it is made, and shall last for five years subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." Sect. 45: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted; that is to say, (1.) For the purpose of any of the following rates which are made during the year that the list is in force, namely, the county rate, the metropolitan police rate, the church rate, the highway rate, the poor rate, the police, sewers, consolidated and other rates in the City of London, the sewers, lighting, general, and other rates levied by order of district boards or vestries, the main drainage improvement and other rates, and sums assessed on any part of the metropolis by the Metropolitan Board of Works, assessments for contributions under the Metropolitan Poor Act, 1867, and every other rate, assessment, and contribution levied, made, and required in the metropolis on the basis of value; (2.) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely, (*a*) The tax on houses levied under the House Tax Act and the Acts therein incorporated or referred to: (*b*) Any tax assessed in pursuance of the Income Tax Act, and any Acts continuing or amending the same, on any lands, tenements, and hereditaments, in all cases where the tax is charged on the gross value, and not on profits: (3.) For the purpose of determining, so far as it is applicable, the value of any hereditament included therein for the purposes of the Acts relating to the sale of excisable liquors, to the qualification of a juror, to the qualification of a vestryman, and an auditor of accounts under the Metropolis Management Act, 1855, and to the qualification of a guardian and of a manager under the Poor Law Amendment Act, 1834, or the Metropolitan Poor Act, 1867, at any time at which such value is required to be ascertained: And in construing the Metropolitan Police Act,

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1829, and the Acts amending the same, the last valuation for the time being acted upon in assessing the county rate shall be deemed to mean the valuation list for the time being in force: And in construing the County Rate Act and Acts referring to the valuation, estimate, basis, or standard for the county rate, the valuation, estimate, basis, or standard shall be deemed to be the rateable value stated in such list: And in construing the House Tax Act and the Acts therein incorporated or referred to, the full and just yearly rent shall be deemed to be the gross value stated in such list: And in construing the Income Tax Act and any Acts continuing or amending that Act, with respect to Schedules A and B thereof, annual value shall be deemed to mean the gross value stated in such list."

The requisition mentioned in s. 47 was duly sent to the overseers, and a copy thereof was sent to the clerk of the assessment committee on April 4, 1913, requiring the overseers to make a provisional valuation list in respect of the council's tramways in the borough of Islington. And upon April 16, 1913, Mr. Dewey, the town clerk of the metropolitan borough of Islington, wrote to the clerk of the London County Council, Spring Gardens, the following letter:—"Metropolitan Borough of Islington, Town Hall, Upper Street, N. 16th April, 1913. Sir,—Valuation (Metropolis) Act, 1869. London County Council Tramways in Islington. I am directed by my valuation committee, as representing the overseers, to inform you that they have had under consideration your notice, dated 4th instant, requesting that the gross and rateable values (57,330*l.* and 36,030*l.* respectively) of the above undertaking should be reduced in consequence of a falling-off in receipts alleged to be due to competition by motor omnibuses to 1*l.* and 1*l.* respectively, and that such assessment should be placed in a provisional valuation list for that purpose. The committee further direct me to inform you that, having regard to the requirements of the above Act, they are not prepared to accede to the request contained in the notice. I am, your obedient servant, Wm. F. Dewey, Town Clerk."

It does not appear from the letter of April 16 on what grounds it was that this committee "having regard to the

requirements of the above Act" were not prepared to accede to the request contained in the requisition. As far as this letter is concerned, it may have been that the committee took the view that the grounds put before them on which the requisition was based were bad in law, because they did not amount to more than a prima facie case of alteration in value; and that the committee thought that they should have put before them more than a prima facie case to justify them in appointing a valuer; or it may be that the committee were of opinion that those who supported the requisition had based the alleged alteration on a comparison of the present value with a wrong antecedent value.

The Divisional Court, however, had before it the affidavits upon which the application was based; and also had before it the correspondence between the town clerk, the clerk to the assessment committee, and the solicitor of the London County Council, which throws a good deal of light on the grounds of refusal. I deal with this correspondence later in my judgment.

The effect of this refusal of the overseers contained in the letter of April 16 was to bring into play sub-s. 2 of s. 47; that is to say, to cast upon the assessment committee the duty to "appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list." The assessment committee say that this duty only arises upon the happening of a condition precedent, namely, that the assessment committee are satisfied that in the course of the year the rated hereditaments have been reduced in value by some cause of a permanent kind; and that if the assessment committee have come to the conclusion that no reduction has been shewn in this case by the prosecutors, the rule for a mandamus ought to be discharged.

This position is based upon the observations of Bigham J. at the beginning of his judgment in *Rex* v. *Southwark Assessment Committee* (1) at p. 292, and the observations of Kennedy L.J. in the same case at p. 308. Perhaps it is convenient to deal with the authorities on this point at once. There are certainly several cases in which it has been laid down that, if the requisition

(1) [1909] 1 K. B. 274.

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states a prima facie case, it is sufficient compliance with the condition precedent introduced by the preliminary words in s. 47, "If . . . . the value of any hereditament . . . . is from any cause increased or reduced in value"; but a different opinion seems certainly to be entertained by Bigham J. and Kennedy L.J. in the case of *Rex* v. *Southwark Assessment Committee.* (1) I prefer, however, the conclusion which results in the duty of the assessment committee to appoint a valuer in case a prima facie case is made on the requisition of reduction or increase in value, as the case may be. I think that the very fact that sub-s. 2 provides that in case the overseers make default in sending such provisional list the assessment committee shall appoint a person to make a provisional list goes far to shew that the condition precedent is satisfied by the requisition making, in the opinion of the assessment committee, a prima facie case of reduction or increase in the value of the hereditament; and it is not argued in this case that the requisition did not make a prima facie case, that is to say, did not shew a prima facie cause reducing the value within the meaning of the preliminary words of the section. A prima facie case means, in my opinion, a case in which the evidence given is such as to raise a presumption of proof, unless qualified or contradicted by evidence to the contrary. The finding of the valuer or his figures may not only determine the quantum of the increase or decrease in the value of the hereditament, but also may determine the question whether or not in fact the items mentioned in the valuation constitute a diminution in value of a continuing nature, or a mere fluctuation in trade. The decision of the assessment committee to my mind in no way indicates the ground of that decision. One requires the valuation of the valuer appointed in order to ascertain the grounds. I shall now proceed with my judgment on the basis that I have just stated.

It is admitted, that for the purpose of deciding the questions arising in this case, it makes no difference in the principles to be applied whether the claim for reduction or increase is made in the case of a supplemental valuation or provisional list.

(1) [1909] 1 K. B. 274.

Sect. 46, sub-s. 1, of the Act provides: "In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list." In the course of the argument I put this question to Sir Robert Finlay: "Am I right in assuming that, when this sort of application is made by requisition, what you have to deal with primarily is the alteration in value in the preceding year?" Sir Robert Finlay answered: "You have to look at that only for this purpose, to see what alteration took place in the year in question, the preceding year. Take the simplest case, the case of a building: has it been erected during the year in question? To see whether it was erected during the year in question, you must, of course, see whether it or any part of it had been erected during the preceding year. In that sense you must start with comparing the state of things in the year in question with the previous year; but that is merely to ascertain what alteration took place in the year in question. Then comes the question of comparison; and my point is that the comparison must be with the quinquennial valuation." Sir Robert Finlay, in support of this proposition, relied upon a passage in the judgment of Lord Halsbury in the case of *Camberwell Assessment Committee* v. *Ellis* (1), a passage which to my mind dealt with the question whether the obtaining a premium in a year subsequent to the making of the quinquennial valuation higher than one obtained before or at the time of the quinquennial valuation was in itself evidence of alteration in value within the meaning of s. 46, sub-s. 1. Lord Halsbury says that, although the evidence might be admissible, "it comes to nothing unless you establish a comparison between the two periods and shew that you have got an enhanced premium given; but nothing of that sort is suggested," and goes on to say: "I say that there was no evidence at all of comparison, and it is only if there is a comparison that this is relevant or useful evidence." I cannot see that this passage in Lord Halsbury's judgment in any degree affects the question which we have to decide. I wish to point out that all evidence, in my opinion, of values in the

(1) [1900] A. C. 510, at p. 518.

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different years of the quinquennial period, before or after the date of the suggested alteration, is admissible upon the question whether the alteration under discussion is an alteration affecting the value of the hereditament, or a mere temporary trade fluctuation.

I agree with the words in the judgment of Bray J., adopting the judgment of Brett M.R., in *Reg.* v. *Poplar Union Assessment Committee* (1) at p. 370: "The meaning of the Act is, I think, that the existing valuation unappealed against should be taken to be correct, and that what you have to do is, treating the existing list as correct, to see whether what has occurred since has altered that which was the rateable value before. If that be true, it seems to me that the gross rateable value in the supplemental list is also to be ascertained by assuming that the value in the list then in force is correct at the commencement of the year, and by adding to or taking from such value"—that is, the value at the commencement of the year—"the addition or diminution, as the case may be, arising from the alteration during the year. When the alteration has been thus ascertained, the value as altered is to be entered in the supplemental list." Bray J. then quotes from the judgment of Bowen L.J. in the same case, at p. 371: "The second matter to be considered is what is the exact correction which the Act requires to be made if some alteration is shewn to exist. Is the whole matter open and the quinquennial list to be set aside, or is only such correction to be made in the figure in the existing list as represents the alteration which is shewn to have taken place in the rateable value during the twelve months? The Solicitor-General has truly pointed out that the quinquennial list is a substantial part and basis of the Act," and so on. Then the learned Lord Justice says this, after reading s. 46: "What is it you want to get upon the supplemental list? The Act does not say you are to get upon it the real actual rateable value, but that the list shall shew the alterations, and limited by this that they must be alterations which have taken place during the preceding twelve months. It is true, as Sir Hardinge Giffard has pointed out, that what is in the supplemental list is not a notice that there has been an

(1) 13 Q. B. D. 364.

alteration, but a figure which represents the alteration. This figure, however, does not shew an alteration unless it bears some relation to such alteration. To my mind the words of the section mean this (though I do not say so confidently, for I think they are very obscure), that the supplemental list must shew the figure to which the rateable value should be altered, so as to shew the alteration that has occurred during the preceding twelve months. Therefore, it must be assumed that the existing list was correct at the commencement of the twelve months, and what has to be done is only to make such alteration as will shew the alteration in the rateable value during this limited period."

I take this opportunity of saying that I think that Lord Halsbury in his judgment in *Camberwell Assessment Committee* v. *Ellis* (1) was merely repeating what was said by Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee* (2), namely, "that what is in the supplemental list is not a notice that there has been an alteration, but a figure which represents the alteration. This figure, however, does not shew an alteration unless it bears some relation to such alteration." He said this in reference to a case in which it was argued that the fact that a large premium had been paid since the quinquennial valuation shewed an alteration, and answered that argument by saying that "although it is evidence it comes to nothing unless you establish a comparison between the two periods and shew that you have got an enhanced premium given"—that is, shew, as expressed in the *Poplar Case* (2), that it has some relation to the alteration. On this point, therefore, I agree with the decision of the Divisional Court.

I shall now deal with the point raised that the Court cannot by mandamus overrule the decision of the assessment committee on questions of fact. Now one is at once faced with this difficulty, that one does not know of any evidence which was given to the overseers further than in the statement of April 4. The assessment committee wrote on July 16 a letter to the solicitor of the London County Council. It begins with these words: "Referring to the correspondence," and concludes as follows: "I have now to inform you that my committee, having fully considered and taken advice upon the matter, have come to the

(1) [1900] A. C. 510, at p. 518. (2) 13 Q. B. D. 364.

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conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section, and therefore decline to accede to the council's request." The statement as to the absence of prima facie evidence indicates the view that the assessment committee themselves took as to the question on which they were entitled to be satisfied, namely, whether there was prima facie evidence, and we may take it that the meaning of their decision was that there was no prima facie evidence. I have read and considered the correspondence referred to, and it seems to me to come to this, that on May 3 a letter was written by Mr. Tanner, the solicitor for the London County Council, giving the assessment committee the figures of receipts, car miles, and receipts per car mile for the two half-years ended September 30, 1911 and 1912, respectively, and he stated that the apportioned figures for each borough for the half-years ended March 31, 1912 and 1913, respectively were not available, but gave the figures for the whole tramway undertaking for those half-years. The letter also gave the figures for the whole undertaking for the half-years ending September 30, 1911, and September 30, 1912. The answer to this letter was a letter of May 7, written by Mr. Dewey, the clerk to the assessment committee, to the solicitor to the London County Council, and runs thus: "Town Hall, Upper Street, N. May 7th. Dear Sir,—Valuation (Metropolis) Act, 1869. London County Council Tramways. I have submitted to my assessment committee the requisition of the London County Council dated the 4th ultimo, and also your letter of the 3rd instant, and am directed to inform you in reply that the committee are unable to ascertain from the statements in your letter that any reduction in the value of the undertaking is proved to be attributable to the competition of motor omnibuses or other specific causes within the parish of Islington. They are desirous of having more definite information upon this point, and particularly of being informed to what extent the loss on the undertaking is due to causes other than the competition to which the council has called attention. I am, yours faithfully, Wm. F. Dewey." The answer to this letter, written by Mr. Tanner, on June 5, 1913, runs thus: "Dear Sir,—Assessment of Council's

Tramways, Islington. Referring to your letter of the 7th ultimo, I am informed that Messrs. W. Eve & Sons have been asked to advise the Islington Assessment Committee in this case, and that they have asked to be supplied with certain facts and estimates in respect of the council's claim for a reduction of assessment. The council's valuer is in communication with Messrs. Eve in regard to the information required, and in view of this it would not appear necessary for me to deal with the point raised in your letter of the 7th ultimo at the moment." The next letter, again a letter from Mr. Tanner to the assessment committee, is dated June 26, 1913, and runs thus: "Dear Sir,—Assessment of Council's Tramways, Islington. With reference to our previous correspondence, you are no doubt aware that Messrs. Eve & Sons, who are advising the assessment committee in the matter, have been supplied with various particulars which shew a prima facie case for the making of a provisional list, and in view of the decision of the Court of Appeal in *Rex* v. *Shoreditch Assessment Committee* (1) I shall be glad to hear during the next two or three days that the assessment committee will appoint a person to make a provisional list in respect of the council's tramways in the borough, in accordance with section 47 (2.) of the Valuation (Metropolis) Act, 1869." I think that those are all the material letters. The outcome is that the county council say: We have, through the particulars supplied to Messrs. Eve at their request, made a prima facie case; the answer of the assessment committee is: We have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section, and decline to accede to the council's request.

I think it convenient to add here some observations which were not included in my judgment as originally drafted. They are as follows: I fully accept the proposition that in arriving at rateable value you have to arrive at the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditament; and also the proposition cited from the judgment of the Master of the Rolls in *Reg.* v. *Poplar Union Assessment Committee* (2): "No one would say that a mere temporary falling off in the receipts would affect the rateable

(1) [1910] 2 K. B. 859. (2) 13 Q. B. D. at p. 369.

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value. If a temporary fall in the receipts during one year would be rectified by an increase of receipts next year, no tenant would care much about such temporary decrease; but if there were evidence which seemed to shew a regular falling off in the receipts, it would not be reasonable to suppose that a yearly tenant would give the same rent for the property, taking one year with another."

Assume all these propositions to be clear law, there still remains the question, what is the function of the assessment committee in case the overseers have not sent to the assessment committee the provisional list? It is to be remembered, in the first place, that the decision of the Court of Appeal in *Rex* v. *Shoreditch Assessment Committee* (1), to which the present Master of the Rolls, Farwell L.J. and Kennedy L.J. were parties, seems to decide in terms that a prima facie case is all that the assessment committee have to look for and affirm or negative, as the case may be. The case of *Rex* v. *Shoreditch Assessment Committee* (1) also raises a question as to how far the Divisional Court can overrule the conclusion in fact, as distinguished from law, of the assessment committee. I agree entirely with the cogent observations of Farwell L.J., beginning on p. 878 of the report. The correspondence shews that the clerk of the assessment committee was perfectly well aware that a prima facie case was all that was necessary to validate the requisition.

It seems to me that the assessment committee did not in fact deal with the question whether the requisition disclosed a prima facie case of alteration in value; but rather whether the conclusion of the one rating expert or the other on the facts was to be preferred. This to my mind was a question to be decided not by the assessment committee on the arguments of the experts on the figures, but by the valuer whom the assessment committee were bound to appoint, if the requisition on its face made a prima facie case of alteration in value. The statute to my mind could not have intended that the assessment committee should always be at liberty to obtain information from experts on one side or the other, and then to decide whether, on the balance of arguments, a prima facie case was made.

(1) [1910] 2 K. B. 859.

The Divisional Court has found that a prima facie case was made out. In my opinion this finding was correct; and I further think that this was a finding in law; and this appeal must be dismissed.

KENNEDY L.J. This is an appeal from the decision of the Divisional Court (Bray and Lush JJ.) who granted an application on behalf of the London County Council for the issue of a writ of mandamus directed to the assessment committee of the borough and parish of Islington commanding them to appoint a person to make a provisional list for the said parish, pursuant to s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869, containing the gross and rateable values of the portion of the tramways of the London County Council within the said parish as reduced since the making in the year 1910 of the quinquennial valuation list in force in the said parish, on the ground that the said values have been reduced within the meaning of the said section by reason of the competition of motor omnibuses.

The respondents to this appeal are ratepayers in the parish of Islington in respect of their tramways within the area of that parish. In 1910, the year of the last quinquennial valuation, they were assessed at a valuation of 57,330*l.* gross and 36,030*l.* rateable value. No supplemental list affecting this valuation has been made. In April, 1913, the respondents served upon the appellants, the assessment committee of the borough of Islington, a copy of a requisition on the Metropolitan Borough Council of Islington, as overseers of the poor of the parish of Islington, requiring them to send to the appellants a provisional valuation list in respect of the respondents' tramways in that parish. Provided that, within the meaning of the first words of s. 47 of the statute, there was, in the course of the preceding year 1912-1913, from any cause a reduction in the value of the respondents' hereditament, the appellants, under sub-s. 2 of the same section, were bound, if, as was the case, the overseers did not send in the provisional list which the respondents had demanded from them, to appoint a person to make such provisional list.

The appellants, however, after full consideration with skilled assistance of the information given to them by the respondents

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in support of the alleged reduction in value of the respondents' tramways, came to the conclusion that there was no prima facie evidence of such a reduction as s. 47 makes a condition of the creation of a duty on the part of an assessment committee under sub-s. 2 to appoint a person to make a provisional list; and accordingly they declined to make the appointment. The respondents, being dissatisfied with this conclusion, applied to the Divisional Court for a mandamus to compel the appellants to make the appointment, and succeeded in their application. We have now to decide whether the judgment in their favour was right.

In regard to the law, although here and there apparently conflicting dicta may be found, certain things, I think, may be treated as now settled by a series of decisions beginning with *Reg.* v. *Assessment Committee of St. Mary, Islington* (1) and ending with *Rex* v. *Shoreditch Assessment Committee.* (2) In the first place, the duty of the assessment committee to appoint a person to make a provisional list on the application of a ratepayer arises only if a certain state of facts has come into existence. Sect. 47 in its opening words states the condition plainly: "If in the course of any year the value of any hereditament . . . . is from any cause increased or reduced in value, the following provisions" (i.e., the provisions of sub-ss. 1 and 2) "shall have effect." The assessment committee are therefore not only entitled, but bound, before appointing a person to make a provisional list upon the requisition of a ratepayer who alleges reduction in value as the ground of his requisition, to see that there is a prima facie case for the existence of such a reduction in value as the statute prescribes as a condition. This is a duty which rests upon them. "The question here and in every such case is, is there a prima facie case calling on the assessment committee to hear and determine the question of value? They may decide either in favour of or against the applicants upon the question of reducing the assessment, but I think they must decide it": per Lord Coleridge C.J. in *Reg.* v. *Assessment Committee of St. Mary, Islington.* (3) In

(1) 19 Q. B. D. 529. (2) [1910] 2 K. B. 859.
(3) 19 Q. B. D. at p. 532.

his judgment in the present case Lush J. expressly adopts this view of the law. If a person is appointed by the assessment committee to make a provisional list, his function is simply to make a provisional list upon the assumption that an increase or a reduction (as the case may be) in value from a cause within the meaning of the first words of s. 47 has been shewn, to the extent of a prima facie case, to the satisfaction of the assessment committee who appoint him.

Secondly, if a ratepayer, who, like the present respondents, is dissatisfied with the conclusion of the assessment committee, because they have held that he has not made out a prima facie case, applies for a mandamus to compel them to appoint a person to make a provisional list, it is clear that the Court will grant a mandamus if the assessment committee have gone wrong in point of law, as, e.g., in wrongly holding that the cause of reduction in value put forward by the ratepayer is not a cause within the meaning of s. 47; and the Court may also grant it if satisfied that the assessment committee have misunderstood or misjudged on material points the evidence before them. I venture to add this to the statement of the last proposition, that, in my humble judgment, unless there is proof of error of this sort and degree, the Court ought not to interfere with their conclusion upon matters of pure fact.

Thirdly, where the rateable value of a hereditament is based upon the power to earn profits, an increase or a decrease in the capacity of the hereditament for earning profits is sufficient to constitute an alteration in value within s. 47, provided it is due to a cause which directly affects the assessable value of the particular hereditament, and is not of a merely temporary nature: *Camberwell Assessment Committee* v. *Ellis* (1); *Reg.* v. *Assessment Committee of St. Mary, Islington* (2); and *Rex* v. *Southwark Assessment Committee* (3), per Lord Alverstone C.J.; but an increase or decrease in receipts is not sufficient evidence of an alteration in value if it is indicative only of a fluctuation. "No one would say that a mere temporary falling off in the receipts would affect the rateable value. If a temporary fall in the receipts

(1) [1900] A. C. 510. (2) 19 Q. B. D. 529.
(3) [1909] 1 K. B. 274, at p. 290.

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during one year would be rectified by an increase of receipts next year, no tenant would care much about such temporary decrease; but if there were evidence which seemed to shew a regular falling off in the receipts it would not be reasonable to suppose that a yearly tenant would give the same rent for the property, taking one year with another": per Brett M.R. in *Reg.* v. *Poplar Union Assessment Committee.* (1)

I think, and at all events I shall assume, that none of the three propositions which I have formulated are now open to controversy in this Court, and I think that in the present case the appellants, in accordance with the third, rightly came to the conclusion, whether it be treated as one of law or of fact, to refuse to appoint a person to make a provisional list.

How do the figures stand? In respect of the four years 1909-10 (the year of the quinquennial valuation), 1910-11, 1911-12, 1912-13, there is a tabular statement in paragraph 4 of the affidavit, sworn October 21, 1913, of Mr. Harold Eve, the surveyor and valuer who advised the appellants in regard to the application of the respondents, which shews the receipts of the respondents' Islington tramways. These figures were supplied to Mr. Eve by the officials of the respondents, the London County Council, with this qualification in regard to the year 1910-11, that as the London County Council have not ascertained the earnings of their Islington tramways for that year, Mr. Eve has, for that year, had to estimate those earnings from the figures of the council's whole tramway undertaking in the county of London (see paragraph 4 of Mr. Eve's affidavit of October 21, 1913, and paragraph 1 of his affidavit of October 24, 1913). That tabular statement shews, in regard to receipts for 1909-10, 184,289*l.*; for 1910-11, 202,803*l.*; for 1911-12, 209,830*l.*; and for 1912-13, 200,129*l.* The same tabular statement shews a calculation of car miles for the same years respectively, 3,747,605; 4,231,986 (estimated); 4,423,503; 4,973,550 (estimated). We have had somewhat elaborate criticisms and calculations placed before us in affidavits made in support of the respondents' case, and expounded in the able argument of the learned counsel for the respondents; but

(1) 13 Q. B. D. 364, at p. 369.

substantially, in my judgment, the figures above set forth are correct. Indeed, as I have said, the figures for receipts are, subject to the single qualification stated above as to the year 1910-11, figures supplied to the appellants by the respondents themselves. They enable us to take a survey of all the four years; and the result of that survey is not to shew, as was shewn in the *Poplar Case* (1), a continuous decrease in the earning capacity of these tramways from which the operation of some cause of a permanent nature would fairly be inferred, but a rise in receipts for two successive years after the year of the quinquennial valuation, and then a drop in the third year, but not to a point below the receipts on which the quinquennial list was based. It is obvious that fluctuations in the receipts and profits of such an undertaking were to be expected. Difference in the weather may occasionally affect the value of the comparison of one particular half-year with another; and apart from such general and casual causes of fluctuation, there are in the present case special causes which have been in operation. Parts of the system were being gradually electrified, involving for the time expense and dislocation of traffic; and improvements in speed and frequency of running were being introduced to meet the competition of motor traffic—all of which only gradually benefit the respondents, but will, as time goes on, increase the earning power of the hereditament and render it much more valuable to the tenant. Even the respondents' clerk, Mr. Bird, alleges only a "serious diminution due mainly to the competition of motor omnibuses." But the result of the evidence, in my view, is that such falling off, if any, in 1912-13, as can be shewn if it is compared with 1911-12, is nothing more than may be sufficiently accounted for by things which must cause occasional and temporary fluctuations in the receipts of an undertaking like that of the respondents. In the Divisional Court my brother Lush only refers shortly to the figures. Bray. J. has taken certain figures given by Mr. Bird in his affidavit of July 30, 1913, for a series of half-years, beginning with September 30, 1911, and ending with March 31, 1913; shewing respectively 104,974*l.*, 102,645*l.*, 98,329*l.*, and 89,989*l.* It seems to me that, in judging what inference ought

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to be drawn from the drop, if drop there be, between 1911-12 and 1912-13—whether, that is to say, the inference ought to be what Brett M.R. in the *Poplar Case* (1) called a "regular falling off in the receipts," or a "mere temporary falling off in the receipts"—it is important to trace the annual receipts over as long a range of years as possible, and that it is not proper to omit the earlier period of 1909-10, which would have shewn that there was a rise in 1910-11. In the *Poplar Case* (2) there was shewn an almost continuous decrease in receipts for all the years from 1874 to 1881; in the *Southwark Case* (3) for four successive years. Further, Mr. Bird's calculation as it stands is, I venture to think, in one respect incorrect, for, as Mr. Bird himself frankly states in the same paragraph of his affidavit, he has for 1912-13 excluded the receipts earned on the blue dotted line on the map. It appears to me that this was, for the purpose of a comparison of receipts, not a correct course. If they had been included, as I think they ought to have been, it would have added, as I understood to be admitted by the respondents, several thousand pounds to the receipts of 1912-13. It appears to me that, whether the learned judges in the Divisional Court were right or wrong in holding, as they did, that the increase or the reduction in value within the preceding twelve months, which is to set in motion the machinery of s. 47, is an increase or a reduction of value in the ascertainment of which the value upon which the current quinquennial valuation was based is not to be considered, but the comparison is to be made with the value at the commencement of the preceding twelve months—a distinct question which I shall presently consider—the appellants were right in coming to the conclusion that the respondents had failed to make out a prima facie case of a reduction in value resulting from a cause of a permanent nature, or, in terms applicable to the circumstances of this particular hereditament, that they had failed to shew that the proper inference from the alleged diminution of earnings in the year 1912-13 as compared with the earnings of the year 1911-12 was, in the language of Brett M.R. in the *Poplar*

(1) 13 Q. B. D. at p. 369. 13 Q. B. D. 364.
(2) 11 Q. B. D. 721, at p. 725; (3) [1909] 1 K. B. 274.

Case (1), such a regular falling off in the receipts owing to the competition of motor omnibuses as would render it unreasonable to suppose that a yearly tenant would give the same rent for the property, taking one year with another. If this view is right, it is in itself sufficient to decide the appeal in favour of the appellants.

But I do not think that I ought to pass over the further and distinct question, which is discussed in the judgments in the Divisional Court, whether the increase or decrease of value in the preceding twelve months, which will justify a requisition under s. 47 and the appointment by the assessment committee of a valuer to make a provisional list, is an increase or a decrease to be ascertained, as the respondents have successfully contended in the Divisional Court, by a comparison of the circumstances affecting the rateable value of the hereditament at the time of the requisition with the circumstances affecting its rateable value at the commencement of the immediately preceding year; or whether the comparison ought to be, as the appellants contend, with the circumstances which established the value of the hereditament at the time of the quinquennial valuation, and upon which, in fact, the quinquennial valuation in force was founded. My brother Bray, after quoting the initial sentence of s. 47, puts the question in this form: "Does that mean increased beyond or reduced below what I may call the quinquennial value, or does it mean increased or reduced during the course of the year from what it was at the commencement of the year?" I do not, with all respect, accept this statement of the point as perfectly accurate; for it is, of course, common ground that the alteration must be an alteration within the twelve months preceding the requisition; and, therefore, the words "during the course of the year" should be inserted in regard to the first as well as in regard to the second of the two alternative positions. Add these words, and you have, I think, in Bray J.'s sentence, a clear and pithy statement of the issue which he, as well as Lush J., has decided in favour of the respondents. I find myself unable to take the same view. What is it that a provisional list under s. 47 is to do? It is to correct, in respect of a hereditament affected by an

(1) 13 Q. B. D. at p. 369.

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increase or a decrease in value during the preceding twelve months, owing to a cause within the meaning of the section, the existing quinquennial, or (if there has been one) the existing supplemental, valuation of that hereditament. The correction is to be effected, as was decided by the majority of the Court of Appeal (Brett M.R. and Bowen L.J., Fry L.J. dissenting) in the *Poplar Case* (1),—for it is agreed on all hands that the fact that in that case the question arose in regard to a supplemental and not, as in the present case, a provisional list under s. 47 is for this purpose immaterial—not by opening the previous quinquennial or supplemental list, but by assuming the value in the list then in force to be the correct value at the commencement of the twelve months preceding, and by deducting from it the diminution in value from the alteration during the twelve months.

That and nothing else was decided by this Court in the *Poplar Case.* (1) It did not decide, and, in my humble judgment, there is nothing in the judgments either of Brett M.R. or of Bowen L.J. to indicate that an opinion was held by either that, because the quinquennial value is to be held to be correct at the commencement of the twelve months preceding the requisition, the assessment committee, in seeing whether a prima facie case is made out for a provisional list because there has been an alteration of value, ought, in considering whether the alleged alteration exists, contrary to the truth to assume that the valuation in the quinquennial list, which the applicant seeks to modify, was made out upon the state of facts in regard to the value of the hereditament which existed at the commencement of the twelve months, and to compare with that the existing state of facts. The thing to be shewn by the applicant asserting a diminution of value is that during the course of the year an alteration has taken place which renders the quinquennial valuation of his hereditament, made (say) three years before, an excessive valuation. If he succeeds in shewing this, he becomes entitled to have a provisional list made which fixes a valuation altered to the extent to which he shews that the value has been altered by something which has diminished the value of the hereditament

(1) 13 Q. B. D. 364.

in the course of the year. He is not at liberty to bring into the assessment any earlier alteration which may have occurred. He cannot be heard to assert that the quinquennial valuation was incorrect at the commencement of the twelve months' period. But what is there in the language of the statute to support the contention of the respondents that he has made out a prima facie case for the alteration of his assessment, although the state of facts which he presents as evidence of the propriety of such an alteration shews, when compared with the state of facts upon which the quinquennial valuation was based, an ample justification for the maintenance of that valuation? Swinfen Eady L.J., whose written judgment I have had an opportunity of reading, has dealt with this part of the case in a way which makes it unnecessary for me to say more in regard to it. I will only add to what I have said that Lush J. would, if I correctly appreciate his judgment, have been disposed to agree with the view which I take—he states, indeed, a clear and forcible reason in support of it—but for three considerations. The first of these is that Mr. Ryde satisfied him that (to quote the words of the learned judge) "when one looks at the preceding sections of the Act one finds this, that the value in the quinquennial list is to be conclusive evidence of the value of the hereditament." I think the section intended to be referred to (and a similar argument was addressed to us) is s. 45. Couched in these general terms, the statement of the learned judge as to the effect of that section is, I venture to think, not quite accurate. That section makes the quinquennial list conclusive only for certain particular and specified purposes. The establishment of the existence of an alteration in value under s. 47 is not one of those purposes. The second consideration, which affected the conclusion of the learned judge, was the wording of s. 46, which speaks of alterations which have taken place during the preceding twelve months, and of s. 47, which speaks of alterations in the course of any year. It is common ground, for s. 47 in terms requires it, that the alteration sought to be established must be an alteration within that period. That, however, in my humble judgment, does not preclude a comparison with the state of facts upon which the quinquennial list was based, when you

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have to inquire whether an alleged alteration in value, justifying a provisional list, has really taken place in a subsequent year. Thirdly, my brother Lush refers to the *Poplar Case.* (1) With that I have already dealt, and given my reasons for coming to the conclusion that it is not a decision which is either directly or indirectly opposed to the contentions which Sir Robert Finlay has put forward on behalf of the appellants.

I am of opinion that this appeal should be allowed.

SWINFEN EADY L.J. On April 4, 1913, the London County Council served a written requisition on the mayor, aldermen, and councillors of the metropolitan borough of Islington, being the overseers of the poor of the parish of Islington, requiring them to send to the assessment committee a provisional valuation of the hereditament mentioned in the schedule to the notice, on the ground that such hereditament had been reduced in value within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, in consequence of the falling off of the receipts from the tramway undertaking, of which the hereditament forms part, due (amongst other things) to competition from motor omnibuses.

The hereditament mentioned in the schedule to the requisition is valued gross at 57,330*l.*, and rateable at 36,030*l.*, and consists of tramways within the borough and at Highgate Hill, car sheds, &c., at Pemberton Gardens, and the power stations at Camden Road, Upper Street, and Woodville Road. The whole property is comprised in one assessment. The overseers did not send any provisional list; and, accordingly, the assessment committee were summoned, and proceeded to consider the matter; and on May 7, 1913, the clerk to the assessment committee wrote to the London County Council for more definite information. The assessment commitee retained Messrs. W. Eve & Sons, rating surveyors, to advise them on the matter; and on June 5, 1913, the solicitor to the London County Council wrote to the clerk to the assessment committee that the county council's valuer was in communication with Messrs. Eve in regard to the information required; and on June 26, 1913, he wrote again alleging that Messrs. Eve & Son had been supplied

(1) 13 Q. B. D. 364.

with various particulars which shewed a prima facie case for the making of a provisional list. On July 16, 1913, the clerk to the assessment committee wrote to the council's solicitor that the assessment committee, having fully considered and taken advice upon the matter, had come to the conclusion that there was no prima facie evidence of such a reduction as was contemplated by the section, and, therefore, declined to accede to the council's request. Upon the application of the London County Council the Divisional Court granted a mandamus to the assessment committee to appoint a person to make a provisional valuation list for the parish; and the present appeal is brought by the assessment committee from the order of the Divisional Court directing the issue of the writ of mandamus.

The Valuation (Metropolis) Act, 1869, provides for the revision of the valuation list every five years; but, by s. 47, if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, provision is made for the preparation of a provisional list containing the gross and rateable value as so increased or reduced of such hereditament. It was decided in *Reg.* v. *Assessment Committee of St. Mary, Islington* (1) that the words in s. 47 "from any cause increased or reduced in value" are not confined to an increase or reduction caused by structural alterations in the hereditament. This view was adopted in the House of Lords in *Camberwell Assessment Committee* v. *Ellis.* (2) Lord Halsbury (at p. 517) stated that a proved alteration in the value may be either from a structural alteration or any other cause whatever. And Lord Davey (at p. 523) stated that he agreed with the learned judges in the Queen's Bench Division, that the words cannot be confined to structural alteration or addition, or anything of that kind. Now there are a large number of rateable hereditaments, such as railways, docks, tramways, and other large undertakings, the rateable value of which is ascertained by working back from the gross receipts, so as to arrive at the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditament. It was with

(1) 19 Q. B. D. 529. (2) [1900] A. C. 510.

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reference to hereditaments of this nature that it was said by the Master of the Rolls in *Reg.* v. *Poplar Union Assessment Committee* (1) at p. 369: "No one would say that a mere temporary falling off in the receipts would affect the rateable value. If a temporary fall in the receipts during one year would be rectified by an increase of receipts next year, no tenant would care much about such temporary decrease; but if there were evidence which seemed to shew a regular falling off in the receipts, it would not be reasonable to suppose that a yearly tenant would give the same rent for the property, taking one year with another." And in the same case Bowen L.J. said at p. 371: "It seems to me that the falling off in the receipts of tonnage rates during the twelve months when the rates were uniform, that is to say, the fact of there being less tonnage coming into the docks, with the light shed upon it by a previous continuous fall in former years, amounts to some evidence that during the last year the rateable value of the docks was not what it was before." The facts of that case appear more fully in the report in the Court below (2); but there was evidence of a great, continuous, and increasing fall in receipts, the figures for 1879 (the latest year available when the quinquennial valuation was made) being 144,000*l.* net profit; for 1880, 111,000*l.*; and for 1881, 71,000*l.* Again, in *Rex* v. *Southwark Assessment Committee* (3) there had been a large and continuous decrease in the receipts of a railway company in respect of local passenger traffic over a portion of their line situated in the parish, which decrease was still continuing. The figures are given at p. 278, shewing the receipts in 1904 (the latest figures available for the quinquennial valuation of 1905), and the receipts in 1905, 1906, and 1907. It is, however, essential to distinguish between cases of this kind and a mere fluctuation, a mere increase or decrease in one year, which may be followed by a change in the opposite direction the next year.

The first question which arises in the present case, having regard to the authorities to which I have already referred, is whether the London County Council placed before the assessment committee such facts as to constitute a prima facie case

(1) 13 Q. B. D. 364. (2) 11 Q. B. D. 721.
(3) [1909] 1 K. B. 274.

for a provisional valuation list. The consideration and decision of this point is, in the first instance, for the assessment committee, and the Court will not readily review their decision unless it involves some mistake in law. Sect. 47 does not make the decision of the assessment committee on the question of fact absolutely final and conclusive, so that it cannot afterwards be questioned or overruled. The section requires that there must be an increase or reduction in value before a person can be validly appointed to make a provisional list; the duty of the person so appointed is not to determine whether there is to be any change or not in the valuation list; he is appointed to make a change—to make a provisional list containing the gross and rateable value as so increased or reduced. The explanation of this is that s. 47 only contemplates a provisional list where there is a clear and material alteration.

The assessment committee in the present case determined that there was no prima facie evidence of such a reduction as is contemplated by s. 47, and therefore declined to appoint a person. This was the very point which it was their duty to decide; they said they had no prima facie evidence of an "alteration" in law, that is, an alteration within s. 47. It was pointed out by Lord Halsbury in *Camberwell Assessment Committee* v. *Ellis* (1) "that, as a matter of law, the mere giving of evidence that the house is worth more than it was assessed at at the quinquennial valuation is not evidence of an 'alteration' in law which ought to be received." The alteration must arise from a cause directly affecting the assessable value of the particular hereditament in question. So here, a mere fluctuation in the receipts of a particular year would not be an "alteration" within the section. But the only ground upon which the London County Council based their application was that such a diminution in receipts had actually occurred during one year. Prima facie it is a mere fluctuation; having regard to the increases over the quinquennial valuation in the two previous years, we know now that it is a fluctuation, that is, a decrease after two successive years of increase, and which year of decrease has been followed by another year of increase, so far as the year has yet

(1) [1900] A. C. at p. 518.

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expired, and which increase in receipts up to December 31, 1913, amounted (as we are now told by the London County Council) to 18,102*l*. But this is not really material, as the Court is only concerned with the facts put before the assessment committee through Mr. Eve, to enable the committee to determine whether a prima facie case had been made out. There was a decrease in receipts for one year only; but what was alleged to have caused it? Various causes: partly competition of motor omnibuses, but to meet this competition the London County Council had much increased the frequency of their tramcars, and sufficient time had not elapsed to judge whether the result of this counter-stroke would be to destroy or substantially reduce this competition. Another cause was the interruption to traffic caused by electrifying certain tram routes, converting them from horse traction to electric traction; indeed, Mr. Bird, the deputy clerk of the London County Council, stated in his affidavit that in arriving at the figures of receipts for purposes of comparison he had excluded the receipts from the line shewn by a dotted blue line on the plan, which was opened for traffic partly on August 3, 1912, and wholly on November 26, 1912. Of course the interruption to traffic caused by this electrification was serious, but temporary only; the change from horse to electric traction was of a kind to lead to largely increased receipts, and to induce the hypothetical tenant, taking one year with another, to pay an increased rent, although during the time when traffic was interrupted by electrification works the receipts from the tramways would be diminished. Another cause partly accounting for the fluctuation was the weather, for the summer and autumn of 1911 were particularly fine, and the same periods of the year 1912 were unusually wet and inclement.

When these various matters were taken into consideration by the assessment committee, they were right, in my judgment, in the conclusion at which they arrived, namely, that there was no prima facie evidence of such a reduction as is contemplated by s. 47, and were right in declining to accede to the council's request.

The other question, which was fully argued, was stated by Bray J.: "Is the increase or the reduction referred to in s. 47

an increase or reduction during the twelve months preceding the requisition, or is it an increase or reduction between the value at the beginning of the quinquennial period and the value at the end of the year in respect of which the requisition is made?" This mode of stating the question does not raise the point argued before us. Both parties agree that it is only an increase or reduction during the course of the current year that is referred to in s. 47; but the question argued before us was whether such increase or decrease, happening within the year, must not also be such an increase or decrease as results in a variation from the quinquennial standard. If the only result of the alteration within the year is to restore the value as at the quinquennial valuation, or at the last revision of the quinquennial list, the appellants contended that there was not any ground for a provisional list. An instance will illustrate the question. At the quinquennial valuation a value is placed upon a particular hereditament; suppose that during the first year subsequently there is an increase in value of 5 per cent., but no supplemental list; the second year an increase of like amount, but no supplemental list; the third year a decrease of 10 per cent. of the original amount, returning to the same value as at the date of the quinquennial valuation. The county council contend that, on an application under s. 46 or s. 47, the valuation list (remaining unaltered) must be taken as conclusive evidence of the gross and rateable value at the end of the second year and beginning of the third year, and that the occupier of the hereditament would be entitled to a reduction to be arrived at by comparing the value at the beginning of the third year (which is to be taken to be the amount in the valuation list in force) with the value at the end; and as in the instance given there has been a decrease of 10 per cent. in the third year, the occupier would be entitled to a reduction on that basis. The appellants contend that, although the valuation list for the time being in force is conclusive evidence of value for the purpose of rates, taxes, and qualifications, as provided by s. 45 of the Act, it is not conclusive as to the value at the commencement of any particular year for the purpose of determining the extent of any increase or decrease in value within the year; and they urge

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that such a construction of the Act would produce inequality, instead of equality and uniformity, and defeat the expressed purpose of the statute. Thus, in the case of the illustration given, the effect of the drop in value in the third year is to bring the hereditament again to the exact value at which it stood at the quinquennial valuation; the appellants contend that there is no case for revision, the existing valuation list being as true and just as on the day on which it was made, and that it ought not to be disturbed; and that any alteration, instead of producing equality, would produce inequality.

There is no dispute between the parties that the alteration, whether increase or reduction, is limited to what has taken place during the current year, and that the entire hereditament is not to be re-assessed, but only the alteration, whether increase or decrease. The point in dispute is limited to the dates which are to be taken for the purpose of comparison. The preamble to the Act recites that it is expedient to promote uniformity in the assessment of rateable property in the metropolis. A new valuation list is made every five years, and the values inserted are intended to remain in force for five years, with provisions "intended to rectify what might otherwise work very unjustly—a valuation to extend for a period of five years without any opportunity of amending it, if it ceased to be in harmony with the actual facts": per Cockburn C.J. in *Reg.* v. *New River Co.* (1) A comparison between the position at the end of the year in question and the position at the date of the last quinquennial valuation, or the last alteration in the quinquennial valuation by means of a supplemental list, is more likely to bring a valuation into harmony with the actual facts than a comparison between the year in question and the beginning of the same year, when, although the quinquennial may not have been varied by a supplemental list, there may nevertheless be a real difference in the value from what it was at the last quinquennial valuation.

No injustice will be caused either to the taxpayer or the rating authority by the construction contended for by the appellants, whereas the construction contended for by the

(1) 4 Q. B. D. 309, at p. 312.

respondents may occasion injustice to either side. If it were the rule, it would occasion injustice to the rating authority in the case of the illustration previously given by me. The true rule is, in my opinion, that stated by Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee* (1): "Taking a broad view of the Act, I think that it would not be consistent with the Act to have the value ascertained by the quinquennial list wholly set aside, whenever any alteration in the value of the hereditament was shewn to have taken place within the preceding twelve months, but that such list ought to be treated as correct at the time it was made, and be corrected only to the extent it has been affected by such alteration." The limit of the alteration, however, is the change during the preceding twelve months. On this view, the valuation list is treated as correct at the time it was made, whether at the quinquennial period, or whether altered and so brought down to date at a subsequent period. But whatever the date when made, or to which corrected by alteration, that is the date at which it is to be deemed to be correct; and the comparison for any alteration in it is to be made with the position as at that date. If the position at that date and at the date when an alteration is requested is identical, no alteration ought to be made, whatever may have been the ups and downs in the intervening period. If the comparison shews that an alteration is proper, the list must be corrected, but to the extent only that it has been affected by any change during the twelve months previous to the making of the supplemental list, or during the course of any year in the case of a provisional list. I gather that Lush J. would have taken this view in the Court below if it had not been urged upon him by counsel for the London County Council that by s. 45 the value in the quinquennial list is to be conclusive of the value of the hereditament. But s. 45 only provides that the list shall be conclusive for the purposes mentioned in the section, and not for the purpose of the revision of the list itself.

If this be the true construction of the Act, then it is manifest that, upon the figures of the London County Council for the year 1912, and independent of any question of a reduction being of a

(1) 13 Q. B. D. at p. 373.

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temporary or fluctuating nature, no prima facie case is made for any reduction by means of a provisional list, as the receipts for the year will shew a substantial increase over the figures upon which the last quinquennial valuation was based. Thus, the receipts for 1909-10 were 184,289*l.*, and for 1912-13 (partly estimated) 200,129*l.*; the 184,289*l.* being composed of two items, namely, 182,103*l.* for traffic receipts, and 2186*l.* for advertisements. These figures appear in paragraph 4 of Mr. Eve's affidavit of October 21, 1913. Mr. James Bird, for the London County Council, attacks both these figures in paragraph 2 of his affidavit of November 19, 1913. As regards the former figure, he states that it would have been 195,900*l.* if certain lines had been operated by electric traction throughout the year, instead of during part of the year only. Upon this footing he includes in this figure of 195,900*l.* the sum of 193,772*l.* for traffic receipts, as compared with Mr. Eve's figure of 182,103*l.*; but Mr. Eve's is the correct figure. It is the actual figure supplied by Mr. Edgar Harper, the statistical officer of the London County Council, to Mr. Eve, for the purpose of the quinquennial valuation of 1909-10; and Mr. Harper's letter of May 26, 1910, furnishing this figure, and explaining how it was arrived at, is set out in paragraph 3 of Mr. Eve's further affidavit of January 19, 1914. With regard to the receipts for 1912-13, Mr. Bird contends that the figure should not be 200,129*l.*, but 190,434*l.*; and he arrives at this result by excluding from the receipts sums actually received on certain of the tramways shewn on the plan by a blue dotted line. This method is not correct; but even if it were, the receipts for 1912-13 at 190,434*l.* would still shew a considerable increase over those of 1909-10 at 184,289*l.*

In my opinion, the appeal should be allowed, and the order for a mandamus discharged.

Appeal allowed; order discharged.

Solicitor for assessment committee: *A. M. Bramall.*
Solicitor for London County Council: *E. Tanner.*

W. F. B.

STREET, Appellant *v.* WILLIAMS, Respondent.

1914
May 14.

Employer and Workman—Minimum Wage—Outworker—False Record of Wages—Trade Boards Act, 1909 (9 *Edw.* 7, *c.* 22), *s.* 15.

By s. 15, sub-s. 1, of the Trade Boards Act, 1909, an officer under the Act may require the production of records of payments made to outworkers by persons giving out work. By sub-s. 2, if any person produces any record of payments knowing the same to be false he is liable to a penalty :—

Held, that a person may be an outworker within the meaning of this section notwithstanding that he is himself an employer of outworkers.

Case stated by justices of Staffordshire.

An information was preferred by John Peter Street, the appellant, against George Williams, the respondent, charging him with producing to the appellant a certain book or record of payments knowing the same to be false, contrary to the provisions of the Trade Boards Act, 1909. (1)

(1) Trade Boards Act, 1909 (9 Edw. 7, c. 22), s. 15: "(1.) Any officer appointed by the Board of Trade under this Act, and any officer of any Government Department for the time being assisting in carrying this Act into effect, shall have power for the performance of his duties—

"(*a*) to require the production of wages sheets or other record of wages by an employer, and records of payments made to outworkers by persons giving out work, and to inspect and examine the same and copy any material part thereof;

"(*b*) to require any person giving out work and any outworker to give any information which it is in his power to give with respect to the names and addresses of the persons to whom the work is given out or from whom the work is received, as the case may be, and with respect to the payments to be made for the work;

"(*c*) at all reasonable times to enter any factory or workshop and any place used for giving out work to outworkers; and

"(*d*) to inspect and copy any material part of any list of outworkers kept by an employer or person giving out work to outworkers.

"(2.) If any person . . . . produces any wages sheet, or record of wages, or record of payments, or any list of outworkers to any officer acting in the exercise of the powers given by this section, knowing the same to be false, ... he shall be liable, on summary conviction, to a fine not exceeding twenty pounds, or to imprisonment for a term not exceeding three months, with or without hard labour."

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The appellant was an officer duly appointed by the Board of Trade for the purposes of s. 15 of the Trade Boards Act, 1909, and was authorized to take these proceedings. The respondent was a member of the firm of Joseph Williams & Sons, chain manufacturers.

An Order had been made under s. 5 of the Act fixing the minimum rates of wages for making hand hammered or dollied or tommied chain. For chains made of iron wire of the diameter of $\frac{13}{32}$ in. imperial standard wire gauge the minimum rate of wages was fixed as follows:—"Where the worker provides (in respect of iron provided by the employer) the workshop where the work is carried on and the tools and fuel or any one of these three heads of outlay—

"Rates for hand hammered or dollied or tommied chain for No. $\frac{13}{32}$ in. I. S. W. G. 6*s*. 8*d*. per cwt."

To this was added a note to the effect that the employer was entitled to receive one penny per cwt. for carriage by him to or from his premises.

On October 22, 1913, the appellant saw the respondent at the place of business of the firm of Joseph Williams & Sons, and demanded the book of payments to outworkers. A book was produced to him from which he took a copy of an entry in an account under the name of Meshach Williams. The entry was as follows:—

$\frac{13}{32}$ in.	38 cwt. 0 qrs. 19 lbs.	@ 6/6	£12 2 6

The figures in the last column had been altered from 10*l*. 2*s*. 6*d*. as originally entered.

The iron had been conveyed from the respondent's premises to those of Meshach Williams, and the chain had been conveyed from the premises of Meshach Williams to those of the respondent at the expense of Joseph Williams & Sons, so that two pence for carriage was properly deducted from the price of 6*s*. 8*d*. fixed by the Order as above stated.

On October 23 the appellant and Meshach Williams called together at the respondent's works and saw the respondent.

At the request of the appellant Meshach Williams produced to the respondent a copy of an account which Meshach Williams said he had sent the week before to the respondent. It contained the item

$\frac{13}{32}$	38 0 19	5/6	£10 9 9

The total sum payable was brought out in both accounts at the same figure. The appellant drew the respondent's attention to this total, which the appellant said was not correct. The respondent, pointing to his book, said that the amount appearing therein as paid had been paid. When asked where the entries in his book were carried forward to, he said that there were no other entries. The appellant stated that Meshach Williams said in the respondent's presence on October 23 that he had not received 6*s*. 6*d*. per cwt. but 5*s*. 6*d*.

Meshach Williams had a workshop and several hearths upon which chain was made. He also employed outworkers. He had lately been prosecuted and fined for paying less than the minimum wages to two outworkers.

The appellant contended that whether Meshach Williams made the chain himself, or by workmen employed by him, or partly by other methods, he was an outworker, and his account in the book produced by the respondent to the appellant was a record of payments to an outworker within the meaning of the Act.

The respondent contended that the evidence shewed that Meshach Williams was himself a manufacturer of chain employing workmen and liable to be fined as an employer for the offence under the Act of paying less than the minimum wages, and that being an employer he was not an outworker within the meaning of the Act. The respondent also contended that the entries in the book shewed only a transaction of sale and not of work done.

The justices, after setting out the words of s. 15, sub-ss. 1 (*a*) and 2, concluded the statement of the case in the following words:—

"6. It appeared to us therefore necessary to decide first whether the record of payment to Meshach Williams was a record

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of payment to an outworker and, secondly, whether the record was false.

"7. We do not find any definition of outworker in the statute or anything to guide us in our construction of what an outworker is.

"8. Upon the above facts we found that Meshach Williams was not an outworker for the respondent's firm; that the transactions might be consistent with records of sale and purchase partly paid for in cash and partly by iron. We further found that the respondent's firm were not employers of Meshach Williams as an outworker. We therefore dismissed the case.

"9. We were of opinion that unless and until the position of employer and outworker was established it was not necessary to decide whether the statement made by Meshach Williams to the respondent on October 23 in the presence of the appellant or that made by the respondent was the true one.

"10. The question upon which the opinion of the Court is desired is whether we upon the above statement of facts came to a correct determination or decision in point of law, and if not, what should be done in the premises."

Sir S. O. Buckmaster, S.-G. (*Branson* and *J. A. C. Skinner* with him), for the appellant. The justices ought to have convicted in this case. The entry in the respondent's book was clearly a false record of payment and false to his knowledge, and the only question is whether Meshach Williams was or was not an outworker. The justices have taken the view that because he employed workmen under him he could not be an outworker within the meaning of the Act. That was an erroneous view which, if acted upon, would go far to nullify the Act. If a person taking piecework employs outworkers, it is most important to know what he receives himself. If he receives the minimum wage or less it is improbable that he is paying his outworkers the minimum wage. To hold that such a person is not amenable to this enactment is largely to frustrate the object of the Act. An outworker means simply a man who takes work to be done at his own house.

David, *K.C.*, for the respondent. The present statute is analogous to the Truck Acts, and the cases decided under those

Acts are therefore in point in this case. They establish that the relation of master and servant must exist before those Acts could apply: *Ingram* v. *Barnes* (1); *Sleeman* v. *Barrett* (2); *Squire* v. *Midland Lace Co.* (3) If this is not the true view, then the question whether a man is or is not an outworker is a question of fact for the magistrates. The fact that Meshach Williams was an independent contractor is one which they properly took into consideration. The evidence for the appellant left it in doubt whether the relation between the respondent and Meshach Williams was not that of vendor and purchaser. On such evidence the justices were right in declining to find that the latter was an outworker.

AVORY J. In view of the contention that Meshach Williams, being himself an employer of labour and liable to be fined if he paid less than the minimum wage, was not an outworker within the meaning of the Act, and of the question submitted by the justices to this Court, namely, whether they came to a correct decision in point of law, it is open to doubt whether they have not given effect to the contention that because Meshach Williams employed other men he could not be an outworker. The Court must therefore send the case back to the justices with the expression of opinion that the mere fact that Meshach Williams employed other men under him for the purpose of carrying out work which was entrusted to him does not prevent the justices from finding that he was an outworker. The question is whether the respondent's firm gave out work to Meshach Williams to be paid for as piecework. If that was the true nature of the transaction and if it was not a case of purchase of iron by and purchase of chain from Meshach Williams, then the mere fact that he was employing persons under him to do the work does not prevent him from being an outworker.

ROWLATT J. I am of the same opinion.

SHEARMAN J. I agree. It is true that the term "outworker" is not defined by the Act, but s. 15 affords an indication of what

(1) (1857) 7 E. & B. 115, 132. (2) (1864) 2 H. & C. 934.
(3) [1905] 2 K. B. 448.

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is meant. Sub-s. 1 (*a*) speaks of "records of payments made to outworkers by persons giving out work." Sub-s. 1 (*b*) provides that an officer may require "any person giving out work and any outworker" to give information. "Outworker" and "person giving out work" are correlative, "outworker" being the person to whom work is given out. This is consistent with the later words of sub-s. 1 (*b*), which speaks of "the names and addresses of the persons to whom the work is given out or from whom the work is received, as the case may be." Accordingly every person to whom piecework is given out is an outworker. (1) In the present case there was evidence that the respondent and Meshach Williams were not mere seller and buyer but were giving out and taking out work. The justices have not stated on what grounds they came to their decision. They ought to have put their own interpretation upon the Act. There is reason for supposing that they may have placed an erroneous construction upon it, and therefore the case must go back to them with the expression of opinion suggested by Avory J.

Case remitted.

Solicitor for appellant: *The Solicitor to the Board of Trade.*
Solicitor for respondent: *William Waldron, Brierley Hill.*

W. H. G.

(1) See the definition of "outworker" in s. 13 of the Workmen's Compensation Act, 1906

[IN THE COURT OF APPEAL.]

C. A.
1914
June 11.

KEMP *v.* LEWIS.

Employer and Workman—Injury by Accident—Compensation—"Contract of service"—Quarryman—Voluntary Help given to Farmer in Hay Harvest—No Money Payment—Gift of Beer or Food—Illegal Contract—Truck Acts, 1831 *and* 1887—*Workmen's Compensation Act,* 1906 (**6** *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a quarryman, was accustomed occasionally during hay harvest to assist a farmer in the evening in getting in his crops. He did not receive any money payment for his services, but the farmer gave him beer and sometimes a supper when the work was over. While thus engaged in carrying hay he fell from the top of a load and was injured, and thereby incapacitated for work. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge awarded him compensation:—

Held, on appeal, that there was no contract of service express or implied between the parties. If there were such a contract it would have been illegal under the Truck Acts, and could not constitute a "contract of service" within the meaning of s. 13 of the Workmen's Compensation Act, 1906. The applicant was not, therefore, entitled to compensation.

Appeal from an award of the judge of the Pontypridd County Court upon an arbitration under the Workmen's Compensation Act, 1906.

The applicant, who was by occupation a quarryman, claimed compensation from the respondent, a farmer, in respect of an injury by accident sustained while he was assisting the respondent by working as a farm labourer upon the respondent's farm. It appeared that he was accustomed during the hay season, when his day's work as a quarryman was finished, to go in the evening and help the respondent in getting in his crops. He did not receive any money payment for his services, but the respondent gave him beer and occasionally, when the work was over, a supper in addition. While thus engaged on the evening of July 9, 1913, in getting in the respondent's hay crop he fell from the top of a load and injured his spine so as to incapacitate him for work.

The county court judge awarded him compensation at the rate of 10*s.* 3*d.* a week. In the course of his judgment the judge

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said: "The conclusion I have come to is that this man was doing manual work of a very responsible character; that part of the inducement, at any rate, for him to do it was an expectation of the reward of beer and of supper; that he had been at similar work before, and had always been similarly rewarded; that Lewis saw that he was doing the work and knew he would be expected to give the reward that was customary and permitted the man to go on, intending to give the customary reward. Then comes the other question. Is the remuneration of so slight a character that it is a mere gratuity or tip, or is it really a remuneration for his services? I have come to the conclusion that there was here a contract of service. It was exceptional service at an exceptional time, and especially valuable in uncertain weather. I am satisfied that the remuneration, so far from being negligible, was effective to the extent that it secured a service which without it would never have been performed. The beer and supper would be the chief inducement. I am unable to find as a fact that payment in money was contemplated, and I find that there was an implied and not an express contract of service."

From this award the respondent appealed.

Harold Morris, for the appellant. There was no evidence upon which the county court judge could properly find that there was a "contract of service" within s. 13 of the Workmen's Compensation Act, 1906. The applicant was nothing more than a volunteer. The appellant could not have sued him for breach of contract if he stayed away, nor could the applicant have sued the appellant for the value of the beer or food inasmuch as the contract, if any, would have been illegal and void under the Truck Acts, 1831 and 1887. (1)

(1) The Truck Act, 1831 (1 & 2 Will. 4, c. 37), by s. 1, provides that "In all contracts . . . . for the hiring of any artificer . . . . the wages of such artificer shall be made payable in the current coin of this realm only and not otherwise; and if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid such contract shall be and is hereby declared illegal, null, and void."

Sect. 3: "Every payment made to any such artificer by his employer of or in respect of any such wages by the delivering to him of goods . . . . shall be . . . . illegal, null, and void."

A mere gratuity inducing a man to give voluntary assistance under circumstances of this kind cannot be treated as wages: *Burns* v. *Manchester and Salford Wesleyan Mission.* (1)

O. Beasley (*A. Parsons* with him), for the respondent. The Truck Acts cannot affect the question whether there is or is not a "contract of service" within the Workmen's Compensation Act, 1906. That Act contemplates contracts which may involve payment for services partly in money and partly in kind.

In *Burns* v. *Manchester and Salford Wesleyan Mission* (1) there was a finding of fact that no contract existed. That case does not apply here. The county court judge has found that there is a contract here, and that is a finding of fact with which this Court will not interfere.

COZENS-HARDY M.R. This is an appeal from the decision of Judge Bryn Roberts, who has held that the appellant is liable to pay compensation to the applicant at the rate of 10*s.* 3*d.* per week under the following circumstances.

The applicant is a quarryman by occupation, but in the summer months, after his work was over, and when the hay harvest was in progress, he occasionally went to the appellant's farm and helped to get in the hay. What did he get for that on the occasions when he was there? Not any money, but beer and generally, but not always, supper or tea. Now it is said that that constituted a contract of service. Where is the contract of service? There is no such express contract. That is distinctly negatived by the county court judge himself. Is there an implied contract of service, and if so what is it? It was not a contract of service involving in the contemplation of either party the payment of a penny in cash. The learned judge says "I am unable to find as a fact that payment in money was

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The Truck Act, 1887 (50 & 51 Vict. c. 46), by s. 2, extends the provisions of the Act of 1831 so as to include any workman within the Employers and Workmen Act, 1875.

Sect. 4 provides that "Nothing in the principal Act or this Act shall render illegal a contract with a servant in husbandry for giving him food, drink not being intoxicating, a cottage or other allowances or privileges in addition to money wages as a remuneration for his services."

(1) (1908) 99 L. T. 579.

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contemplated." He has found, therefore, that there was never any agreement to pay wages in money. Putting it in the most favourable terms for the applicant, what does that amount to? The learned judge holds by reason of the appellant having seen the man at the top of the cart or waggon from which he fell that there was an implied contract to pay for his services. How was he to pay? Clearly not in money, but there was simply to be a gift of beer, and occasionally a supper also. Can it be said that a contract of that kind, which is by the Truck Acts made illegal, is a "contract of service" within the meaning of the Workmen's Compensation Act? It is quite clear that the Workmen's Compensation Act did not repeal or overrule the Truck Acts, and that that cannot be a good contract of service under the Workmen's Compensation Act which is an illegal or void contract under the Truck Acts. But, quite apart from the Truck Acts, I have grave doubt whether the proper inference from all the facts found is not that this was merely a voluntary service rendered by the man in the hope of getting some beer and possibly some supper after the work was over. In my opinion that of itself does not create a contract of service such as is contemplated by the Act. For these reasons I think that the appeal succeeds. The learned judge has misdirected himself in point of law, and therefore, there being no contract of service, there was no liability on the part of the farmer to pay this man compensation.

SWINFEN EADY L.J. I am of the same opinion. If we were at liberty to draw inferences of fact from the evidence, I should have come to the conclusion that the service was rendered by the applicant in expectation of a reward in the shape of beer and supper—in the language of the learned county court judge, that the beer and supper would be the chief inducement to render the service. The expectation of receiving beer and supper would induce the applicant to work at loading hay for his neighbour after his day's work as a quarryman had been finished. The finding of fact by the learned judge was that there was no contract to pay any money, and no money payment, and if there were, as he finds, a contract of service to

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be paid in beer and supper, such a contract would be wholly illegal and void. Under the Truck Act of 1831 wages must be paid in current coin, and by s. 3 every payment made in respect of wages by delivery of goods is illegal, null, and void. It was held by the Court of Common Pleas in *Wilson* v. *Cookson* and *Fisher* v. *Jones* (1) that it is an offence against the Truck Act to pay in goods instead of money, even though there was no previous contract or understanding between the employer and workman that the remuneration should be made in that way. The Act of 1831 did not extend to servants in husbandry, but the Act of 1887 extended the previous Act to servants in husbandry with certain qualifications. Sect. 4 of the Act of 1887 provides "that nothing in this Act or the previous Act shall render illegal a contract with a servant in husbandry for giving him food, drink not being intoxicating, a cottage or other allowances or privileges . . . . in addition to money wages as a remuneration for his services." But a payment in food, unintoxicating drink, or other allowances, including the allowance for a cottage, must be in addition to the money paid. You may pay a servant in husbandry a weekly wage and give him a cottage. The cottage in that way is validly taken as part of his remuneration, but there must be a money payment. Now here if there were such a contract, as the learned judge finds there was, that the man is to be paid for his labour by beer and supper only, the contract would be illegal. First the contract itself would be rendered illegal by the payment in beer only—by intoxicating drink—because under the Truck Act of 1831 a contract is illegal if you pay the whole or any part of the wages otherwise than in current coin; a promise to pay in beer would render the whole contract illegal. But it does not rest there, because, without the intoxicating drink, paying a man by supper only would be illegal, since it is not combined with any money wages for his services. If there were such a contract as the learned judge has found, it would be a wholly illegal contract; there was no legal contract for service. But I agree with the Master of the Rolls that really the true view of the evidence, if we are at liberty to draw an inference, is

(1) (1863) 13 C. B. (N.S.) 496.

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that it was a mere gratuity, that the man worked for his neighbour, expecting that he would give him supper with beer. There was no finding by the learned judge of any legal contract of service, and the workman was not employed in any contract of service within the meaning of the Workmen's Compensation Act.

PICKFORD L.J. I am of the same opinion. I think as soon as the learned county court judge had negatived the contention and the evidence on the part of the applicant, that he was invited to go there to work for a money payment, as soon as that fact was negatived, there was nothing left except what the learned county court judge very properly calls an expectation of a reward of beer and supper which induced him to go when it was convenient and pleasant for him to go—because that is the only time that he would go according to his own evidence—and work during harvest. If there had been such a contract it would have been an illegal one. In my opinion there was no contract of service, and therefore the appeal will be allowed.

Appeal allowed.

Solicitors: *F. E. Metcalfe, Bristol; James H. Cross, Cardiff.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1914
June 16.

JONES *v.* D. DAVIES & SONS, LIMITED.

Employer and Workman—Compensation—Costs—Qualifying Fee of Doctor—Examination prior to Commencement of Proceedings—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 4; *Sched. II., par.* 7—*County Courts Act*, 1888 (51 *& 52 Vict. c.* 43), *s.* 113—*County Court Rules*, 1903 *and* 1904, *Order* LIII., *r.* 43—*Consolidated Workmen's Compensation Rules*, 1913, *r.* 76.

A workman met with an accident and received compensation under the Workmen's Compensation Act, 1906, during incapacity. He found himself unable to resume full work and his solicitors wrote to his employers asking for suitable work and compensation. The latter repudiated liability and the workman filed a request for arbitration. After the letter but before the filing of the request the applicant was examined by a doctor on behalf of the employers. The doctor gave evidence at the hearing and the learned judge made an award in favour of the employers and ordered the applicant to pay the costs, including the qualifying fee of the doctor. The applicant appealed from the latter part of the order on the ground that the doctor's examination was made before proceedings were commenced and not with a view to giving evidence:—

Held, that there was no ground for saying that a qualifying fee could not be paid for an examination made before the filing of the request for arbitration; that the question was within the discretion of the learned judge; and that on the facts he was right.

Appeal from an award of the judge of the Pontypridd County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Daniel Jones was a workman employed as a collier by D. Davies & Sons, Limited. On April 10, 1913, he met with an accident and broke his left arm. He received compensation during incapacity till September 5 and endeavoured to return to work but was unable to do more than light work.

On October 20, 1913, his solicitors wrote to the employers a letter in which they said "we shall now be glad to hear whether you are prepared to offer our client suitable work, and to pay him compensation from the date when he failed to do his ordinary work." After some further correspondence the employers repudiated liability, and on December 13 the workman filed a request for arbitration, claiming compensation at 1*l.* a week from

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September 5, 1913. The employers answered that the applicant had as and from September 5, 1913, recovered from the effects of his accident. The learned judge made an award in favour of the employers and ordered the applicant to pay the costs "together with the qualifying fee of Dr. Downing," one of the witnesses called at the hearing. It appeared that Dr. Downing on behalf of the employers examined the applicant on October 25 and was called as a witness at the hearing of the arbitration.

The applicant appealed from the order to pay this fee on the ground that Dr. Downing had not qualified in the proceedings inasmuch as he had only seen the applicant before the request was filed, and had not done so with a view to giving evidence.

T. Hollis Walker, K.C., and *Wilfred Lewis*, for the appellant. The learned judge had no jurisdiction to order the applicant to pay this qualifying fee. By Sched. II., paragraph 7, of the Act of 1906 costs are in the discretion of the judge subject to rules of Court, and by r. 76 of the Workmen's Compensation Rules, 1913, such costs are to be taxed according to county court scales. By Order LIII., r. 43, of the County Court Rules, 1903 and 1904, the judge may order payment to an expert witness for "qualifying to give evidence and for attending the trial." But in this case the doctor examined the applicant at a time when no proceedings had been commenced or were contemplated, and the examination cannot have been made with a view to giving evidence or attending the trial. The letter of October 20 only shewed that there was a possibility of litigation.

Ivor Bowen, K.C., and *A. Parsons*, for the respondents. The judge had jurisdiction to make this order and he has exercised his discretion properly. A question had arisen between the parties and the examination was made with a view to that state of things: *Mountain* v. *Parr.* (1) There is no reason why this should not be done before proceedings are commenced. It can be done after notice of the accident: Sched. I., paragraph 4, of the Act of 1906; *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries.* (2) Costs follow the event unless specially provided for: s. 113 of the County Courts Act, 1888. In the

(1) [1899] 1 Q. B. 805, 807. (2) [1913] 2 K. B. 145, 151.

present case it was quite reasonable to get the applicant examined, and he ought to pay this fee.

[SWINFEN EADY L.J. referred to Chitty's Archbold, 14th ed., p. 703, note (*u*), and *Johnson* v. *Lawson*. (1)]

T. Hollis Walker, *K.C.*, in reply.

COZENS-HARDY M.R. stated the facts and proceeded. Under the County Court Rules, Order LIII., r. 43, a qualifying fee can only be allowed if and when the judge himself directs it, and the judge has directed it. In an action in the High Court there is no direction given by the judge, but it comes before the taxing Master in the ordinary course. Here the point is made that there can be no qualifying fee before the commencement of the proceedings. For that I think neither in principle nor on authority is there any foundation. The issue of the writ is not the particular time. The question is when the dispute really arises; and it is quite clear that this dispute, by which I mean the dispute about liability to pay compensation, had arisen before that. I think it arose when the employers stopped paying compensation in September. Certainly it arose on receipt of the solicitors' letter of October 20. Then what is the position? We have consulted the senior taxing Master, who tells us that in a common law action a claim against a defendant where the question is whether the defendant is liable for an alleged accident, and the claim is followed up by an action, it is a matter of course to allow a qualifying fee to a doctor who attends on the instruction of the person who is ultimately the defendant, and advises him either that there is or is not a case which he ought to defend, and afterwards gives evidence. It is a matter of course to allow a proper qualifying fee in a case like that. I think there is no ground whatever for saying that a qualifying fee cannot be allowed because the examination was made before the request was filed and before the litigation began. It is a case absolutely within the discretion of the learned judge, and as the exercise of his discretion is in favour of allowing the qualifying fee, I think it would be wrong for us to interfere with that discretion or to do anything else than to dismiss the present appeal.

(1) (1824) 2 Bing. 341.

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SWINFEN EADY L.J. I am of the same opinion. This is an appeal from that part of the award by which the learned county court judge has directed that the costs of Dr. Downing for qualifying should be allowed. This case does not come before the Court as such questions usually do on application to review taxation after the matter has been before the Master and the facts have been inquired into. It is an appeal from the award, and the ground of the appeal is first that the examination by the doctor was before the commencement of the present proceedings, and, in the alternative, that the doctor did not in fact examine the applicant for the purpose of giving evidence. The matter was before the learned judge and he obviously came to the conclusion of fact that the doctor did make an examination with a view to giving evidence; he would not have allowed a qualifying fee unless the doctor had examined the patient in order to qualify. What seems to have been the fact is that Dr. Downing was called to see the workman with a view to advising the respondents but also with the view of giving evidence if in his opinion the claim was one that could not be sustained. The other ground is that the proceedings had not been instituted on October 25 when the examination was made. In my opinion it is not essential for a witness to be allowed a qualifying fee that the whole of the qualifying should have taken place after the proceedings commenced. Here the dispute had arisen between the parties: the claim had been made: it was not assented to; and as I gather, really for the purpose of qualifying himself to advise and give evidence, the doctor examined the workman. Under those circumstances, especially having regard to the opinion of the senior taxing Master, I am of opinion that this is a case in which the judge had ample jurisdiction to allow a proper qualifying fee.

PICKFORD L.J. I am of the same opinion. I wish to guard myself against being supposed to say that every doctor who is sent by an intended defendant to examine an intended plaintiff is necessarily entitled to a qualifying fee. It must be a question of fact in each case whether he went there expressly as an attendant or if he went to qualify to give evidence. If he went to

qualify to give evidence it does not seem to me impossible that he went at the same time with a view to giving advice to his clients as to whether they should contest the action or not. I felt that this was a question which must be arising every day in the King's Bench Division in accident cases where a plaintiff makes a claim for an injury and asks the intended defendants whether they will pay him, and before they will give him any answer one way or the other they ask that he should be examined by their doctor and he is so examined. On the doctor's advice the action when instituted is contested and that doctor gives evidence. That must be a state of things which is arising every day, and I was anxious to know what the practice was with regard to treating the attendance in the case as entitling the doctor to a qualifying fee or not. We have been told by the senior taxing Master that it always is allowed, and there seems no reason why it should not be when the fact is once arrived at that the doctor intended on his examination not only to advise his clients but to qualify himself for giving evidence if necessary. From the early case mentioned by Swinfen Eady L.J. in the course of the argument there does not seem to be any rule which lays down that the issue of the writ is a dividing line before which no fee can be allowed for qualifying. It must be a question of fact in each case. In this case the learned county court judge, as I presume, although we have not got any evidence on that point because it was a discussion after his judgment of which no note was taken, must have come to the conclusion as a matter of fact that Dr. Downing intended not only to enable himself to advise his clients but also to qualify himself to give evidence in any proceedings that might be instituted afterwards. Having found that fact I can see no reason why we should interfere and no grounds upon which we can interfere with the decision to which he came.

Appeal dismissed.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

H. C. R.

C. A.
1914
March 19.

[IN THE COURT OF APPEAL.]

WESTERN ELECTRIC COMPANY, LIMITED *v.* GREAT EASTERN RAILWAY COMPANY.

Railway—Carriage of Goods—Steam Vessels—Carriage partly by Sea and partly by Land—Contract for through Carriage—Exception of Negligence —Reasonableness—Alternative Rate at Railway Company's Risk during Land Portion of Carriage—Damage to Goods during Land Carriage—Great Eastern Railway (Steamboats) Act, 1863 (26 *&* 27 *Vict. c. ccxxv.*), *s.* 5—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7.

The defendants owned steamers trading between Antwerp and Harwich, and they also owned a line of railway from Harwich to North Woolwich. Their special Act, which empowered them to maintain and work the steamers, applied the provisions of the Railway and Canal Traffic Act, 1854, to the steamers and the traffic carried thereon. The plaintiffs were in the habit of having goods consigned to them from Antwerp to North Woolwich via Harwich by the defendants' steamers and railway, and they had signed an agreement requesting that all goods for which there were alternative rates delivered by them or on their account at any of the defendants' stations for carriage by railway might be carried at the reduced rates, and in consideration thereof the plaintiffs agreed to relieve the defendants from all liability for loss, damage, misdelivery, delay, or detention except upon proof that such loss, &c., arose from wilful misconduct on the part of the defendants' servants. Goods of the plaintiffs were shipped on the defendants' steamer at Antwerp for delivery at North Woolwich Station via Harwich at the reduced rate under a bill of lading which had "owner's risk" upon it, and which exempted the defendants from liability for (inter alia) all accidents, loss, and damage whatsoever from any act, neglect, or default of the pilot, master, officers, engineers, or crew in the management or navigation of the ship or otherwise. The goods were damaged during the land journey between Harwich and North Woolwich owing to the negligence of the defendants' servants. There was a higher rate for goods of the same class from Antwerp to North Woolwich under which the goods would have been carried, so far as the land portion of the journey was concerned, at the defendants' risk as common carriers, but the plaintiffs would have had to accept a bill of lading for the sea portion of the journey containing the same negligence clause as that in the bill of lading under which the goods were actually carried :—

Held, that there was evidence to support the finding of a county court judge that, as it was one journey from Antwerp to North Woolwich, and as during the sea portion of that journey there was no alternative rate under which the plaintiffs could have had the goods carried at the defendants' risk as common carriers, the condition relieving the

defendants from liability for negligence was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, and that therefore the defendants were liable for the damage to the goods.

APPEAL from the decision of a Divisional Court (Channell and Lord Coleridge JJ.); reported [1913] 3 K. B. 15.

The action was brought in the City of London Court to recover damages for injury to two cases of telephonic accessories while being carried on the defendants' railway from Harwich to North Woolwich, owing to the negligence of the defendants' servants.

For several years the plaintiffs had consigned similar goods from Antwerp to North Woolwich via Harwich, that is to say, by the defendants' steamers from Antwerp to Harwich and by the defendants' railway from Harwich to North Woolwich. By the Great Eastern Railway (Steamboats) Act, 1863 (26 & 27 Vict. c. ccxxv.), the defendants were empowered to maintain and work steam vessels between the port of Harwich and the ports of Flushing, Rotterdam, and Antwerp, and by s. 5 "the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels of the company, and to the traffic carried thereon."

On September 19, 1907, it was agreed between the plaintiffs and the defendants that the rate for the carriage of the plaintiffs' goods from Antwerp to North Woolwich should be 20*s.* per ton if declared at owner's risk. On June 7, 1910, the defendants' goods manager wrote to the plaintiffs stating that with the view of meeting some of the objections which traders had taken to the then existing form of agreement for carriage of traffic at owner's risk the railway company had made certain alterations of a concessionary character, and they enclosed a form of agreement in which the new conditions were embodied. The document was dated June 7, 1910, and was headed "General agreement for goods to be carried at reduced rates at owner's risk," and it stated: "I beg to inform you that the Great Eastern Railway Company have two rates for the carriage of certain goods, at either of which rates the same may be consigned at the sender's option:—one the ordinary rate, when the company accept the ordinary liability of a railway company; the other a reduced rate adopted when the sender agrees to relieve the company and all other companies or

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persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of trader's trucks) except (1.) upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. . . . . If you wish to have the advantage of the reduced rate, it will be necessary for you to fill up and sign the form printed below, and then return it to the company." The form referred to was filled up and signed by the plaintiffs and was returned to the defendants. It was headed "To the Great Eastern Railway Company . . . . " and so far as material was as follows: "In reference to the above we request that all goods for which there are alternative rates delivered by us or on our account at any of your stations, for carriage by railway, may be carried at the reduced rates (where and so long as such rates exist) except when specially consigned at the higher rate; and in consideration of your charging for the said goods such reduced rates we agree to relieve you and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of trader's trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants."

In 1912 the plaintiffs had two cases of telephonic accessories consigned to them from Antwerp to North Woolwich via Harwich at the reduced rate of 20*s.* per ton. The goods were shipped under a bill of lading which stated that they were shipped in good order and well conditioned upon the defendants' steamer at Antwerp bound for Harwich, to be delivered in the like good order and condition to the plaintiffs at North Woolwich Station, "the act of God, the King's enemies . . . . and all accidents, loss, and damage whatsoever . . . . from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, or crew in the management or navigation of the ship or otherwise as also railway accidents being excepted, and the owners being in no way liable for any consequences of the causes above excepted."

The bill of lading had the words "owner's risk" printed upon it. The rate of freight was not specified therein, the rate having been already settled by the agreement of September 19, 1907. It appeared that there was an alternative rate of 33*s.* per ton for the carriage of goods of a similar description from Antwerp to North Woolwich Station via Harwich, under which so far as the land part of the journey was concerned the goods would be carried at the defendants' risk as common carriers, but so far as the sea part of the journey was concerned, as the judge of the City of London Court found as a fact, the plaintiffs would have had to accept a bill of lading in similar terms to and containing the same negligence clause as the bill of lading in the present case, except that the words "owner's risk" would not have appeared upon it.

While the goods were being conveyed from Harwich to North Woolwich by railway they were damaged by rain owing to the negligence, but not the wilful misconduct, of the defendants' servants.

The judge of the City of London Court, in the course of his judgment, said that in his opinion the contract must be treated as a contract for the whole journey, and not as divisible into separate contracts for land and sea carriage, the bill of lading stating the journey to be from Antwerp to North Woolwich Station. The goods were carried at a reduced rate at owner's risk, the conditions being contained in the agreement of June 7, 1910, and the bill of lading. He drew the inference from the correspondence and the evidence that, if the plaintiffs had elected to pay the higher rate, they would nevertheless have had to accept a bill of lading containing the negligence clause. In his opinion the plaintiffs did not have an alternative option to send their goods on the terms of the defendants having the ordinary liability of common carriers, and therefore the defendants, on whom the onus lay, had not shewn that the condition on which they relied was just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854. He accordingly gave judgment for the plaintiffs. The defendants appealed.

The Divisional Court (Channell J. and Lord Coleridge J.) held that, as it was one journey from Antwerp to North Woolwich,

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and as during the sea portion of that journey there was no alternative rate under which the plaintiffs could have had the goods carried at the defendants' risk as common carriers, the condition relieving the defendants from liability for negligence was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, and that therefore the defendants were liable for the damage to the goods.

The defendants appealed.

Leslie Scott, K.C., and *Bruce Thomas*, for the defendants. The goods being carried under an owner's risk contract, prima facie the defendants are not liable, and the question is whether on the facts the terms of carriage were just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854. The shippers had a right to an alternative contract at carriers' risk. The true view is that, whether or not the negligence clause in the bill of lading is made a term of the agreement between other shippers and the defendants, yet the terms of the contract between the plaintiffs and the defendants excluded that evidence as irrelevant to the case. The effect of the correspondence is to shew a general agreement between the plaintiffs and the defendants under which, in consideration of the shippers giving to the railway company the whole of their traffic and exonerating them from all liability except for misconduct, the railway company agreed to carry at a 20*s.* instead of a 33*s.* rate and to accept individual consignments at company's risk rate. There was no evidence before the county court judge to justify his inference of fact that, if the plaintiffs had elected to pay the higher rate, they would have had to accept a bill of lading giving no alternative rate. Until the running agreement was ended in accordance with its terms, the railway company were bound to carry at the reduced alternative rate, the consideration being that the plaintiffs would send the whole of their traffic by that route. It was open to the plaintiffs to bring their goods to the quay at Antwerp and pay 33*s.* and have them carried at the company's risk. The bill of lading was a receipt only and did not alter the terms of the general contract. The fact that there is no alternative rate for the sea portion is not enough to make the contract as a whole unjust and unreasonable. An

owner's risk contract may be reasonable, even though there is no alternative rate: *Sutcliffe* v. *Great Western Railway.* (1) The bill of lading does not purport to exempt the company from liability in respect of the land portion of the carriage; it applies to the sea portion only. [They also cited *Peek* v. *North Staffordshire Railway.* (2)]

R. V. Bankes, K.C., and *R. H. Balloch*, for the plaintiffs, were not called upon.

LORD SUMNER. In this case the plaintiffs sued the Great Eastern Railway Company for damage to goods which were consigned at a through rate from Antwerp to North Woolwich Station, which arrived in this country in safety but were damaged by the negligence of the railway company's servants somewhere upon the land portion of the transit. There was a bill of lading issued for the goods at Antwerp, but the only term in it that we have to consider is one which excepts in the usual broad language various or any causes of loss even though occasioned by the negligence of the shipowners' servants, the shipowners being in this case the Great Eastern Railway Company.

The carriage was at owners' risk, but the plaintiffs contend that they are not bound by the owners' risk terms or more strictly that the Great Eastern Railway Company are not entitled to set up the exception of their servants' negligence conveyed by that expression, because it is not a just and reasonable term within s. 7 of the Railway and Canal Traffic Act, 1854.

The substantial question was whether there was any available alternative open to the owners of the goods by which they could, if they paid for it, have the protection of the railway company's liability for their own servants' negligence. The facts were found in favour of the plaintiffs on the only point that really seems to have been in dispute, namely, as to what the practice was and what the attitude of the railway company was with regard to the shipment of these goods and the terms on which they were shipped at Antwerp.

(1) [1910] 1 K. B. 478. (2) (1863) 10 H. L. C. 473.

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Lord Sumner.

The appellants' first point is this: although the learned judge purported to find that there was no substantial alternative to the acceptance of a bill of lading by which the goods, so far at least as the sea transit is concerned, were carried under an exception of shipowners' servants' negligence, he was wrong in so finding because there was no evidence upon which he could so find; and, alternatively, even if his finding, so far as it goes, be accepted in law, there was an alternative upon the admitted facts, which therefore made the terms of the actual carriage just and reasonable and such as the railway company could insist upon. It was said that from 1907 to the time of the shipment in question there was subsisting a contract under which the Great Eastern Railway Company were bound, if called upon, to carry at company's risk by sea as well as by land through to North Woolwich Station, and the bill of lading is like a bill of lading given by a shipowner to a charterer and until negotiated is a mere receipt for the goods, and its terms, including the exception of negligence, can be disregarded for the purposes of this case. Accordingly there was an actual alternative of a company's risk rate, and the consignors elected to pay an owners' risk rate. They have had their choice and are bound. Whether or not correspondence between parties such as these arranging rates and terms for through traffic would stand in the same position as a charterparty, so as to make the bill of lading a mere receipt in the hands of the consignor, we need not consider, because there was no subsisting contract, antecedent to that which arises at the time of the acceptance of goods for shipment, by which the railway company were contractually bound to accept goods at a company's risk rate. There was an offer to do so but there was no more. Prior to 1907 the plaintiffs' goods had been consigned at company's risk and at a through tonnage rate of 33*s.* per ton. On September 19, 1907, the Great Eastern Railway Company sent out a printed form with a quotation of a 20*s.* rate from Antwerp to North Woolwich for goods declared at owners' risk. Although that was in form only a quotation it was enclosed in a covering letter, which states that "the writer understands that you have accepted this company's offer of 20*s.* per ton from Antwerp to

North Woolwich and I enclose a quotation herewith which, however, is made on the distinct understanding that you hand the whole of your traffic to us for conveyance from Antwerp to London." On September 26 the plaintiffs wrote accepting this. The result, therefore, is that what was a quotation in the printed form became a contract which might be expressed in these terms: "In consideration of you, the Western Electric Company, undertaking to hand us the whole of your traffic, we, the Great Eastern Railway Company, undertake to convey it for you at owners' risk for 20*s.* per ton, this contract to be terminable at any time."

This left any question of a company's risk rate untouched; the contract only related to the terms upon which the railway company bound themselves to carry at owners' risk. In May, 1910, the railway company gave notice that they were making concessions to traders, charging them a reduced rate at owners' risk and suggesting that a form of agreement should be signed by their customers in substitution for the form in use. No general agreement form had been signed by the plaintiffs so far, but they did on June 7, 1910, sign a general agreement form. It is a printed document, and it begins by a form of letter from the railway company to the plaintiffs, stating that they had two rates, an ordinary rate with the ordinary liability of a railway company, and a reduced rate where the sender agrees to relieve the railway company except on proof of wilful misconduct of their servants. To that the plaintiffs replied in the following terms: "In reference to the above"—that is, the above notice of the two rates—"we request that all goods for which there are alternative rates delivered by us or on our account at any of your stations, for carriage by railway, may be carried at the reduced rates, except when specially consigned at the higher rate," and then setting out specifically the terms of such carriage, they add: "and we further agree that this agreement shall apply to traffic consigned to us from stations on other companies' lines when the rate charged for the carriage of such traffic is a reduced alternative rate. We also agree to the conditions on the back hereof. This agreement shall continue in force from the present date until we signify in writing to the contrary."

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I think this was no more than a statement which might have been put in these terms: "You offer two rates; we request you, till this letter is cancelled, to give us the lower rate when we tender goods, unless we specially ask for the higher rate, and if by reason of our tendering goods to you without special request a contract of carriage arises, we agree that the following terms shall apply": in other words, it is not a contract for the carriage of goods generally, but only a standing instruction as to what terms are to be understood when a contract for specific goods is concluded. The point is only material in this connection. Is the agreement of 1910 in substitution for the agreement of 1907, in which case the contractual part of the 1907 arrangement has gone, or is it only to supplement and improve it, in which case its contractual character remains? In either case it is a contract, if a contract at all, only with regard to consignments at owners' risk. Then the letter contains this proviso: "Provided nothing herein contained shall prevent us during its continuance from sending or receiving any particular consignment at the higher rate, should we at any time so direct in writing." That is a saving clause that this arrangement, whatever it be, leaves the plaintiffs entirely free at any time to send any particular consignment at the higher rate if they like. The higher rate continued to be an actual rate, for it was a through rate at company's risk in the company's rate-books accessible to traders generally. It therefore constituted a continuing offer to the plaintiffs amongst others, of which they could avail themselves at any time by tendering goods and claiming to have the benefit of that rate. Stopping there, the defendants would have made out their case that there was in existence an alternative to the owners' risk rate, and that therefore they were entitled to hold the consignors bound by the exception which the actual contract of carriage contained. There was, however, evidence before the learned judge, the result of which was that he found in the following terms: "To ascertain whether the plaintiffs had such an option"—the suggestion being that the option was an unreal and illusory one, a paper option and not genuine—"I refer to the letters from January 22 to January 25, 1913,"—passing between the solicitors to the parties

so as to obtain admissions before the trial—"and to Mr. Vale's evidence"—he was called from the railway company—"and I draw the inference that if the plaintiffs had elected to pay the higher rate they would nevertheless have had to accept a bill of lading containing the negligence clause." Mr. Vale's evidence was to the effect that the form of the bill of lading, which contains this negligence clause, was in the ordinary practice of the company the one that was used, that a bill of lading was always given, and in that form, and that he really could not say whether or not individual customers could or could not obtain a form of bill of lading and alter it specially. The correspondence, which I will not read at length, clinches the matter and shews that this was the only form of bill of lading used between Antwerp and Harwich at the time in question, and that it was invariably used in the case of any goods shipped by the defendants' steamers from Antwerp to Harwich whatever the rate might be. Whether the full effect of the admission was appreciated when it was made, I cannot tell, but there it is; there was evidence before the learned county court judge, to say the least of it, upon which he could find as he did find, that, although there might be in the rate-book and in the printed document of 1910 a continuing public offer of a company's risk rate, in point of fact you could not get your goods carried on those terms. I do not in the least say, nor would it matter if I did say, whether I should have had any difficulty in arriving at the same conclusion; by that finding, as there is evidence, we must be bound. It has not been contended before us that the transit and the contract for the transit were divisible, or that, as the loss occurred on the part of the journey where this unreasonable term did not apply, where there really was an alternative, therefore the sea transit terms could be rejected and only the land transit terms be looked at. It is accepted as one transit, and unless some other ground can be shewn the bargain for carriage at owners' risk is unenforceable by reason of the fact that as to the sea part of the transit there was not a real alternative of a company's risk rate at a higher figure.

The remaining points may be disposed of shortly. It is said that although the existence of some alternative is a well-

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recognized criterion of the fairness of the contract at owners' risk, it is not the only criterion, and that we might look at the contract for ourselves and say that on some ground or other it is not unreasonable to have a through contract, the gist of which is that, although you pay the company's risk rate, the company's risk will only arise when the goods are landed, and if you pay the owners' risk rate, the company's risk will never arise at all, and it will be owners' risk throughout. It is possible that there may be circumstances in which it would still be open to us to hold that a contract might be reasonable in the absence of an alternative of the character described, but the effect of the authorities is that this contract cannot be upheld in the absence of any available alternative. In *Doolan* v. *Midland Ry. Co.* (1) a negligence clause in a railway company's bill of lading was treated by Lord Blackburn in these terms: "as the condition now before your Lordships tries to exempt the company from all liability for the negligence of its officers and servants, if any condition can be unreasonable, this is." Kelly C.B. in *Rooth* v. *North Eastern Ry. Co.* (2) summarizes many older cases and says: "The authorities cited on behalf of the plaintiff shew that, in order to disentitle the owner of the cattle carried to complain, a *choice* must be left to him to accept or to refuse the offer of the company." I do not think we have any materials here upon which we could distinguish the present case, and say that, notwithstanding the absence of any choice, still we can see for ourselves that the contract is reasonable. I am sure I cannot tell whether the difference between 20*s*. and 33*s*. is of any significance or not. The presence of negligence clauses in bills of lading, now more frequent than it was in 1877, is not in itself, even if one took judicial notice of it, enough to get over *Doolan* v. *Midland Ry. Co.* (1)

The other point is that the bill of lading is nothing at all and may be neglected because, there being an outstanding public offer open for acceptance to carry at company's risk at the higher rate, as soon as the consignor produces his goods and puts them on the deck, he by that very act accepts this advertised offer, and thereupon a contract arises forthwith for carriage on the

(1) (1877) 2 App. Cas. 792. (2) (1867) L. R. 2 Ex. 173, at p. 178.

company's risk rate, and the railway company cannot help themselves. Their offer has been accepted, and they are bound by it: *Carlill* v. *Carbolic Smoke Ball Co.* (1) It is not necessary to go into considerations of that kind, because the learned judge's finding covers this point also: "I draw the inference that if the plaintiffs had elected to pay the higher rate they would nevertheless have had to accept a bill of lading containing the negligence clause." If they had gone with their goods, no matter what they demanded and no matter what liability the railway company might have incurred by refusing their demand, in substance what they would have got would have been the choice between carriage on the terms of the bill of lading at owners' risk and no carriage at all. If the learned judge's finding amounts to that, as I think it does, it is an answer to the argument founded on *Carlill* v. *Carbolic Smoke Ball Co.* (1)

Under those circumstances, I think the conclusion that the learned judge drew follows inevitably, that the railway company were not in a position to allege against the owners of the goods the acceptance of limiting terms, which made the loss fall upon the owners of the goods because they were carried at owners' risk, and they are therefore liable upon their ordinary liability. The appeal fails and must be dismissed.

KENNEDY L.J. I am of the same opinion, and after the very full discussion that this matter has received from the president of the Court, it really would be a waste of time to say more than a few words in my own judgment.

The single point really to be decided, or the single final point to be decided, is whether or not the plaintiffs could successfully contend that the contract of carriage here was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854. It has been sought to shew that the right claimed did exist on the part of the railway company, because there was an alternative rate offered which was sufficient to create a reasonableness in the contract between the parties. In my opinion, on the facts as found by the learned county court judge, that point cannot be

(1) [1893] 1 Q. B. 256.

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maintained. He has found in a passage already referred to that he would draw the inference that, if the plaintiffs had elected to pay the higher rate, which is the alternative put forward by the defendants, they would nevertheless have had to accept a bill of lading containing the negligence clause. It is clear, if that is to have any effect, that the meaning of the words of the learned judge "would nevertheless have had to accept" is that they would have been obliged to treat as the contract between them and the railway company a bill of lading containing this negligence clause. Whether that was the right inference or not, it is certainly so much an inference of fact that I am not at liberty to differ, and I agree with that which has been pointed out, namely, that there was a letter which was produced to us in the correspondence which preceded the trial in which substantially that which Mr. Vale said was rendered more clear, namely, that the one bill of lading which alike would have been the one which the consignor was required to have, whether on the higher or the lower rate, was one which contained the large exemption from every sort of liability so far as regards the transit by sea. To my mind it may sometimes and under certain circumstances possibly be arguable, where there is a contract which covers in terms both a sea and a land passage, in view of the very different classes of risk in these days in the case of sea transit as distinguished from land transit, that the Court might consider whether a large restriction upon the liability of a common carrier in regard to the sea carriage might be held not incompatible with the reasonableness of an alternative higher rate, but for the present purposes the journey is a single journey, the goods are to be carried all the way to North Woolwich, and if it be true, as the learned judge has found and as I think he had evidence upon which he could find—whether I should have found the same myself or not—that even with the higher rate the consignor would have to accept as his contract the terms which contain the negligence clause, it seems to me that the case for the appellants fails, and that the judgment below was right; and, under those circumstances, I cannot but agree with the judgment and with the reasons for it which have been pronounced by the president of this Court.

A. T. Lawrence J. I agree. I do not wish to add anything, except to say that I agree because I think the findings of the county court judge bind our decision in this case. I profoundly disagree with the findings, but that of course cannot be helped.

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Appeal dismissed.

Solicitors for plaintiffs: *Woodhouse & Davidson.*
Solicitor for defendants: *E. Moore.*

W. J. B.

[IN THE COURT OF APPEAL.]

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UNITED STATES STEEL PRODUCTS COMPANY *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Carriage of Goods—Condition in Consignment Note—Goods received and held by Railway Company "subject to general lien for any . . . . moneys due to them from the owners of such goods upon any account"—Construction of Condition.

The plaintiffs, who were the vendors of goods, authorized their agents to deliver the goods to the defendants for carriage to the buyers upon the terms of a consignment note which contained the following condition:—"All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses."

The plaintiffs' agents accordingly delivered the goods to the defendants for carriage to the buyers. The plaintiffs had paid all freight and charges in respect of the carriage of the goods. While the goods were still in possession of the defendants as carriers, the plaintiffs heard of the insolvency of the buyers, and, by their agents, gave notice of stoppage in transitu to the defendants. The buyers, who had meanwhile become owners of the goods by indorsement and delivery of the bill of lading, were indebted to the defendants in the sum of 1171*l.*, which did not include any freight or other charges in respect of the goods. The defendants claimed that under the condition in the consignment

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note they had a lien as against the plaintiffs in respect of the 1171*l.* due from the buyers:—

Held, that the condition ought to be read as meaning that the defendants were entitled to a lien as against the plaintiffs in respect of the money due from the buyers to the defendants, and not as merely meaning that the defendants should not be bound to deliver the goods to the consignees, the buyers, until the consignees had discharged any debt due in respect of all goods which had been carried for them by the defendants.

Decision of Pickford J. [1913] 3 K. B. 357 reversed.

APPEAL from a decision of Pickford J. in an action tried in the Commercial Court without a jury; reported [1913] 3 K. B. 357.

The action was brought by the plaintiffs, a corporation existing under the laws of the State of New Jersey, United States of America, whose place of business in the United Kingdom was at New Broad Street, London, against the defendants to recover damages for detinue and/or conversion of the plaintiffs' goods, namely, 387 tons 3 cwts. 7 lbs. of steel billets. The billets in question were part of 1500 tons sold by the plaintiffs to Messrs. Tupper & Co., Limited, of Batman's Hill Works, Bilston, Staffordshire, on the terms of a contract dated December 29, 1910, which was in substance a c. i. f. contract. In part performance of the contract 500 tons of billets were shipped by the plaintiffs in the steamship *Manchester Shipper* from Philadelphia, U.S.A., to Messrs. Tupper & Co., Limited, at Bilston under a through bill of lading dated February 28, 1911, and made between the plaintiffs and Manchester Liners, Limited, the owners of the *Manchester Shipper*, and the freight to Tupper & Co.'s works at Bilston under the bill of lading was prepaid by the plaintiffs. The bill of lading provided that the goods were to be carried to Manchester and there delivered from the ship's deck to order. Upon the bill of lading were the words "Notify Tupper & Co. Goods to be forwarded to Batman's Hill Works, Bilston, Eng., via Great Western Railway from Manchester and the carrier is authorized by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier."

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Clause 10 of the bill of lading was as follows: "Goods destined to ports or places other than the ship's port of discharge are to be forwarded thence at the risk of their owners, and shall be subject exclusively to the conditions of the carriers who may complete the transit."

The *Manchester Shipper* with the billets on board arrived in the port of Manchester on or about March 14, 1911, and on March 10, in pursuance of the authority given by the bill of lading, R. J. Darlington, the representative of Manchester Liners, Limited, had signed the Manchester Ship Canal Company's consignment note for goods to be carried at reduced rates at owner's risk, which (so far as material) was as follows:

"Manchester Ship Canal Company.

"Consignment note for goods to be carried at reduced rates at owner's risk.

. . . . .

"To the Manchester Ship Canal Company.

"Manchester Docks

"March 10th 1911.

"Receive and forward the undermentioned goods, to be carried at the reduced through rate below the company's ordinary through or local rate, in consideration whereof I agree to relieve the Manchester Ship Canal Company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from any liability for loss, damage, misdelivery, delay, or detention (including detention of trader's trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons, parties to any through rate under which the goods are carried.

"All charges to sender.

(Sender or consignee)

"For Manchester Liners Limited

"Signature of sender or his representative,

"R. J. Darlington."

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Upon the back of the consignment note were a number of "General Conditions," among which was the following:—

"7. All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses."

Meanwhile Tupper & Co. had become owners of the billets by indorsement and delivery of the bill of lading by the plaintiffs.

Manchester Liners, Limited, delivered the billets to the Manchester Ship Canal Company for carriage to Messrs. Tupper & Co. at their Batman's Hill Works under the consignment note, and the billets were delivered by the Manchester Ship Canal Company to the defendants, the Great Western Railway Company, and loaded into that company's trucks for carriage to Tupper & Co.'s works. It was admitted that the defendants were parties to the through rate. On March 24, 1911, information reached the plaintiffs that Tupper & Co. were insolvent, and they immediately instructed Manchester Liners, Limited, to give notice to the defendants to stop delivery of the goods. Manchester Liners, Limited, gave the notice to the defendants on the same day.

The defendants had a claim against Tupper & Co. for 1171*l.*, which did not include any sums for freight or other charges in respect of the billets, and the defendants claimed that under clause 7 of the conditions upon the consignment note they had in respect of all sums due to them from Tupper & Co., Limited, a lien as against the plaintiffs. In order to release the goods an agreement was made between the plaintiffs and the defendants that the plaintiffs should pay to the defendants the 1171*l.*, that the defendants should deliver the billets to the plaintiffs or their order, and that if it should be decided in this action that the defendants were not entitled to retain the goods in respect of

that sum they would return the amount to the plaintiffs. The plaintiffs accordingly paid the defendants the 1171*l.*, and the defendants by the plaintiffs' order delivered the billets to the Romford Iron Company, Limited.

The only question material to this report was whether, although nothing was due from the plaintiffs to the defendants in respect of the carriage of the goods, the defendants had under clause 7 of the conditions upon the consignment note as against the plaintiffs a lien for the 1171*l.* due to the defendants from Tupper & Co., Limited.

Pickford J. held that, although the words of the condition were wide enough to extend considerably further, it ought to be read as meaning that the carrier should not be bound to deliver the goods to the consignee until he had discharged any debt due in respect of all goods which had been carried for him by the carrier, and that it should not be read as meaning that the carrier should be entitled to a lien as against persons who had nothing to do with the debt. He therefore gave judgment for the plaintiffs.

The defendants appealed.

John Sankey, K.C., and *McCardie* (*Lynden Macassey*, K.C., with them), for the defendants. The question turns on a clause generally found in consignment notes, but there is no authority in point. On the arrival of the *Manchester Shipper* at Manchester on March 14 with the goods on board it became the duty of the Manchester Liners, Limited, who were the agents for this purpose of the plaintiffs, to get a contract for the carriage of the goods from Manchester to Bilston. They accordingly entered into a contract with the defendants by means of the consignment note, in signing which they agreed to the conditions on the back of the note, including clause 7, by which it was stipulated that all goods delivered to the defendants would be received and held subject to a lien on the goods for money due to them for the carriage of and other charges upon such goods and also to a general lien for any moneys due to them from the owners of such goods upon any account; there was thus a contractual general lien over the goods given by the plaintiffs' agents to the defendants.

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Cases may be cited to shew that a carrier cannot have a general lien by custom, but none can be cited to shew that he cannot have it by contract. When the plaintiffs appointed the Manchester Liners as their agents to make a contract of carriage with the defendants, what authority did the plaintiffs give them? It is submitted that they gave them the authority contained in the bill of lading, to make a contract of carriage "upon such conditions as" [the Great Western Railway Company] "may exact." There is no statute to prevent the defendants entering into any such contract. The "owners of such goods" against whom the general lien was given were Tuppers, to whom the property passed by indorsement and delivery of the bill of lading. The object of the contract must have been to give the Great Western Railway Company rights against the plaintiffs. The plaintiffs cannot divest the Great Western Railway Company of the right which they themselves were parties to creating for them. The authority is quite clear in its terms, and there is no limitation of the effect of the condition. There is no ambiguity in the consignment note, in which the word "owner" may well have a different meaning to that which it has in the bill of lading. [They cited *Oppenheim* v. *Russell.* (1)]

Colam, K.C., and *Schiller, K.C.*, for the plaintiffs. A carrier gets a special lien by virtue of the fact of his getting the goods into his possession; a general lien he can only get by contract. There is no contract in the present case under which the defendants acquire a general lien. The words "the owner" should be read both in the bill of lading and in the consignment note as meaning "the owner for the time being"; the documents would then mean that each successive owner is authorizing the carrier to retain the goods for any debt which that owner may owe to the carrier on a general account, and not that he is authorizing the carrier to retain the goods as against him for a debt due from some successive owner. It cannot be that the condition gives the defendants the right to postpone the plaintiffs' right of stoppage in transitu in favour of a lien for the debt of a third person. [They also cited *Smith* v. *Goss.* (2)]

John Sankey, K.C., was not called upon to reply.

(1) (1802) 3 Bos. & P. 42.

(2) (1808) 1 Camp. 282.

LORD SUMNER. This is the appeal of the defendants, the Great Western Railway Company, against a decision of Pickford J. that they should pay 1171*l.* to the plaintiffs. The plaintiffs in the United States sold steel billets to Tupper & Co., a firm at Bilston in Staffordshire. A portion of these billets went forward from Manchester to Bilston by the Great Western Railway. They had reached Bilston station, and a few had been delivered to Messrs. Tupper, who were on the verge of bankruptcy. The plaintiffs exercised, or purported to exercise, the right of stoppage in transitu, being unpaid vendors. The railway company set up a lien against them, not for the actual charges for the carriage of the goods by rail, but for a large general balance of account due from Messrs. Tupper. That there was such a large general balance of 1171*l.* is not in dispute. How it arose we do not know, nor does it matter.

The plaintiffs contested that lien; the defendants insisted on it. The money was paid under protest in order to get the goods, which apparently the plaintiffs had disposed of elsewhere, and the plaintiffs sue to recover it. The question reduces itself to one of competing liens or rights to possession and may be stated thus: is there such a contract binding upon the plaintiffs, as between themselves and the defendants, as constrains them to postpone their right of stoppage in transitu to the claim of the railway company to detain the goods till Messrs. Tupper's debt of 1171*l.* is satisfied. That depends upon the construction of condition 7 in the railway consignment note.

The plaintiffs were c. f. and i. vendors, and the duties of c. f. and i. vendors cannot safely be considered without knowing exactly what the course of business is. Under a contract dated December 29, 1910, they sold steel billets to Messrs. Tupper at 4*l.* 12*s.* 9*d.* net per ton of 2240 lbs., cost, insurance (f. p. a.), and freight paid to buyer's works, Bilston, England—as I understand, some cartage would be involved between the station at Bilston and the works—payment by thirty days draft from date of arrival at buyer's works, plus interest, railway company's arrival note to be sent to sellers promptly. The parcel in question, about a third of the whole, was shipped at Philadelphia by the *Manchester Shipper*, which belongs to Manchester Liners,

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Limited, under a bill of lading dated February 28, 1911. The *Manchester Shipper* arrived in the docks at Manchester on March 14. In the interval two things had happened. On March 10, in anticipation of the arrival of the *Manchester Shipper*, a direction or request to the Manchester Ship Canal Company, agents for the defendants, to receive and forward the goods, was signed by the agent for Manchester Liners, Limited. In it the ship was stated to be due to arrive two days thereafter, the owner's risk rate was the rate adopted, and there was an express agreement to the conditions on the back of the note followed by the words "This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the goods are carried." This agreement is in substance made with the Great Western Railway Company. On the same day the plaintiffs' agents in London, who had by this time got the first and second parts of the bill of lading, sent them by post to Messrs. Tupper at Bilston, duly indorsed in blank by the United States Steel Products Company, who were the shippers under it. They added in the covering letter, "As usual, we shall be glad to receive the advice note from the railway company,"—that is, the advice note of the arrival of the goods—"when we shall draw on you at thirty days for the amount of our invoice"—thirty days from the date of that advice note. The result is that in fact Messrs. Tupper never paid for these goods, because, before the advice note was to hand and the requisite draft could be drawn and could mature, Messrs. Tupper had become insolvent.

We know nothing of the facts as between the railway company and Messrs. Tupper beyond the existence of this 1171*l.* debt, and we know and say nothing about any rights which their trustee in bankruptcy might have to claim these goods as being property vested in them, or to remit the Great Western Railway Company to a proof in the bankruptcy. Suffice it to say that on delivery of this indorsed bill of lading the property in the goods passed to Messrs. Tupper, and with it the rights and liabilities of suit under the bill of lading itself. No question arises as to rights of suit upon the bill of lading. It is not clear whether, in point of time, the contract for the railway carriage, created by the consignment note of March 10, precedes or succeeds the passing

of that property. We do not know the course of business; we do not know whether the letter to Bilston was put in course of post before the consignment note was signed or afterwards. We therefore cannot tell whether, at the moment when the consignment note was signed, the United States Steel Products Company still had, for some very brief period, the property in the goods vested in them, or whether it had already been divested by delivery of the bills of lading to the post office, which by the course of business was the agent of the indorsees of the bill of lading, to receive them. I do not think it matters, because in my view "the owners of such goods" in clause 7 cannot mean the owners of such goods merely at the moment when this document was signed, but must at least mean "the owners of such goods" at the time when the lien which is dealt with in that clause first can become operative; that is, after delivery to the railway company some four days afterwards of the goods themselves.

The goods began to arrive at Bilston on March 18, 1911. Some small portion was delivered, but it is common ground that as regards the rest the transitus had not determined, and that therefore the right of stoppage in transitu still existed, whatever other right might be prior to it.

Accordingly the unpaid vendor's claim to stop in transitu and resume possession and the cross-claim of the railway company to retain possession until the debt of 1171*l.* is satisfied are in competition. Who are the parties to the contract with the Great Western Railway Company? The vendors, the plaintiffs, are parties to it, and Messrs. Tupper are not. Although this is a through transit and arranged for by the c. f. and i. vendors in all its stages, it is not done by a through bill of lading of the familiar type where you have a railway transit in the United States, an ocean transit to this country, and a further craft or railway transit in this country, with a succession of liens for the charges of each section of the route, which each successive carrier discharges when he takes possession of the goods in reliance upon the lien which is given to him for them. There are plenty of such cases in the books, but they do not touch this case. The contract per bill of lading here is a contract

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which terminates upon delivery at the aforesaid port of Manchester. That is an answer to the observation that condition 10 of the bill of lading, which is somewhat similar to condition 7 of the railway consignment note, affects the matter. It only affects the matter during the performance of the bill of lading contract, but the bill of lading has stamped in its margin two things in magenta ink—I have the original before me —"Freight prepaid"—and we are told that in fact that not only means ocean freight prepaid, but an inclusive sum prepaid in Philadelphia, which will cover all the charges that may be payable in order to reach Bilston—and "Goods to be forwarded to Batman's Hill Works, via Great Western Railway, Bilston, England, from Manchester, and the carrier is authorized by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding, but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier." This clearly provides for something to be carried out after the bill of lading is accomplished.

There has been some dispute as to who "the owner" in that clause is; there is none that "such conditions as" the connecting carrier "may exact" are the conditions on the consignment note. They are the usual Great Western or Manchester Ship Canal conditions. These marginal words occur in a bill of lading, a document signed on behalf of the carrier, and the statement that "the carrier is authorized by the owner of the goods to forward them" is a statement not by the principal who authorizes the agent, but by the agent, the carrier, who receives the authority from the principal. It is made at a time when Messrs. Tupper have no property in the goods and are not parties to the contract for their carriage. "The owner" in that clause means the United States Steel Products Company, and that company has given authority to Manchester Liners, Limited, to forward from Manchester; Manchester Liners, Limited, have accepted a contract binding them to do so and to pay all charges for forwarding. The United States Steel Products Company owned the goods, they were arranging as c.f. and i. vendors for their transmission, and were taking a bill of lading

to their own order, which retained the property in themselves, and so they retained the control of the goods until they delivered it duly indorsed to a third party. I think that a contract arose on shipment between the United States Steel Products Company and Manchester Liners then and there in Philadelphia, under which Manchester Liners undertook an employment, coupled with an authority, and before the goods arrived they exercised that authority by making the consignment with the Ship Canal Company and through it with the Great Western Railway Company. Therefore, there is privity of contract between the railway company and the United States Steel Products Company, and the matter is not affected by the question whether Manchester Liners are del credere agents or not, though in this case they evidently made themselves liable for, and doubtless discharged, the land charges. "All charges," says the consignment note, "to senders," and so it is signed.

In that state of affairs Messrs. Tupper, had they not become insolvent, could claim delivery of goods, the property in which had passed to them, and could say, "They are our goods and have been brought here under arrangements made by other parties, not as our agents but as our c. f. and i. vendors. Whatever may be inferred from our receipt of the goods when that takes place, until we receive the goods and until the railway company's lien is given up, the company holds them under a contract with the consignors, the United States Steel Products Company." Now it is only between those parties that we have to determine the rights. What then does condition 7 mean? I will read it: "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of every such lien and expenses." It is noticeable that in that condition, alone of all the conditions, the expression "owners of such goods"

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is used, and the only place where "owner" occurs at all in the document elsewhere is in the phrase "reduced rates at owner's risk." The language throughout, as is regular in contracts of carriage where the carrier is protected by a lien and does not know where the property may happen to be, is that appropriate to such a contract of carriage; it is "consignor" and "consignee"; it is "*sender*" and I think "*receiver*" of the goods; and it is nowhere else, except in that one condition, "owners of the goods." The inference I draw is that the expression "owners of such goods" occurs in condition 7 with the deliberate intention of dealing with the ownership as distinguished from the mere consignment and despatch. The first part of the clause provides contractually for what is already provided for by a carrier's lien at common law, namely, a lien for money due for the carriage of and other charges on such goods. It is not contested that as the plaintiffs are parties to the contract, if by the course of business this freight had not already been discharged, it would have been money due to the railway company from them, and therefore they would have been liable to discharge that lien. Though they are unpaid vendors they cannot place their right of stoppage in transitu in front of that lien, which they have by an express personal contract conferred. Then it proceeds, in exactly the same structure, "and also to a general lien for any other moneys due to them"; before I go on to the next word I will pause—"for any other moneys due to them." I do not see how the word "other" can import any restriction which would limit those moneys to moneys due from the same parties, namely, the consignors. They are followed by the words "from the owners of such goods," who, by the time this lien attaches, may be as in this case totally different persons from the senders who are contracting with the railway company. The clause continues "any other moneys due to them from the owners of such goods upon any account." Now who are "the owners of such goods" at the time when this condition attaches? They were Messrs. Tupper. If you scratch out "owners of such goods" and write in "Tupper & Co.," cadit quæstio, and yet what other interpretation is to be put upon it? It is pointed out that the remainder of the clause

which tries to make the lien effectual by giving a power of sale refers to a power of sale to be exercised at a date measured from the time when the first notice is given to the owners of the goods, and as the railway company have no means of knowing who the owners of the goods are, as distinguished from the consignors with whom they are in contract or the consignees whose names appear on the consignment note, they may not be able to give notice to the true owners at all. That may be a reason for saying that "owners of such goods" in this condition must be either the consignors whose name and address are known or the consignees whose name and address are known, but that does not advance matters in a case where no third party is concerned, and the question is only between the original parties to the contract. The expression in the first part of the clause, "from the owners of such goods," was used deliberately, and must be applied so far as effect can be given to it. The plaintiffs cannot say that the first three lines apply in this transaction and the second three do not. They have assented to something in clear words, and the only question is to ascertain what it is in their power to bind by that term. As they were no longer owners of the goods, they cannot by these words alone bind the new owner. For that purpose it would be necessary to shew some agency from him to enter into this contract, which is not shewn, or some new contract by him or some new authority by him. But as against themselves they can do this, which applies to the very case in question and is quite a common position between consignor and carrier; they can subject their right of stoppage to a prior right of retention on the part of the Great Western Railway Company. Some effect must be given to these words, and I can see none which would not at least include that. I think that, by contract, they had precluded themselves from asserting their right to stop in transitu in priority to the right in the railway company which they had agreed should be exercisable, when the railway company were in actual possession of the goods.

Therefore, when the question arises, "Were the railway company entitled to exact 1171*l.* before resigning possession?" I think the answer is "Yes," because the only ground that the

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plaintiffs have for demanding redelivery without any payment would be that their right of stoppage in transitu could not be affected by a carrier's lien arising subsequently. As they could not set up that by reason of their own contract, which barred them from setting it up, I think they were bound either to leave the goods where they were and let the company make what they could out of them, or, if they wanted them, pay that which the railway company asked for de facto and demanded de jure, 1171*l.*

The learned judge has taken a different view, from which I respectfully dissent. He has thought, and I felt the same myself, that it is a drastic general condition in a typical railway document, which thus enables the railway company, as it is said, to pay Messrs. Tupper's debts with the plaintiffs' goods. Accordingly he read it thus—I am quoting from [1913] 3 K. B. at p. 365; " . . . . but I think that the clause may be and ought to be held to be satisfied by extending it no further than that, and by reading it, as it quite well can be read, as meaning that the goods shall be held by the company, and the company shall not be bound to deliver them to the consignee until he, the consignee, has discharged the debt that is due in respect of all goods which have been carried for him by the carrier." Nothing need be said now as to what the right against the consignee would have been, but I do not see how it can be a practicable construction to insert as he virtually does the limiting words " as against the consignee " after the words " general lien." It is admitted that those words need not be read in after the prior words " subject to a lien for money due to them for the carriage." I do not see how a limitation like that can be any more inserted after the later words " general lien." Those words must be left unlimited, because so they stand in the contract between the parties.

I think that the appeal must succeed; the judgment below must be set aside, and must be entered for the defendants.

KENNEDY L.J. I am of the same opinion. To my mind this is a difficult as well as a novel case, although the difficulty arises really upon the effect to be given to one clause, clause 7 of the contract with the Great Western Railway for the final stage of the delivery of the goods which, under a c. i. f. contract, were to be

delivered to a firm at Bilston by the seller in Philadelphia. This is not disputed which is stated in many books—I am quoting from Benjamin on Sales (last edition) at p. 879: "The unpaid seller's right of stoppage takes precedence of a carrier's lien for a general balance, though not of his lien for the special charges on the goods carried, and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods whilst in transit by process out of the Mayor's Court of the city of London." For that statement, which it seems to me is a true statement of the law, he refers to the case cited in the argument of *Oppenheim* v. *Russell* (1), to an American case, and, for the second part of the proposition, to the nisi prius case of *Smith* v. *Goss.* (2)

The question of construction seems to me to be shortly this: Has the railway company by this condition, which is part of the contract, varied the law, which would exist without that condition, so as to give the railway company a right, when the seller stops in transitu, to say, you must satisfy first my carrier's lien for the carriage of the goods and charges connected with the carriage, and more than that, you must satisfy that which without this condition I could not claim, namely, my lien for the general balance due from the firm at Bilston? I cannot construe it, except in that sense. I cannot find anything which justifies me in saying that any narrower construction can be given. As it was perfectly competent for the railway company to do, they have by this condition increased that which without any condition would have been their right to a right making the claim of the unpaid vendor subject to what they may be entitled to for a general lien for the moneys due to them from the owners of such goods. If I am asked, then, who were the owners of the goods, I think, for the reason that the president of this Court has already stated, that it is impossible to answer the question who were the owners of such goods, except by saying that this Bilston firm of Tupper & Co. were the owners of the goods, and it is in respect of the general balance due on the account between the railway company and Tuppers that this present claim of the Great Western Railway Company arises. I cannot read the words in any other way, and, apart altogether from the purpose,

(1) 3 Bos. & P. 42. (2) 1 Camp. 282.

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which is a dangerous guide, I should say the natural interpretation of the condition is, as I have said, to increase the lien, existing in law, though also specially mentioned in the first clause of the condition, to the general lien which, but for the condition, unquestionably the company would not have.

Now, Pickford J. in his judgment himself says that he will not say that the words are not large enough to extend considerably beyond the meaning which he has given, which is the meaning, as I understand it, that the goods may be held by the company, and that the company are not bound to deliver them to the consignees until the consignees have discharged the debt due in respect of all the goods carried for them by the carrier. In other words, the clause may be read as giving the carrier a right as against the consignees which shall not constitute in point of legal construction a right of lien by the carrier against the person who contracted with the carrier in sending the goods. With great respect, it seems to me that the natural purpose of the contract is to give some right against the person with whom the carrier was contracting, and the person with whom the carrier was contracting, as has been already pointed out by Lord Sumner, is unquestionably the sender of the goods by his agent, the Manchester Liners, who for him made the contract with the Great Western Railway Company. It is a stipulation which, however much, or however little, that stipulation might be binding against the consignees, whoever they happened to be, certainly must be construed to be an agreement by which there is some right given as against the other contracting party. On its face, it purports to give that right in the shape of a lien which, but for the condition, the carrier would not have had against that party. Nor am I, with great respect, able to agree with that which the learned judge seems to have treated as the only alternative: "I think that that is quite a possible and fair reading of this condition, and it is not necessary," he says, "that I should read it that they should be entitled to hold as against everybody who has nothing to do with the debt at all." For the purpose of the appellants' case in this appeal it is not necessary to do more than say: "As against you who contract with me, and who, as an unpaid vendor, are claiming to exercise the right of stoppage

in transitu—as against you I have made a clear and unambiguous stipulation for a right of lien for a general balance of account which I should not otherwise have had." Whether it would have been good as against everybody who had nothing to do with the debt at all we are not concerned to say, but I venture respectfully to point out that in my opinion the alternative view presented by the learned judge is not truly the alternative view, because all that is claimed by the Great Western Railway Company is that, "as against you the vendor, stopping in transitu, who have made through your agent an express contract with me, I do say that I have by contract got a lien for what is due to me on the account between me and the Bilston firm."

It is suggested, however, that the clause is not unambiguous, and the argument not infrequently heard is, where terms appear as part of the contract in a form which has been drawn up by one of the two parties, as here by the carrier, they ought to be construed as against him if there is any ambiguity.. I can only say that in my view, looking at this fairly, there is no ambiguity directly you have ascertained that there were "owners," in this case the Bilston firm, who were the debtors on balance of account to the railway company at the time when they demanded the delivery of the goods. I can quite conceive a case in which, if a carrier by sea, who would be entitled ordinarily only to his lien for freight, had stipulated with the sender of the goods shipped that he was to have a lien for demurrage as well as freight, he might, if the goods were stopped in transitu, point to that stipulation and say: "In this case, although the law would only give me the right of delivering you back these goods upon payment of freight, demurrage has been incurred, and I am entitled, by the express terms which gave me a lien for demurrage as well as freight, to have paid by you, before I deliver the goods to your order, demurrage, as well as freight, because I especially stipulated for it."

In my opinion, this appeal should be allowed.

BRAY J. I am of the same opinion. The question seems to me to be this, whether under the particular circumstances of this case

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the defendants could be obliged to deliver the goods to the plaintiffs without payment of 1171*l.*, the moneys due from Tupper & Co. to the defendants.

The defendants' case is this: They say that a contract of carriage was made between you, the plaintiffs, and us, the defendants, whereby we were given a lien by you for those moneys. The first proposition which the defendants have to establish is this: that the contract of carriage was made between the plaintiffs and the defendants. In order to see that, we have to look at the contract of carriage which was dated March 10. Now it is clear that the defendants, the Great Western Railway Company, were parties to that contract, because it provides: "This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the goods are carried." The Great Western Railway Company were such parties.

The more difficult question is whether the plaintiffs were the other parties to that agreement. I think they were. The actual persons who signed this agreement were the Manchester Liners, Limited: "Signature of sender or his representative—Darlington: Manchester Liners, Limited." Were the Manchester Liners, Limited, the agents for the plaintiffs when they entered into that contract? It seems to me they were. The so-called through bill of lading contains this clause: "Goods to be forwarded to Batman's Hill Works, Bilston, England, via Great Western Railway, from Manchester, and the carrier is authorized by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding, but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier." It seems to me that that clause authorized the carriers, who were the Manchester Liners, Limited, to enter into a contract on behalf of the owner—we shall see presently who the owner is—to forward the goods to these works at Bilston. Now, who was the owner? It says "authorized by the owner." I do not think there can be any doubt about that point. I forget the exact date of this contract; it was made at all events long before March, and beyond all doubt at that time the plaintiffs

were the owners of the goods. I do not think it means the owners for the time being; I think it means the owners of the goods at the time this contract was made. Therefore, in my opinion, the Manchester Liners were authorized by the plaintiffs to enter into a contract of carriage, and they did enter into that contract of carriage when they signed this document on March 10, and by that means a contract was made between the plaintiffs and the defendants.

The next question is, What rights did that give to the defendants with regard to withholding delivery of the goods? That must depend, of course, upon the terms of the contract. By the terms of the contract the Manchester Liners (that is, the plaintiffs) agreed to be bound by the conditions on the back, and the condition we have to consider is the seventh condition. I will not read it; it has been read already. It purports to give to the company a particular lien and a general lien. The defendants are claiming to exercise the general lien. What is it a lien for? It is a lien for "any other moneys"—that means moneys other than the moneys for which the particular lien is given—"due to them from the owners of such goods upon any account." Now, what is the meaning of the word "owners"? I think it means the owners at the time this lien attaches; and inasmuch as the goods did not arrive in Manchester until March 14, it is quite clear that they did not reach the Great Western Railway Company till some days afterwards, and for several days before that, under the indorsement and delivery of the bill of lading, Messrs. Tupper & Co. had become the owners of the goods. Therefore, there was a general lien, if a general lien was given, for money due from Tupper & Co. to the Great Western Railway Company upon any account. It is conceded that there was due from Tupper & Co. to the railway company 1171*l.*; I do not think there can be much ambiguity about it.

Then the question, decided by Pickford J., is, "Did this give a right to withhold the goods as against the plaintiffs?" Now let us consider first, apart from the general lien, the particular lien, "all goods delivered to the company will be received and held by them subject to a lien for money due to them." There can be no question that that is binding on the plaintiffs, and

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the plaintiffs do there agree that the Great Western Railway Company shall be at liberty to withhold the delivery of the goods until those charges are paid. There is a clear contract. Now, the words "subject to a lien" are used here, and the words that follow. That must be a lien, a larger lien, no doubt, but still a lien, and I understand if a sender of goods, a party to the contract of carriage, gives the carrier a lien, he gives him a right to withhold delivery of the goods until the lien is satisfied. That is what the defendants are claiming here. I cannot see ambiguity in the word "lien"; it means this, as I read the contract—the Great Western Railway Company shall as between them and the plaintiffs, not as between third parties, be at liberty to withhold delivery of the goods until this lien is satisfied. That is all that is said here. It seems to me that, by virtue of this contract between the plaintiffs and defendants, there is this right; this is the right which they claim to exercise, and which, in my opinion, they are entitled to exercise.

Under these circumstances, in my opinion, the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *A. J. Greenop & Co.*
Solicitor for defendants: *L. B. Page.*

W. J. B.

JOS. MERRYWEATHER & CO., LIMITED *v.* WM. PEARSON & CO.

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May 19, 20.

[1913 J. 84.]

Ship—Charterparty—Timber Cargo—Freight payable per Cubic Fathom—Measurement—Alternative Methods—Wrong Method adopted—Remeasurement, Cost of—Liability of Charterer.

A charterparty provided that the ship should load from the agents of the charterers a cargo of pit props and that freight should be payable at a specified rate "per intaken piled fathom of 216 cubic feet." Pit props are measured either by lengths and tops, or by lengths alone. The former method gives more timber to the fathom than the latter. The language of the charterparty indicated that the cargo was to be measured on the basis of the latter method, but the method in fact adopted at the port of loading by the shippers was on the basis of lengths and tops, which gave 683 cubic fathoms, and a bill of lading for that number was tendered to the master and signed by him under protest. In accordance with a term of the charterparty, the bill of lading contained the words "measure unknown." On the arrival of the ship at the port of discharge the shipowners, alleging that the bill of lading measurement was inaccurate, caused the cargo to be remeasured by lengths only, on which basis the cargo was found to consist of 784 cubic fathoms. The shipowners sued the charterers to recover the expense incurred in remeasuring the cargo:—

Held, that under the charterparty there was a contractual obligation on the charterers to procure the measurement of the cargo at the port of loading according to the method indicated by the charterparty, and that, as this had not been done, the charterers were liable to pay to the owners the expense incurred by them in having the cargo measured at the port of discharge.

Action in the commercial list tried by Bailhache J. without a jury.

By a charterparty dated August 15, 1913, and made between the plaintiffs as time chartered owners and the defendants as charterers, it was agreed that the steamship *Ragna* should proceed "to one or two places in Skelleftea district" and there load from the agents of the charterers a full and complete cargo of pit props, and being so loaded should proceed to Tyne, West Hartlepool, or Hull, as ordered on signing bills of lading, and deliver the cargo on being paid freight at the rate of 35*s.* "per intaken piled fathom of 216 cubic feet."

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The charterparty, which was the printed form of the Chamber of Shipping Wood Charter (Scandinavia and Finland), to the United Kingdom, 1899, contained the following clause:—"6. The bills of lading to be prepared on the form indorsed on this charter, and shall be signed by the master, quality, condition, and measure unknown, freight and all conditions, clauses and exceptions as per this charter. The owners shall not be responsible for the number of pieces signed for by the master or his duly authorised agents, fire and fraud excepted . . . ."

The *Ragna* proceeded to Burea, a port nominated by the defendants, in accordance with the charterparty, and was there loaded with a cargo of pit props by a company called the Bure Aktiebolag for the defendants' account, the company having entered into a contract for the supply of timber to the defendants.

The shippers prepared a bill of lading in the form indorsed on the charterparty, containing the words "quality, condition and measure unknown," and stating that "683 cubic fathoms pit props" had been shipped on the *Ragna*. The captain being of opinion that more than 683 cubic fathoms had been loaded signed the bill of lading under protest and informed the plaintiffs by telegram that he had done so.

The vessel sailed from Burea to West Hartlepool, but it was subsequently agreed that she should discharge at Immingham. On arrival at that port the cargo was discharged and the plaintiffs caused it to be piled and measured in order to ascertain the exact number of fathoms upon which freight was to be paid. The result of the measurement was to shew, as the defendants admitted, that the cargo measured "per piled fathom" contained 784 cubic fathoms. The discrepancy in the figures was due to the fact that the measurement by the shippers at Burea had been conducted on what was known as the "length and top" system, which gave more timber to the fathom than if the measurement was made by lengths alone, the latter method being the one indicated by the words "per intaken piled fathom" in the charterparty.

The plaintiffs claimed to recover from the defendants the expense of piling and measuring the cargo at Immingham,

amounting to 269*l*. By the points of claim it was alleged that it was the duty of the defendants to measure by themselves or their agents, the shippers, the cargo per piled fathom and to state such measure correctly on the bill of lading, and, further, that in presenting the bill of lading the defendants, or their said agents, impliedly warranted that the measure represented on the bill of lading was correct.

The defendants, by their defence, denied the alleged duty and implied warranty and that the shippers were their agents for the purposes alleged. The defendants while denying liability paid 176*l*. into Court and called witnesses to prove that the amount claimed by the plaintiffs for the expense of piling and measuring was excessive and unreasonable.

Leslie Scott, K.C., and *R. A. Wright*, for the plaintiffs. The charterparty provides that freight is to be paid "per intaken piled fathom," that is to say, on a measurement made at the port of loading. That involves an obligation on the charterers to see that the measurement is correctly made at the port of loading according to the method of measuring contemplated by the charterparty, i.e., a measurement of lengths only and not of lengths and tops, and to tender a bill of lading containing a correct measurement of the cargo. In this case the measurement at the port of loading was admittedly not made on the proper basis, and, therefore, in order to ascertain the amount of the freight, it was necessary to have the cargo remeasured at the port of discharge. The charterers having failed to perform their obligations under the charterparty, and not having tendered a correct bill of lading, are liable to bear the expense incurred in measuring the cargo a second time. [They referred to *London Transport Co.* v. *Trechmann* (1); *Spaight* v. *Farnworth* (2); *Moller* v. *Living* (3); *New Line Steamship Co.* v. *Bryson & Co.* (4); *Krüger & Co.* v. *Moel Tryvan Ship Co.* (5); *Elder, Dempster & Co.* v. *Dunn.* (6)]

Adair Roche, K.C., and *C. Robertson Dunlop*, for the defendants.

(1) [1904] 1 K. B. 635.
(2) (1880) 5 Q. B. D. 115.
(3) (1811) 4 Taunt. 102.
(4) 1910 S. C. 409.
(5) [1907] A. C. 272.
(6) (1909) 15 Com. Cas. 49.

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This is the first time that it has ever been suggested that charterers guarantee that the measurement of the cargo shall be correctly stated in the bill of lading. In order to impose this obligation on the charterers the plaintiffs must read an implied term into the charterparty, but that can only be done when it is necessary to give such efficacy to the transaction as both parties must have intended it to have: *Hamlyn* v. *Wood*. (1) It is not necessary in this case to add any implied term to this charterparty. Although by the charterparty freight is to be payable on the intake measurement, the bill of lading contains the words "measure unknown," and, therefore, the shipowners can always have a second measurement if they doubt the accuracy of the measurement at the port of loading, but there is nothing in the language of this charterparty to impose upon the charterers the liability to pay for the cost of the remeasuring. It may be that the method of measuring adopted by the shippers at the port of loading was not that which the shipowners and charterers had contemplated, but the charterparty contains no contract on the part of the charterers that either they or the shippers would adopt any particular method of measuring. In *Spaight* v. *Farnworth* (2) Bowen J. pointed out that there is nothing unnatural in the shipowner and charterer agreeing that freight shall be paid on the measurement figures arrived at at the port of loading, but that is very different from saying that the charterer guarantees the accuracy of those figures. The decision in *New Line Steamship Co.* v. *Bryson & Co.* (3) would have been different if there is an obligation on the charterer to measure according to some particular method. [*Coulthurst* v. *Sweet* (4) and *The Skandinav* (5) were also referred to.]

Leslie Scott, K.C., in reply. The words "measure unknown" are inserted in the bill of lading in order to protect the shipowner in the event of short delivery: *Jessel* v. *Bath* (6); *Tully* v. *Terry*. (7)

(1) [1891] 2 Q. B. 488.
(2) 5 Q. B. D. at p. 118.
(3) 1910 S. C. 409.
(4) (1866) L. R. 1 C. P. 649.
(5) (1881) 51 L. J. (P.) 93.
(6) (1867) L. R. 2 Ex. 267.
(7) (1873) L. R. 8 C. P. 679.

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BAILHACHE J. This case raises an interesting point under a charterparty made between the plaintiffs as owners and the defendants as charterers of the steamer *Ragna*. The only question raised at the trial relates to the right of the plaintiffs to recover the expense which they incurred in measuring and checking a cargo of timber on its arrival in this country, the contention of the plaintiffs being that that was an expense which ought under the charterparty to be borne by the defendants, the charterers. The question turns upon the construction to be placed on the charterparty, and perhaps also to a slight extent on the bill of lading. By the charterparty the *Ragna* was to proceed to a port in the Skelleftea district and there load a cargo of pit props. The cargo was to be taken from alongside and brought to the steamer's side, as customary, and the freight was to be paid at so much per "intaken piled fathom of 216 cubic feet." There are two methods of measuring pit props. One is to pile or stack them and to cube them up according to their lengths alone. This was the method which was called for by the charterparty. The other method is to pile and stack them according to their lengths and according to their diameters, and this is called the "length and top" method. If this latter method is adopted, more timber to the fathom is obtained than if the measurement is made by lengths alone, and consequently the length and top method is more favourable to the purchaser, and less favourable to the shipper of the cargo and to the ship. In the present case the contract between the charterers and their shippers provided for the measurement, as between them, to be by the length and top method, which is, as I have said, more favourable to the purchaser and less favourable to the shipper. This was the method in fact adopted.

The cargo was measured on land, as cargoes always are measured in this particular district, and the cargo was ready for the steamer some little time before she arrived at the port of loading. Clause 6 of the charterparty provides that bills of lading are to be "prepared on the form indorsed on this charter, and shall be signed by the master, quality, condition, and measure unknown, freight and all conditions, clauses and exceptions as per this charter." There is an indorsement on the

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back of the charterparty of the form of the bill of lading, which does not specify in express terms that the measurement of the cargo shall be inserted in the bill of lading. It refers to "pieces" and "specification" and not in express terms to measurement. After this cargo had been loaded, bills of lading for 683 cubic fathoms were tendered to the master. He knew that the steamer carried a much larger number of fathoms than that when measured as provided for by the charterparty, and he, therefore, signed the bills of lading with a protest, referring in his protest to the method by which the timber had been measured.

On the arrival of the vessel at the port of discharge in this country the owners declined to accept freight calculated on the number of standards specified in the bill of lading, and claimed to have the cargo remeasured according to the charterparty on the intaken piled measure, that is to say, stacked and piled and measured according to lengths, irrespective of the diameter of the props. The charterers were willing that that should be done, and at their expense, but a difficulty arose in this way. The plaintiffs said "We want it done by some independent person, or at any rate we want it checked by some independent person, and we want it checked by the Customs Fund authorities." The defendants were unwilling that the checking should be done at their expense. The plaintiffs then took the matter entirely out of the defendants' hands, and engaged men to pile and stack the timber, and then had it measured and checked by the Customs Fund authorities. In so doing they expended a considerable sum of money, nearly 300*l.*, and they seek to recover that sum from the defendants in this action.

The point of law to be decided on the construction of the charterparty may be stated very shortly. It is this: Did the charterers enter into a contractual obligation with the shipowners that the timber should be measured according to the standard of measurement required by the charterparty? Or, was this the position, that it was within the contemplation of both parties that a measurement of that description should be taken, but that the charterers did not contract, any more than the shipowners did, that it would be taken? I have come to the conclusion that,

on the true construction of the charterparty, there was an implied, if not an express, contractual obligation that the measurement should be taken, and should be taken on the basis which is called for by the language of the charterparty. I come to that conclusion for the reason that, apart from the fact that all the parties contemplated that it would be done, the charterers or the shippers were, as a matter of practice, the only persons who were able to measure the timber in this way. It was contemplated that the measuring should be done on land, and it was done on land, and it had to be done before the arrival of the ship. In my view that was, in the circumstances, a part of the obligation which the charterers undertook. Just as they undertook to provide a cargo, so also they undertook in this particular case that that cargo, when provided, should be furnished with the necessary measurements to enable the freight to be calculated according to the "intaken piled fathom." I think that that conclusion is strictly in accordance with the well-known cases of *The Moorcock* (1) and *Hamlyn* v. *Wood.* (2) It seems to me that, from the business point of view, that was the only thing which could be done; and I think I am right in implying that term as an implied contractual term of the charterparty. I do not greatly rely on clause 6, but that clause does, I think, rather strengthen the conclusion at which I have arrived, because it shews that it was contemplated by the charterparty that bills of lading should be prepared by the charterers, or by the persons who for this purpose were the charterers' agents, and that, when the bills of lading were presented to the master for signature, they should contain a measurement of the cargo, not necessarily in order to comply with the printed form of bill of lading indorsed on the charterparty, but for practical purposes and for the convenience of all parties. The bills of lading as presented in this case did in fact contain a measurement, and the whole trouble has arisen because the standards of measurement required by the contract of sale and by the charterparty differed. In my judgment, under this charterparty the charterers were under a contractual obligation to have the cargo measured in the method required by the charterparty. They failed to perform that

(1) (1889) 14 P. D. 64. (2) [1891] 2 Q. B. 488.

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obligation, and as a result of their breach of contract expenses were incurred by the shipowners, which the charterers are consequently liable to pay.

The defence to the action therefore fails, but I think that the sum which the defendants have paid into Court is sufficient to cover all the reasonable and necessary expenses which the plaintiffs incurred, that is to say the cost of the timber being checked and piled and measured by the Customs Fund authorities.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Lawrence Jones & Co., for J. B. Strover, West Hartlepool.*

Solicitors for defendants: *William A. Crump & Son, for Turnbull & Tilly, West Hartlepool.*

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May 7.

MAW, APPELLANT *v.* HOLLOWAY, RESPONDENT.

Salmon Fishery—Weir—Apron of a Weir—Trap or Device for taking Fish—Device for catching Salmon—Salmon Fishery Act, 1873 (36 & 37 *Vict.* c. 71), *s.* 15—*Salmon Fishery Act*, 1865 (28 & 29 *Vict. c.* 121), *s.* 36.

By s. 15 of the Salmon Fishery Act, 1873, no person shall place upon the apron of any weir any basket, trap, or device for taking fish, except as therein mentioned.

By s. 36 of the Salmon Fishery Act, 1865, any person using within a fishery district any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty.

A row of six hatches extended across the entire width of a river. When all these hatches were down the main body of the river passed down a mill stream and under a mill, ultimately returning to the bed of the river below the mill. When the hatches were opened the water flowed through each hatch down a separate sloping surface of masonry into a separate culvert under a road which crossed the river, and so into a pool. Hatches 1 and 2 were permanently closed. When hatches 3 and 4 were open the water passed down the sloping surfaces, then up and along a close boarded wooden platform resting on the bottom of the culverts, and thence into an eel trap. Spent or injured salmon had been found in the trap:—

Held, that the row of hatches constituted a weir, and that the sloping surfaces of masonry opposite the hatches constituted the apron of a weir

within the meaning of s. 15 of the Act of 1873, and that a trap or device for taking fish had been placed upon the apron of a weir within the meaning of that section.

Held, also, following *Lyne* v. *Leonard* (1868) L. R. 3 Q. B. 156, that the trap or device was a device for catching salmon within the meaning of s. 36 of the Act of 1865.

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THESE were two cases stated by justices of the borough of Romsey.

In the first case an information was laid by the appellant against the respondent for that the latter on July 7, 1913, at Sadler's Mill, Romsey, unlawfully did place upon the apron of a weir at Sadler's Mill, Romsey, in a river called the Test, a certain trap or device for taking fish not being a wheel or leap for taking lamperns used between the 1st day of August and the 1st day of March following, contrary to s. 15 of the Salmon Fishery Act, 1873. (1)

The justices dismissed the information, but stated a case for the opinion of the Court in which the following facts appeared :—

"5. The respondent was at all material times the occupier of Sadler's Mill aforesaid under a tenancy from Mr. Wilfred Ashley. The respondent by a subsequent agreement took the trap hereinafter referred to from Mr. Ashley for one year from June 24, 1913, and paid Mr. Ashley 5*l.* in respect thereof. The mill is situate in the main river. A short distance above the mill a stream leaves the main river, passes through and under and drives the mill, rejoining the main river a short distance below the mill. Fish cannot pass under the mill building as their

(1) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 15 : "No person, between the first day of January and the twenty-fourth day of June inclusive, shall hang, fix, or use in any salmon river any baskets, nets, traps, or devices for catching eels or the fry of eels, or place in any inland water any device whatsoever to catch or obstruct any fish descending the stream ; or shall at any time place upon the apron of any weir any basket, trap, or device for taking fish, except wheels or leaps for taking lamperns between the first day of August and the first day of March ; and any person acting in contravention of this section shall incur a penalty not exceeding two pounds for every day during which he suffers such engines to be fixed or used as aforesaid. But nothing herein contained shall extend to prohibit the use of eel baskets not exceeding in any part ten inches in diameter constructed so as to be fished with bait, and not used at any dam or weir."

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passage is entirely blocked either by the mill hatches being down or by the mill wheels running. The main river at the mill passes through certain sluice gates or hatches extending across the entire width of the main river and hereinafter described.

"6. There are six such sluice gates or hatches (numbered from left to right looking up the river as 1, 2, 3, 4, 5 and 6 and are so referred to in this case and in the plans hereinafter referred to for the purpose of identification). The closing of those gates or hatches entirely prevents any water from passing through them down the river; the water must either then pass through the mill or flood the banks or the tops of the hatches. The hatches can also be used to regulate and control the flow of water down the river. These sluice gates or hatches are raised, lowered, and controlled by means of a winch worked from a platform immediately above them in what is called the 'hatch house.' When these sluice gates or hatches are entirely closed and the mill is working the full flow of the stream passes through and drives the mill. If all the said hatches are open and the mill is not at work the whole of the stream passes through the hatches. The water flows through the hatches when and as opened into culverts one to each hatch running under a roadway crossing this part of the river and through the culverts into the pool below. These culverts are at the outlet 5 feet 3 inches high from the crown of the arch to the bottom and 2 feet 6 inches wide. The culverts have hard smooth flat bottoms. Hatches 1 and 2 are kept fixed and permanently closed. At the top of these two hatches are two small hatches or flights worked by hand from the said platform 1 foot 7 inches deep. When those upper hatches are open there is a space of about $3\frac{1}{2}$ inches through which water can pass. When hatches 5 and 6 are open the water drops on to a substance of sloping masonry and then passes down and out into the pool below. When hatches 3 and 4 are open the water in the case of each hatch drops down a substance of sloping masonry and then up and along a wooden platform which rests at a point between K and L marked on plan No. 2 hereinafter referred to and leads to the trap hereinafter described.

"7. On July 7, 1913, below the hatches above described and

in such a position that all the water from hatches 3 and 4 came through it there was a trap for taking eels. The entrance to the said trap (called the hawk of the trap) was by a close boarded slope or platform leading to the trap. The extremity of the said hawk touched the floor of the culverts below hatches 3 and 4 at a point somewhere between the points marked K and L on the plan No. 2 mentioned hereafter and at least 7 feet 6 inches above the exits from the culverts. Hatches 3 and 4 were open, the mill was not working, and the said trap was working and hatches 1 and 2 and 5 and 6 were closed on July 7, 1913.

"8. Three plans were put in evidence and copies thereof are annexed hereto numbered 1, 2 and 3 respectively and form part of this case. Dimensions and details of the structure not specifically herein stated can be found on reference to the said plans. Two photographs shewing hatches 1 and 2 and 5 and 6 closed and hatches 3 and 4 open and the trap working were also put in evidence and copies thereof are annexed hereto and form part of this case.

"9. On the night of July 7, 1913, the mill was not working and the trap was taking all the water going down the stream with the exception of a slight leakage.

"10. The appellant further tendered evidence (1.) to shew the effect of the working of the trap on the passage of fish between 1902 and 1908 inclusive, (2.) to shew that the slope from the bottom of hatches to the exits of the culverts was cemented or paved in and up to 1908. The appellant further tendered evidence as to an agreement between the respondent and a Mr. John Ernest Hutton, a fishing tenant of some fishing just above Sadler's Mill, made on or about July 15, 1913. We were of opinion that all such evidence as to conditions of affairs at other dates before and after the date of the alleged offence was inadmissible and we rejected the same.

"11. At the close of the case for the prosecution it was contended on the part of the respondent that the word 'apron' meant something connected with a weir; that the structure in question was not a weir as there was no fixed obstruction used for the purpose of damming up water; that even if it was a weir the sloping masonry referred to was properly the invert of the culvert and not the apron of a weir; that the only things used

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for damming up water were the hatches and these were movable; and that if there was an apron the apron ceased at the point K on the plan referred to, and the evidence did not shew that the close boarded platform came up as far as that point. No evidence was called on behalf of the respondent.

"12. It was contended on behalf of the appellant that the structure from and including the hatches to the exit of the culverts taken as a whole constituted a weir, and that the hard smooth flat bottom of the culverts, which slopes steeply to the point K on the plan and then very gradually to the exit to the pool, formed the apron of the weir within the meaning of 'weir' and 'apron' in the said Act; and that the trap was by means of the close boarded arrangement shewn a 'trap' or 'device' for taking fish placed on the apron of the weir within such meaning, and that the offence charged had therefore been committed.

"13. We were of opinion from the facts before us that the case was not sufficiently proved and we accordingly dismissed the information.

"14. The questions for this Honourable Court are: (1.) Whether we were right in rejecting the evidence tendered for the prosecution and referred to in paragraph 10 hereof. (2.) Whether we upon the above statement of the facts came to a correct decision in point of law, and if not what should be done in the premises."

In the second case an information was laid by the appellant against the respondent for that the latter on July 16, 1913, at Sadler's Mill, Romsey, a place within the Hampshire Rivers Fishery District, did after a time appointed by law in that behalf unlawfully use a certain fishing mill dam or other instrument or device, to wit, a fish trap, not being a rod and line, for catching salmon without having a proper licence for the same, contrary to s. 36 of the Salmon Fishery Act, 1865. (1)

(1) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 36: "From and after a time to be appointed as aforesaid in a fishery district, any person using within that district any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding twenty pounds."

The justices dismissed the information, but stated a case for the opinion of the Court in which the following facts appeared :—

"5. Sadler's Mill together with the sluice gates or hatches and trap hereinafter mentioned was on the date complained of, namely July 16, 1913, in the occupation of the respondent. At Sadler's Mill, apart from the hatches used in connection with the mill machinery, there are six sluice gates or hatches used to regulate the flow of the stream and in connection with the working of the mill. The water flows through these six hatches when and as opened into culverts one to each hatch running under a roadway crossing that part of the river and through the culvert into the pool below. Connected with two of these hatches numbered 3 and 4 is a trap. The hatches, culverts, and trap are shewn on plans 1, 2, and 3, which are annexed hereto and form part of the case. The trap is made of slats with narrow spaces and the sides partly patched and formed with close boards. The trap is built with piles fixed in the bed of the stream. Fish cannot escape through the sides of the trap but are carried along and drop into a well at the lower part of the trap from which they cannot return. The entrance to the trap is a close boarded slope or platform which runs up two of the culverts some distance. This boarded slope is similar in each of the said two last mentioned hatches one of which is hatch No. 3 and the other hatch No. 4 shewn on the plans appended hereto and leads to the trap. The said close boarded platform is carried up for some distance from a point somewhere between the points K and L on the plan hereto appended and joins the stage of the trap at an upward slope so that the water when these two hatches are open is shot up and along the trap through and over the side and lower end, and all fish coming within sucking distance of the two last mentioned hatches when open must necessarily be carried into the trap and into the well at the lower end of it. The trap is worked by opening the said two hatches when the mill is not working and when the other hatches are closed so that all the water flowing down passes through the said hatches and through the trap.

"6. The entrance to the trap is not, but the body of the trap is, within the Hampshire Fishery District the boundaries of

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which are defined by the certificate of the Board of Agriculture and Fisheries dated May 29, 1907. The conservators for the Hampshire Fishery District in accordance with s. 34 (8.) of the Salmon Fishery Act, 1865, duly gave notice by advertisement appearing in the issue of the *Salisbury and Winchester Journal* dated November 2, 1907, a newspaper circulating in the district, of a time, namely, January 31, 1908, at the expiration of which it would be illegal to fish for salmon in the district without a licence. The respondent had not on July 16 any licence under the said section.

"7. The river Test is a salmon river and there was evidence before us that spent or injured salmon, but not fresh fish, had been found in the trap. On the date complained of the trap was used by the respondent and worked in the manner and the hatches were in the position as shewn on two photographs then taken on behalf of the appellant and at the hearing put in evidence. The photographs are annexed hereto and form part of this case. The only hatches open were those leading to the trap.

"8. Evidence was given that from 1902 to 1908 salmon had been seen in the trap and that these were spent or injured fish on their way to the sea. (Counsel on behalf of the respondent objected to this evidence, but we being of opinion it should be allowed overruled the objection.) But no evidence was given that any salmon had been caught in the trap during the occupancy of the mill by the respondent nor since the year 1908. Evidence was also given that the trap is intended for catching eels and is not adapted for catching salmon.

"9. No material alteration appears to us to have been made to the trap since the year 1908.

"10. On the part of the appellant it was contended that the above facts disclosed an offence under the section and that even if this trap was intended to catch eels only it was an instrument whereby salmon might be caught and that it did in fact catch salmon.

"11. On the part of the respondent it was contended that, inasmuch as there was no evidence that the trap was an instrument or device intended for the catching of salmon, no offence under the section had been committed.

"12. We dismissed the information.

"The question for this Honourable Court is were we right in this decision. If so, the information is to stand dismissed, otherwise the case is to be remitted to us with directions as to what should be done in the premises."

E. B. Charles, K.C., and *Morle*, for the appellant.

Foote, K.C., and *Ricketts*, for the respondent.

The following cases were cited:—*Briggs* v. *Swanwick* (1), *Hanbury* v. *Jenkins* (2), *Lyne* v. *Leonard* (3), *Watts* v. *Lucas* (4), *Hill* v. *George* (5), and *Short* v. *Bastard*. (6)

AVORY J. The question in the first case arises under s. 15 of the Salmon Fishery Act, 1873; it is whether the respondent did place upon the apron of the weir in the Test a device for taking fish. By the help of a plan and a model we have been enabled to understand the construction of this device. After having stated the facts the justices set out the contentions of the parties. They say that the respondent contended that the word "apron" meant something connected with a weir; that the structure in question was not a weir, and that even if it was a weir the sloping masonry referred to was properly the invert of the culvert and not the apron of a weir; that the only things used for damming up water were the hatches, and these were movable, and that, if there was an apron, the apron ceased at the point K on the plan, which is just inside the culvert, and that the evidence did not shew that the close boarded platform came up as far as that point. They say that the appellant contended that the structure from and including the hatches to the exit of the culverts taken as a whole constituted a weir, and that the hard smooth flat bottom of the culverts, which slopes steeply to the point K on the plan and then very gradually to the exit to the pool, formed the apron of the weir within the meaning of "weir" and "apron" in the Act; and that the trap was by means of the close boarded arrangement shewn a "trap" or "device" for

(1) (1883) 10 Q. B. D. 510; 52 L. J. (M.C.) 63.
(2) [1901] 2 Ch. 401.
(3) L. R. 3 Q. B. 156.
(4) (1871) L. R. 6 Q. B. 226.
(5) (1880) 44 J. P. 424.
(6) (1881) 46 J. P. 580.

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taking fish placed on the apron of the weir within such meaning, and that the offence charged had therefore been committed. They say "We were of opinion from the facts before us that the case was not sufficiently proved and we accordingly dismissed the information." They have not said on what grounds in law they acted, nor in what respect the case was not proved. We must take it that they accepted the contentions of the respondent. It is therefore necessary to examine those contentions. First it is suggested that the portion of s. 15 which makes it an offence to place upon the apron of a weir any device for taking fish must be limited to fish ascending the stream, because the earlier part of the section makes it an offence to place in any inland water any device whatsoever to catch or obstruct any fish descending the stream. I see no ground for so limiting the effect of the words in question. Having used the expression "any fish descending the stream," the Legislature in the same section mentions "any device for taking fish." In the next section it speaks of using a contrivance for the purpose of "deterring salmon from passing up a river." In my opinion it cannot be said that in prohibiting the placing upon the apron of a weir any device for taking fish the Legislature overlooked the fact that between January 1 and June 24 injured fish may be carried down stream or that it did not intend the words to apply to all fish whether going up or down stream. Then was this a weir? In the Standard Dictionary a weir is described as "an artificial obstruction placed in a stream to raise the water, divert it into a mill-race or irrigation ditches, or form a fish pond; a dam."

There can be no doubt that there was here a dam answering the purposes described. A weir may be simply a dam banking up the water either entirely or partially. It does not cease to be a weir because there may be a natural fall in the river bed. The original condition of things is immaterial. Was this dam a weir at the date in question? A weir is still a weir notwithstanding some superadded artificial construction, for example a framework to support hatches. Over some weirs the water flows naturally and continuously. Other weirs are fitted with hatches. Some weirs have hatches extending across the whole breadth of the river so that all the water can be penned back by the hatches.

In others the hatches only occupy part of the river's width. Some weirs have hatches in the centre; the water flows over either side, and the hatches are only to allow a more copious flow. But the whole construction with or without hatches is a weir.

The next question is whether there was placed upon the apron of this weir a trap or device for catching fish. I might content myself by saying that, looking at the plan, the point where this artificial wooden platform rested was upon the apron of a weir, but I can go beyond that. Looking at this plan and model I am of opinion that the apron is that which forms the slope from the top of the weir to the bed of the river below it. The construction was placed there to protect the bed of the river from being scoured by the water falling upon it. The whole of that construction is the apron. Therefore in my judgment the point K on the plan from which the wooden platform started, the object of which was to carry fish up to the basket in which they were caught, was upon the apron of a weir.

There remains the question, was this a trap or device for taking fish? It might be difficult to say at what point the trap commences; but on the facts in this case and in view of the decision in *Briggs* v. *Swanwick* (1) I think the trap commenced on the apron of the weir. In that case the proceeding was, as in the present case, under s. 15 of the Salmon Fishery Act, 1873. The facts were that at the lower side of a weir was fixed an iron grating sloping upwards, with bars half an inch apart, so that when the shuttles of the weir were raised the water rushing under them would pass through the grating but sweep any fish into a trough which carried them into a well or trap from which they could not escape. Field J. said, "I think that the appellant did place the device, because in its normal condition, if I may use the expression, the thing is not a trap, but so soon as the shuttle is raised, the trap is set." Mathew J. said, "There was no trap set until the gate or shuttle was raised, but when the appellant raised it he set the trap." That decision, together with the fact stated in the second case that all fish coming within sucking distance of two of the hatches when opened must necessarily be carried into the trap and into the well at the

(1) 10 Q. B. D. 510; 52 L. J. (M.C.) 63.

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lower end of it, from which, it is also stated, they cannot return, points to the conclusion that this contrivance is a trap or device placed upon the apron of a weir. In my view all the contentions raised by the respondent were wrong and the justices ought to have convicted in the first case.

The second case raises a question under s. 36 of the Salmon Fishery Act, 1865. In this case again the justices have stated facts relating to the same trap or device. They state that evidence was given that from 1902 to 1908 salmon had been seen in the trap and that these were spent or injured fish on their way to the sea, but that no evidence was given that any salmon had been caught in the trap since the year 1908; that evidence was also given that the trap was intended for catching eels and was not adapted for catching salmon; and that no material alteration had been made to the trap since the year 1908. They then set out the contentions of the appellant and respondent respectively upon which they say "we dismissed the information." Again they do not vouchsafe any reasons for their decision and again we must take it that they gave effect to the contention of the respondent, which was that "inasmuch as there was no evidence that the trap was an instrument or device intended for the catching of salmon no offence under the section had been committed." If that was the only ground for the decision it cannot stand, because on the authority of *Lyne* v. *Leonard* (1) that contention is wrong. Blackburn J. there said: "The respondent put down a putt in such a state that salmon could be caught in it, and the justices thought it was necessary for the appellant to shew that the respondent meant to catch salmon with it; but that is a mistake on their part; the penalty is imposed irrespective of intention. If people use an instrument whereby salmon may be caught, they must pay for a licence." It is clear on the facts that this is a device whereby salmon may be caught, and therefore in this case also the justices ought to have convicted.

One other point taken by Mr. Foote calls for notice. He contended that this section must be read as applying only to cases where at the time of the act complained of salmon are likely to be caught. In my view the Court cannot hold as matter

(1) L. R. 3 Q. B. 156.

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of law that no salmon can be caught descending the stream in the month of July. The question is whether at a date in July the respondent was using a device which in the words of Blackburn J. in *Lyne* v. *Leonard* (1) was "an instrument whereby salmon may be caught." By the trap in question salmon had been caught. Therefore in my opinion both appeals should be allowed.

ROWLATT J. Taking the second case first, there seems to be no doubt that the justices have addressed their minds to the wrong question. I had some doubt as to whether the case ought not to go back to them that they might state whether in the words of Blackburn J. in *Lyne* v. *Leonard* (1) the device is one "whereby salmon may be caught"; but I think this case must be taken as meaning that there was here a device into which salmon could find their way; whether they could do so at one time of the year or at another is immaterial; the Court cannot take judicial notice of the time when there may be spent salmon in the river Test. On this case therefore I agree with the judgment of Avory J.

As to the first case I do not dissent, but I have certain misgivings. No doubt the trap or device in this case was placed on an apron. The close boarded structure was placed on an apron; it lifted the body of descending water off the apron and passed it through the retaining portion of the trap. The close boarded structure was the entrance to the trap the retaining portion of which was no doubt at some distance away. It was therefore part of a trap and it was placed upon an apron. So far I have no difficulty. But was it placed upon the apron of a weir? I confess that the argument of Mr. Foote upon this point presents to me a formidable appearance. A hatch is not a weir. Water gushes under pressure through a hatch, but falls naturally over a weir. It is well known that instead of the old-fashioned weir is often found a complicated structure consisting of a series of hatches strictly and properly so called because the water flows through and not over them. It may be that they constitute a weir, but it does not seem to follow that the sum of the aprons of the

(1) L. R. 3 Q. B. 156.

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hatches together makes up the apron of a weir. It is no offence to place a trap upon the apron of a hatch. It may be that the same effect upon the river is produced by a succession of hatches as is produced by a weir; and it may be (though it does not follow) that the mischief is the same whether a trap is placed upon the apron of one of several hatches or whether it is placed upon the apron of a weir. But it happens that the latter operation is forbidden while the former is not. The effect of a penal statute must not be extended beyond the fair meaning of its words. Therefore I have some doubt as to whether this trap or device was placed upon the apron of a weir. However, the other members of the Court do not feel pressed by this difficulty, and I am not disposed to differ. Accordingly I agree that both appeals should be allowed.

SHEARMAN J. With regard to the first case I agree so entirely with the opinion of Avory J. that I only add a few words out of respect to the doubts of my brother Rowlatt. The summons in this case charged the respondent under s. 15 of the Act of 1873 with placing upon the apron of a weir a trap or device for taking fish. The view I take of the statement of this case is that the justices, thinking that the law was obscure, have made their findings of fact and have asked this Court to draw such proper inferences as are not inconsistent with their findings. Looking at the case in that light I have no doubt that the prosecution proved that the defendant at the date named had placed upon the apron of a weir a trap or device for taking fish. I entertain no doubt that paragraph 6 of the case accurately describes a weir. It is true that "weir" is not defined in this Act, but some light is thrown on the matter by the definition of "fishing weir" in s. 4 of the Act as "any erection, structure, or obstruction fixed to the soil either temporarily or permanently across, or partly across, a river or branch of a river, and which is used for the exclusive purpose of catching or facilitating the catching of fish." A weir therefore would seem to be "any erection, structure, or obstruction fixed to the soil either temporarily or permanently across, or partly across, a river or branch of a river." This shews that in this Act "weir" is meant to have a wide and not

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a narrow interpretation. Looking at the plan and at the description in paragraph 6 of the case I think the structure is none the less a weir because it is entirely composed of a number of hatches fixed in a frame work and set upon a sill. This succession of hatches constitutes a weir; each hatch is part of the weir. Then I see no difficulty in drawing the inference that the sloping masonry, which all parties recognize as an apron, is the apron of a weir.

The second case is covered by the decision in *Lyne* v. *Leonard*. (1) I therefore agree that both appeals should be allowed.

Appeals allowed.

Solicitors for appellant: *Purkis & Co., for H. J. King & Aylward, Salisbury.*

Solicitors for respondent: *Church, Adams & Prior, for Lamport, Bassitt & Hiscock, Southampton.*

W. H. G.

[IN THE COURT OF APPEAL.]

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March 16, 17; *April* 6.

R. LESLIE, LIMITED *v.* SHEILL.

Infant—Contract—Money lent—Fraudulent Misrepresentation as to Age—Equitable Relief—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

The defendant, an infant, by fraudulently representing that he was of full age, induced the plaintiffs to lend him two sums of 200*l.* each. To an action by the plaintiffs to recover the amount of the advances on the ground that they had been obtained by fraudulent misrepresentation, or in the alternative for money had and received by the defendant to the use of the plaintiffs, the defendant pleaded infancy:—

Held, that the cause of action was in substance ex contractu, that the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiffs.

APPEAL of the defendant from a decision of Horridge J. after trial with a common jury.

The plaintiffs were a firm of registered money-lenders, and they sued the defendant, to whom they had made two advances

(1) L. R. 3 Q. B. 156.

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of 200*l.* each, to recover 475*l.*, being the amount of the advances with interest, on the ground that the defendant had obtained the advances by fraudulently representing that he was of full age at the time; in the alternative, they claimed 475*l.* as money had and received by the defendant to the use of the plaintiffs; the defendant was still a minor at the date of the issue of the writ, though he attained full age before the trial. The learned judge left the following question to the jury: "Were the plaintiffs induced to make the two advances of 200*l.* each, or either of them, by the fraudulent misrepresentation of the defendant that he was twenty-one?"; to which the jury answered, "Yes—both." Upon further consideration, Horridge J. ordered judgment to be entered for the plaintiffs for 400*l.*

The defendant appealed.

Harry Dobb, for the defendant. In *Levene* v. *Brougham* (1) it was held by the Court of Appeal in a similar action that the contract was void under the Infants' Relief Act, 1874 (2), and that the defendant was not estopped from relying on the statute by the fact that he had made a misrepresentation as to his age. That case is in point and should be followed. *Ex parte Unity Joint Stock Mutual Banking Association* (3) is the decision which at first sight appears to be most against the defendant. But there the Court were dealing with a fund and dividing it amongst creditors; it was not a case of enforcing a contract. In *Esron* v. *Nicholas* (4) an infant was held bound to return a premium he had received on granting a lease, which he was seeking to set aside. In *Stikeman* v. *Dawson* (5) there was no express representation as to his age by the infant and it was held that the

(1) (1909) 25 Times L. R. 265.

(2) By the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void: provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

(3) (1858) 3 De G. & J. 63.

(4) (1733) 2 Eq. Cas. Abr. 488; 1 De G. & Sm. 118, n.

(5) (1847) 1 De G. & Sm. 90.

plaintiff could not recover, and the same was the case in *Ex parte Jones*. (1) *Watts* v. *Creswell* (2), where a decree was made against an infant, was a case of tort not founded on contract. In *Cowern* v. *Nield* (3) it was held that where an infant trader enters into a contract for the sale of goods and is paid the price by the purchaser, but subsequently fails to deliver the goods, the purchaser cannot recover the price in an action for money had and received, even though the contract was for the infant's benefit, unless it can be proved that in substance the cause of action arose ex delicto. Now, since the Infants' Relief Act, 1874, an infant cannot be made liable on his contracts, though they are fraudulently made by him. It would upset the whole scheme of the Act if the plaintiff could sue the infant not on his contract but on an equitable liability. *Stocks* v. *Wilson* (4) went beyond the authorities. As to the position of an infant who sets up a plea of infancy, though he has represented himself to be of full age, reference may be made to *Bartlett* v. *Wells* (5), which was followed in *De Roo* v. *Foster*. (6) These cases shew that even at common law before the Act an infant could not be debarred by his fraud from setting up the defence of infancy. He could not by his own act render himself capable of entering into a contract which the law said he was incapable of entering into. It is said that "money had and received" will lie against the infant, but that form of action depends on a contract implied by law. The infant cannot be sued upon his express promise, because he is in law incapable of making it; and it cannot be that the law will imply a promise to repay which he is incapable of making. In any event no such claim can be brought until the infant is of full age. In all the equity cases in which the defendant has been held liable he has been over twenty-one.

J. B. Matthews, K.C. (*G. F. Spear* with him), for the plaintiffs. No doubt an infant is liable for pure torts: *Johnson* v. *Pye*. (7) Equity had no special doctrine with regard to infancy. But there was an equitable doctrine of fraud, which resulted in

(1) (1881) 18 Ch. D. 109.
(2) (1714) 9 Vin. Abr. 415.
(3) [1912] 2 K. B. 419.
(4) [1913] 2 K. B. 235.
(5) (1862) 1 B. & S. 836.
(6) (1862) 12 C. B. (N.S.) 272.
(7) (1665) 1 Sid. 258.

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restitution, and which was applicable equally to adults and minors. It is not true to say that an action for "money had and received" is limited to contract, for you may waive a tort and sue for "money had and received": *Bristow* v. *Eastman* (1), where it was held that an action for money had and received would lie against an infant to recover money which he had embezzled, though there can be no implied contract in embezzlement. That case was recognized and followed by Kay J. in *In re Seager, Seeley* v. *Briggs*. (2) Nothing in the Infants' Relief Act, 1874, touches this case. The Act is limited to contracts; it does not deal with the liability of the infant under the equitable doctrine. This view was not presented to the Court in *Levene* v. *Brougham*. (3) *Moses* v. *Macferlan* (4) is an authority in favour of the defendant. *Bartlett* v. *Wells* (5) was not an attempt by the plaintiff to enforce an equitable claim; it was an attempt to enforce an equitable replication, which was held to be bad. In *Nelson* v. *Stocker* (6) the judgment of Turner L.J. amounts to an explicit statement that infants no more than adults can escape the consequences of their fraudulent misrepresentations. But *Ex parte Unity Joint Stock Mutual Banking Association* (7) is decisive in favour of the plaintiffs. It decides that a person defrauded by an infant can prove in bankruptcy in competition with other creditors, because there was a subsisting liability which equity would have enforced. And *Stocks* v. *Wilson* (8) is also decisive in the plaintiffs' favour. The word "contract" in the Infants' Relief Act, 1874, is used in its strict sense, and does not extend to liabilities independent of contract.

Harry Dobb in reply. In *Nelson* v. *Stocker* (6) no doubt the dicta of Turner L.J. were expressed in very general language; but that case was before the Infants' Relief Act, 1874, which rendered an infant incapable of making such a contract.

Cur. adv. vult.

(1) (1794) 1 Esp. 172.
(2) (1889) 60 L. T. 665.
(3) 25 Times L. R. 265.
(4) (1760) 2 Burr. 1005
(5) 1 B. & S. 836.
(6) (1859) 4 De G. & J. 458.
(7) 3 De G. & J. 63.
(8) [1913] 2 K. B. 235.

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April 6. KENNEDY L.J. read the following judgment of LORD SUMNER. At the time of the transaction in question the appellant was an infant. He succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him 400*l.* on the faith of his being adult. Perhaps they were simpler than money-lenders usually are; perhaps the infant looked unusually mature. At any rate when they awoke to the fact that they could not enforce their bargain and sought to recover the 400*l.* paid, charging him with fraud, the jury found that the appellant had been guilty of fraud, and he does not now complain of the verdict. On further consideration Horridge J. gave judgment against him for the full amount that he received.

It is not a pretty story to begin life with, and one might have expected that the appellant's chief anxiety would have been to live it down, but money is money, and I suppose 400*l.* is more than he cares to pay, or rather to repay, if he can manage to avoid it. Accordingly he appeals, alleging that there is no process of law by which the money-lenders can get their money back from him, and, if this is so, he must succeed on this appeal.

The claim first pleaded is for the amount of principal and interest, as damages sustained because by his fraud the plaintiffs have been induced to make and act upon an unenforceable contract. So long ago as *Johnson* v. *Pye* (1) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid. "One cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto": per Byles J. in *Burnard* v. *Haggis*. (2) "A married woman," says Pollock C.B. in *Liverpool Adelphi Loan Association* v. *Fairhurst* (3), speaking before the common law had been altered by Married Women's Property Acts, "is liable for frauds committed by her on any person as for any other personal wrong. But when the fraud is directly connected with the contract with the wife and is the means of effecting it and parcel of the same transaction, the wife cannot be responsible or the husband be sued for it together with the

(1) 1 Sid. 258.
(2) (1863) 32 L. J. (C.P.) 189.
(3) (1854) 9 Ex. 422; 23 L. J. (Ex.) 163.

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wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind, which a feme covert could make whilst she knew her husband to be alive, that could not be treated as a fraud, for every such contract would involve in itself a fraudulent representation of her capacity to contract. . . . . In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him . . . . If the action should be maintainable 'all the pleas of infancy would be taken away, for such affirmations are in every contract.'" The Chief Baron's quotation is from *Johnson* v. *Pye*. (1) As Lord Kenyon says in *Jennings* v. *Rundall* (2), alluding to *Zouch* v. *Parsons* (3), "this protection was to be used as a shield and not as a sword; therefore if an infant commit an assault or utter slander God forbid that he should not be answerable for it in a Court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract." It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. The rule is well settled. No action of deceit lay against the present appellant and this claim was abandoned, but for the purposes of this case it is important to observe the principles on which an infant's immunity is established in this regard.

Nor does the other cause of action pleaded fare any better. To the claim for return of the principal moneys paid to the infant under the contract that failed, as money had and received to the plaintiffs' use, there are at least two answers: the infancy itself was an answer before 1874 at common law, and the Infants' Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained, where in substance

(1) 1 Sid. 258.

(2) (1799) 8 T. R. 335, at p. 337.

(3) (1765) 3 Burr. 1804.

the cause of action was ex delicto: *Bristow* v. *Eastman* (1), approved before 1874 in *In re Seager* (2), and cited without disapproval in *Cowern* v. *Nield.* (3) Even this has been doubted, but where the substance of the cause of action is contractual, it is certainly otherwise. To money had and received and other indebitatus counts infancy was a defence just as to any other action in contract *Alton* v. *Midland Ry. Co.*, per Willes J. (4); *In re Jones*, per Jessel M.R. (5); Dicey on Parties, p. 284; Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 605. Further, under the statute the principle, which at common law relieved an infant from liability for a tort directly connected with a voidable contract, namely, that it was impossible to enforce in a roundabout way an unenforceable contract, equally forbids Courts of law to allow, under the name of an implied contract or in the form of an action quasi ex contractu, a proceeding to enforce part of a contract, which the statute declares to be wholly void. This has been recently illustrated in the closely analogous case of a claim on the footing of money had and received for moneys paid but irrecoverable under what in law was a lending and borrowing ultra vires: *Sinclair* v. *Brougham.* (6)

The ground on which Horridge J. held the appellant liable was that by reason of his fraud he was compellable in equity to repay the money, actually received and professedly borrowed, and compellable too by a judgment in personam for the amount, not by any mere proprietary remedy. The rule in equity has been so stated at times by text-writers, both remote and recent (Fonblanque's Equity, 1820, 5th ed., i. 77; Roscoe's Nisi Prius, 16th ed., 642; Wace on Bankruptcy, ed. 1904, p. 6), but of authority for it there is very little. *Esron* v. *Nicholas* (7), a decision of Lord King's, was much relied upon. He is reported to have said "infants have no privilege to cheat men," a wholesome truth indeed, but I should hardly call it a principle. The case was examined by Knight Bruce V.-C. in *Stikeman* v. *Dawson* (8), who concluded that the facts as reported do not

(1) 1 Esp. 172.
(2) 60 L. T. 665.
(3) [1912] 2 K. B. 419.
(4) (1865) 34 L. J. (C.P.) 292, at pp. 297, 298.
(5) 18 Ch. D. at p. 118.
(6) [1914] A. C. 398.
(7) 2 Eq. Cas. Abr. 488.
(8) 1 De G. & Sm. 90.

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support the decree as made. He procured the note in the registrar's book and found it impracticable to appreciate the decision without knowing the evidence and the pleadings in full, and these unfortunately are not forthcoming. It is a case in which an infant stood by (apparently without actual fraud) while his guardian, or a person purporting to be his guardian, granted a lease. He received or took the benefit of the fine, but when he came of age he repudiated the lease. In a suit to compel him either to grant the plaintiff a new lease or refund the fine, the decree was that, if he did not grant the lease, he should pay back the fine. This seems to be the converse of a line of decisions, both at law and in equity, the gist of which is that a person who takes and keeps property cannot rely on infancy to release him from its burdens, especially if sued when of age, as in some instances was the case: see Year Book, 2 Hen. 6, 318; *Kirton* v. *Eliott* (1); *Earl of Buckinghamshire* v. *Drury* (2); *Evelyn* v. *Chichester* (3); *Lemprière* v. *Lange* (4); whatever may be thought of some of these decisions, they do not touch the present case. There is a long gap in the cases relied on after *Esron* v. *Nicholas*. (5)

For a very long time and in many forms equity has interfered to give relief against frauds committed by infants, or has refused it to infants guilty of fraud; but the practice and even the principles applicable to such cases were long ill-defined. "An infant," says Knight Bruce V.-C. in *Stikeman* v. *Dawson* (6), "however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense and for civil purposes in the view of a Court of Equity, though perhaps only when pubertati proximus or older . . . . and may therefore commit a fraud for which or the consequences of which he may after his majority be made civilly liable in equity. . . . . I agree . . . . that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine." Though many cases have been decided on this subject, none has been cited to us till one in last year in which the decision has directly been

(1) (1613) 2 Bulst. 69.
(2) (1761) 2 Eden, 61.
(3) (1765) 3 Burr. 1717.
(4) (1879) 12 Ch. D. 675.
(5) 2 Eq. Cas. Abr. 488.
(6) 1 De G. & Sm. 90.

that the defendant must pay back under a judgment purely in personam a sum equal to that which he obtained during infancy under a purported contract of lending and borrowing, which was entered into by the lender on the faith of the borrower's fraudulent assertion that he was of full age.

There are, however, some dicta of importance and some decisions which are alleged to bear indirectly on the point. In *Nelson* v. *Stocker* (1) Turner L.J. says: "if the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it . . . . Infants are no more entitled than adults are to gain benefit to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed most fully with the decision of the Vice-Chancellor," which was that the defendant should be decreed to pay 1000*l.* under his covenant, made when an infant, to place that sum in the hands of trustees, contained in a marriage settlement executed by him and by other parties after he had fraudulently represented himself to be of full age. As, however, the party to the settlement who was most concerned, namely the infant's wife, knew the truth, the Lords Justices allowed the appeal. It will be seen that the actual decision in *Nelson* v. *Stocker* (2) does not touch the present case, nor does the dictum, if its principle be estoppel after majority against denying the truth of a statement made when under age, as explained by Sir Ford North in *Mohori Bibee* v. *Dhurmodas Ghose* (3); and see *Wright* v. *Snowe*. (4) The observations of the Court of Appeal in *Levene* v. *Brougham* (5) that there could be no such estoppel were made apparently without citation of any of these cases, but in such a case the Infants' Relief Act would be an answer to estoppel now.

Much reliance was placed on *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (6), with which should be read the comments on it by Bacon V.-C. in *Ex parte Jones* (7) (which are in point though his actual decision was overruled) and by

(1) 4 De G. & J. at p. 464.
(2) 4 De G. & J. 458.
(3) (1903) L. R. 30 Ind. Ap. at p. 122.
(4) (1848) 2 De G. & Sm. 321.
(5) 25 Times L. R. 265.
(6) 3 De G. & J. 63.
(7) 18 Ch. D. at p. 115.

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Baggallay L.J. at p. 123. In that case the debtor King, while under age, had obtained advances from the association by a fraudulent misrepresentation that he was of full age. He was adjudicated bankrupt after he came of age and the association was admitted to prove in the bankruptcy for the amount advanced. The Lords Justices arrived at this conclusion somewhat reluctantly on the authority of uncited decisions of Lord Cowper, Lord Hardwicke, and Lord Thurlow. Lord Cowper's case is probably *Watts* v. *Creswell* (1), in which he says that if an infant was old enough and cunning enough to carry on a fraud he ought in a Court of Equity to make satisfaction for it. Lord Hardwicke's opinion may be that in *Earl of Buckinghamshire* v. *Drury* (2)—"minors are not allowed to take advantage of infancy to support a fraud," against which should be set Lord Mansfield's more particular statement in the same case at p. 72, that if the infant took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent by pretence of infancy. The allusion to Lord Thurlow probably is to the case of *Beckett* v. *Cordley* (3), where he said, "if there was fraud of which the infant was cognisant, she would be bound as much as an adult." If these be the authorities relied on in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (4), and I can find none nearer, they hardly touch the decision in that case, nor do they, or the decision itself in *In re King* (4), affect the case now before us. There, the bankruptcy standing unchallenged and the question being how the assets should be administered among competing creditors or claimants, it was held that persons who had been defrauded by the bankrupt when under age and thereby induced to lend him money had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word. It is clear that Jessel M.R. thought the decision anomalous and one not to be extended: see *Ex parte Jones.* (5) Since then it has been decided in *Reg.* v. *Wilson* (6)

(1) 9 Vin. Abr. tit. Enfant, N., pl. 24, p. 415.
(2) 2 Eden, at p. 71.
(3) (1784) 1 Bro. C. C. 358.
(4) 3 De G. & J. 63.
(5) 18 Ch. D. at pp. 120, 121.
(6) (1879) 5 Q. B. D. 28.

that an infant cannot be convicted, under s. 12 of the Debtors Act, 1869, of quitting the country fraudulently with property that ought to be divided among his creditors, since in law he has none. Whatever may be said of *In re King* (1) now, it does not govern the present case, but it must be admitted that the language of the Lords Justices is hardly consistent with any other view than that the bankrupt was in equity personally liable to pay the debt in question. There is further language of a similar kind in *Maclean* v. *Dummett* (2), where the Privy Council speaks of an infant as "contracting debts" in his trade by fraudulently asserting himself to be of full age, but this again was not necessary to the decision. These seem to be all the material dicta.

As to the cases, *Clarke* v. *Cobley* (3) is one in which the Court restored the status quo affected by an infant's fraud by ordering him to return promissory notes, the surrender of which he had procured by falsely stating that he was of age, and by putting him under terms not to plead the Statute of Limitations if sued upon them, but a decree against him to pay the amount of the notes, though he was now of age, was expressly refused. In *Cory* v. *Gertcken* (4), where Sir T. Plumer says "though in general a payment to an infant may be bad, yet if the infant practises a fraud he is liable for the consequences," he only decided that a person could not make his trustee pay over again a sum that he had got from him by fraudulently representing himself, while still an infant, to be already of full age, and in *Chubb* v. *Griffiths* (5) Lord Romilly M.R., when saddling an infant defendant with costs who had been passing off his safes as Chubb's safes, says that he does so "on the principle laid down in *Cory* v. *Gertcken*." (4) What he conceived this principle to be I can hardly tell, but at any rate it is not a general liability in equity for fraud. Jessel M.R. in *In re Jones* (6) regards *Cory* v. *Gertcken* (4) as a pure action of tort. The grounds of an infant defendant's liability for costs were again discussed in *Woolff* v. *Woolff* (7), another case of similar dishonesty, and the liability

(1) 3 De G. & J. 63.
(2) (1869) 22 L. T. at p. 711.
(3) (1789) 2 Cox, 173.
(4) (1816) 2 Madd. 40.
(5) (1865) 35 Beav. 127.
(6) 18 Ch. D. at p. 118.
(7) [1899] 1 Ch. 343.

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was rested on the above principle and authority, also without any hint of a wider one that in equity an infant is generally liable for fraud. I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to shew that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to *In re King, Ex parte Unity Joint Stock Mutual Banking Association*. (1) Restitution stopped where repayment began; as Kindersley V.-C. puts it in *Vaughan* v. *Vanderstegen* (2), an analogous case, "you take the property to pay the debt."

Last year, in *Stocks* v. *Wilson* (3), an infant, who had obtained furniture from the plaintiff by falsely stating that he was of age and had sold part of it for 30*l*., was personally adjudged by Lush J. to pay this 30*l*. as part of the relief granted to the plaintiff. This is the case which more than any other influenced Horridge J. in the Court below. I think it is plain that Lush J. conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods, which he could not restore because he had sold them. The argument was that equity would not allow him to keep the goods and not pay for them, that if he kept the property he must discharge the burthen, and that he could not better his position by having put it out of his power to give up the property. Lush J. expressly says (4) "it is a jurisdiction to compel the infant to make satisfaction," and, at p. 246, "the remedy is not on the contract." At pp. 242—243 he says "what the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages and compensation for the loss of the other party's

(1) 3 De G. & J. 63.
(2) (1854) 2 Drew. 363.
(3) [1913] 2 K. B. 235.
(4) [1913] 2 K. B. at p. 247

bargain. If the infant has obtained property by fraud he can be compelled to restore it"; but now comes the proposition, which applies to the present case and is open to challenge, "if he has obtained money he can be compelled to refund it." The learned judge thought that the fundamental principle in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (1) was a liability to account for the money obtained by the fraudulent representation, and that in the case before him there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this be his ratio decidendi, though I have difficulty in seeing what liability to account there can be (and certainly none is named in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (1)), the decision in *Stocks* v. *Wilson* (2) is distinguishable from the present case and is independent of the above dictum, and I need express no opinion about it. In the present case there is clearly no accounting. There is no fiduciary relation: the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act.

Accordingly the appeal succeeds; the judgment must be set aside and entered for the defendant. He will have the costs here, where he succeeds, and of the further consideration below, where he ought to have succeeded. Further than this there should be no costs given him. He cannot be made to pay the costs of the action, in which he was entitled to judgment, but I think that, as he was charged with fraud and found guilty of it, he must pay the costs of that issue, to be set off against such

(1) 3 De G. & J. 63. (2) [1913] 2 K. B. 235.

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costs as he gets, and as to any other general costs of the action, which must be small, I think there is good ground for saying that there be no order for payment on either side.

KENNEDY L.J. read the following judgment:—The plaintiffs, a firm of money-lenders, sue in this action the defendant, an infant, claiming 475*l.* and interest as damages for fraudulent misrepresentation, and, alternatively, 475*l.* as money had and received by the defendant to the use of the plaintiffs. The alleged misrepresentation was a statement of the defendant that he was of age, made by him in order to induce the plaintiffs to lend him, as they did, two sums of 200*l.* each in December, 1911. The case was heard by Horridge J. sitting with a common jury. The verdict was that the plaintiffs were induced to make both loans by the fraudulent misrepresentation.

Horridge J. has held that an action ex delicto raising a claim for damages for fraud would not lie against an infant when, as in this case, the fraud was an inducement to the contract, the non-performance of which was the basis of the pecuniary injury for which the plaintiff claims compensation in damages. This, in my judgment, was clearly right. The law is well put by Sir Frederick Pollock in his Principles of Contract, 8th ed., at p. 78: "He" (i.e., the infant) "cannot be sued for a wrong when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women, the law does not allow. . . . . But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable." The first proposition was established as long ago as the year 1665 in the case of *Johnson* v. *Pye* (1), and was dwelt upon by the judges of the King's Bench in *Jennings* v. *Rundall* (2); the second is illustrated, in regard to an infant, by *Burnard* v. *Haggis* (3),

(1) Sid. 258. (2) 8 T. R. 335.
(3) (1863) 14 C. B. (N.S.) 45.

in the year 1863, and, in regard to the analogous case of a married woman who has represented herself as a feme sole or sui juris, by the judgment of the Court of Exchequer pronounced by Pollock C.B. in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) in the year 1854.

In regard to the second and alternative claim in this action—a claim, as pleaded, for 475*l.* as money had and received by the defendant to the use of the plaintiffs, which the learned judge has in his judgment reduced to 400*l.*, by the omission, I presume, of interest—I am equally of opinion that the plaintiffs' case cannot be maintained. I venture, with all due deference to the fact of the citation of it with approval in 1889 by Kay J. in *In re Seager* (2), and by my brother Phillimore in 1912 in *Cowern* v. *Nield* (3), to entertain a doubt whether in *Bristow* v. *Eastman* (4), tried by Lord Kenyon, where an infant had fraudulently converted moneys of the plaintiff to his own use, (and therefore there was a good cause of action substantially ex delicto and wholly independent of contract upon which the plaintiff was entitled to succeed) the plaintiff's claim, if and so far as it depended upon an indebitatus count, ought to have prevailed against a plea of infancy. Be that as it may, I am certainly of opinion that in the present case, where the defendant is an infant, the cause of action is in substance ex contractu and is so directly connected with the contract of loan that the action would be an indirect way of enforcing that contract. "So far as regards the principal moneys lent, the plaintiffs were not entitled to recover upon their alternative common law claim for money had and received by the defendant for their use." I think that this would be so as the law stood before 1874, and further that to hold otherwise now would be improperly to open the door to a serious inroad upon the statutory provisions of the Infants' Relief Act, 1874, ss. 1, 2, and the Betting and Loans (Infants) Act, 1892, s. 5. It appears to me that Horridge J. intended so to hold and to dismiss the plaintiffs' claim not only so far as it rested upon the claim for damages for fraudulent misrepresentation, but also so far as it rested upon the claim on an implied contract for money had and

(1) (1854) 9 Ex. 422.
(2) 60 L. T. 665.
(3) [1912] 2 K. B. at p. 423.
(4) 1 Esp. 172.

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received to the use of the plaintiffs. I think that is so, although he gave judgment for the plaintiffs in an action in which those were the only claims pleaded, and in which, so far as the report informs us, no amendment of the plaintiffs' pleadings was asked for or granted. Reading the concluding portion of the judgment commencing with the words "There remains, however, the question whether or not a Court of Equity would order restitution to be made by an infant who had obtained property by fraud" (1), I think that the learned judge held that, having all the facts and the finding of the jury before him, the just and proper course was, without requiring any formal amendment, to treat the plaintiffs as basing their claim upon an assertion such as was pleaded by the plaintiff in the recent case of *Stocks* v. *Wilson* (2) before Lush J., to which Horridge J. expressly refers in an earlier passage in his judgment. Such a course was, in my opinion not only unobjectionable, but right.

We have, therefore, to consider in this Court whether or not the defendant lay under such an equitable liability to the plaintiffs as entitled them to the judgment for 400*l.* which the learned judge has entered in their favour. Now, beyond all question, there are cases in which a Court of Equity will interfere to prevent the fraud of an infant, such as an express misrepresentation of full age, from working an injustice. There is, at the same time, excellent authority for declining to define in positive terms the range of such interference. In *Stikeman* v. *Dawson* (3), a case in the year 1847 referred to by counsel in the course of their arguments, Knight Bruce V.-C., after quoting certain language of Ulpian and Paulus to shew the view of the civil law in regard to the fraud of infants, proceeded thus: "Unquestionably it is the law of England that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense and for civil purposes in the view of a Court of Equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense and for criminal purposes, and may therefore commit a fraud for which

(1) (1913) 29 Times L. R. 555. (2) [1913] 2 K. B. 235.
(3) 1 De G. & Sm. 90, at p. 109.

or the consequences of which he may, after his majority, be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But, as far as equity is concerned, the practical application of the rule or doctrine to which I have just been referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author who says that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine." I shall certainly not embark upon an adventure of which so eminent a master of equity as Sir J. L. Knight Bruce has spoken thus discouragingly. Happily, it is not necessary to do so for the decision of the present case. We have not to discover to what other cases the rule or doctrine ought to be held to extend, but whether there is either principle or binding judicial authority for its application to this particular case, in which the plaintiffs have been held by Horridge J. entitled in virtue of it to obtain by an action in personam repayment from an infant of the principal money owing to them under a contract of loan into which the lenders were induced to enter by a fraudulent representation of the borrower that he was of full age. After a careful consideration of the numerous reported decisions which have been brought to our attention by the industry of counsel, I have come to the conclusion that the judgment of Horridge J. cannot be supported. I am not satisfied that the rule or doctrine of equity referred to by Knight Bruce V.-C. has ever been so applied. Lord Sumner in his judgment, which I have had the opportunity of reading, has so fully, and, in my judgment, so satisfactorily, dealt with the equity cases and the judicial dicta in which the plaintiffs' counsel seek to find support for the judgment in their favour, as well as the recent judgment of Lush J. in *Stocks* v. *Wilson* (1), that it is quite useless for me to consider those cases or those dicta in detail. I desire, however, to add a few further observations.

In the first place, it appears to me that whilst Courts of Equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation,

(1) [1913] 2 K. B. 235.

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as, e.g., the promissory note in the old case of *Clarke* v. *Cobley* (1); to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it (cf. *Watts* v. *Creswell*) (2); and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in *Cory* v. *Gertcken* (3); there is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the amount of the principal lent, to give validity as against the infant to a void contract.

In the next place, I desire to say that in my view, whilst there are no doubt dicta in the judgments of the Lords Justices in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (4), upon which the plaintiffs in this case naturally lay stress, the decision ought, as I understand the judgment of Lindley J. in *Miller* v. *Blankley* (5) (and the language used by Jessel M.R. in the later case of *Ex parte Jones* (6) appears to me to be in accord), to be treated as expressing the law in bankruptcy and not as expressing a doctrine of general application. The action in *Miller* v. *Blankley* (7) was an action of debt against a builder for goods supplied. He pleaded infancy as a defence. The plaintiff's counsel relied upon *In re King, Ex parte Unity Joint Stock Mutual Banking Association.* (4) In the course of this judgment Lord Lindley (then Lindley J.) said: "We are now asked to carry further the doctrine which Turner L.J. in *Ex parte Unity Bank, In re King* (4) expressed his reluctance to act upon. He concurred, however, in the judgment of Knight Bruce L.J.; and no doubt that case must be taken to decide that where an infant borrows money upon a fraudulent misrepresentation and subsequently becomes bankrupt the debt is proveable in his bankruptcy.

(1) 2 Cox, 173.
(2) 9 Vin. Abr. 415.
(3) 2 Madd. 40.
(4) 3 De G. & J. 63.
(5) (1878) 38 L. T. 527, at p. 530.
(6) 18 Ch. D. at p. 120.
(7) 38 L. T. 527.

I think that is still law in bankruptcy; but we should not take the doctrine any further."

In my judgment the nature of the claim in the present case is not one to which the equitable rule or doctrine invoked by the respondents applies so as to make the action maintainable, and this appeal must be allowed. As to costs, I concur in the special order stated by the president of this Court in his judgment.

KENNEDY L.J. read the following judgment of

A. T. LAWRENCE J. The plaintiffs sue for 475*l.*, first, as damages for deceit, secondly, for money had and received to their use. The plaintiffs are money-lenders, who made loans to the defendant while he was an infant. They were induced to do so upon the faith of false representations made by the defendant as to his age.

The defendant pleads his infancy.

It was admitted that upon the authorities the cause of action in deceit must fail: *Johnson* v. *Pye* (1); *Bartlett* v. *Wells.* (2) The defendant was of an age when he would be responsible criminally and also for his torts independent of contract, but not for frauds in obtaining a contract, because to hold him responsible in damages for such frauds would in effect be to hold him responsible for the contract so obtained.

It would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud—as easy as obtaining the usual promissory note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud.

It has been the policy of the law to protect infants; they have been held incapable of binding themselves by their contracts—with certain exceptions not material to this case. That this is the law was admitted. But it was argued for the plaintiffs that these considerations do not affect the claim for "money had and received." Horridge J. was induced to take the view (following a decision of Lush J. in *Stocks* v. *Wilson* (3)) that there was in equity a right to relief to the extent of the money actually

(1) Sid. 258; 1 Keb. 913. (2) 1 B. & S. 836.
(3) [1913] 2 K. B. 235.

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received. It was said for the plaintiffs that the action for money had and received was not founded upon a promise implied by law, but rested upon what was called by counsel a "doctrine of equity." I do not think this argument is well founded. There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud.

The contracts of an infant, which were formerly voidable only, are now by the Infants' Relief Act, 1874, made absolutely void. He is further protected in respect of loans by 55 & 56 Vict. c. 4, ss. 3, 4, 5. These statutes are as binding upon the equitable, as they are upon the common law, jurisdiction of the Court. I do not think that it is correct to say that the action for money had and received is wholly independent of contract. It arises wherever money has been received which ex æquo et bono belongs to the plaintiff. In such case the law implies a promise to pay it to the plaintiff, but where the express promise to repay the money is by statute "absolutely void" it is impossible to imply a promise to repay the same money: see observations of Jessel M.R. in *Ex parte Jones*. (1) To do so would be to (in large part) defeat the policy of the statute, and would violate the well-established principle that where there is an express promise no other like promise can be implied.

Lord Mansfield in *Moses* v. *Macferlan* (2) excepted debts "contracted during infancy" from the operation of the action for money had and received, shewing that he regarded it as an action depending upon an implied promise.

None of the authorities cited to us in my opinion extend to establish the plaintiff's claim in this case.

The judgment in *Stocks* v. *Wilson* (3) seems to treat the

(1) 18 Ch. D. at p. 118. (2) 2 Burr. 1005.
(3) [1913] 2 K. B. 235.

subsequent sale of the property by the infant as wrongful, and as affording a foundation for treating the money obtained thereby as received to the plaintiff's use. If this had been so, if it had been a wrong independent of contract, it would no doubt have made a case in which the plaintiff could, by waiving the tort, have afforded a consideration for the implied promise to pay over the proceeds, and he could have recovered on the common count for "money had and received." But this is rendered impossible by the judge's finding that the property in the goods had passed to the infant before he disposed of them (and as to the major portion thereof that he did so with the concurrence of the plaintiff in the action). The really wrongful act was the obtaining the goods under the contract of purchase by the pretence that he was of full age; as to that, it was admitted that he could not be sued in tort for the fraud. There was therefore no actionable tort independent of contract which could be waived to form a consideration for the implied promise.

In the case of *Watts* v. *Creswell* (1), which was relied upon the fraudulent infant was in possession of the lands as to which he had misrepresented the title, and was setting up a former settlement upon himself to defeat the mortgagee under that title. It was held that he could not do so in equity without making satisfaction for the fraud. This is a long way from establishing anything like an equity to sue as for "money had and received." If when the action is brought both the property and the proceeds are gone, I see no ground upon which a Court of Equity could have founded its jurisdiction.

In the case of *Esron* v. *Nicholas* (2) (which is very imperfectly reported) the defendant was ordered to repay a premium received while he was an infant in respect of a lease granted by a person whom he had falsely represented to be his guardian. He was now claiming to receive the rents and profits reserved under a subsequent lease of this very property granted by himself after he came of age. Knight Bruce V.-C. does not seem to have approved of the case: see *Stikeman* v. *Dawson* (3); but at least it can be said that the infant's possession of the property and

(1) 9 Vin. Abr. 415.

(2) 2 Eq. Cas. Abr. 488; 1 De G. & Sm. 118.

(3) 1 De G. & Sm. 90.

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claim to set up the later lease and to receive the rents and profits thereof afforded a ground for the intervention of the Court of Equity. In *Stikeman* v. *Dawson* (1) the Vice-Chancellor, it is true, refused relief against the infant upon the ground that he had made no express misrepresentation; but there the infant was seeking to recover certificates of shares he had sold and handed over to the purchaser. In such a case, if fraud were established against the infant, there would be ground for equity to interfere to restrain him from recovering the certificates without making compensation for the money obtained by the fraud.

The only case which has been cited to us which gives rise to any difficulty is *In re King, Ex parte Unity Joint Stock Banking Mutual Association* (2), where a proof in bankruptcy was allowed in respect of a loan made to the bankrupt when an infant on the faith of a fraudulent misrepresentation that he was of full age. Knight Bruce L.J. treated himself as bound by authority, and the Court reluctantly allowed the proof. I have examined all the cases cited on that occasion, and cannot find that any one of them goes to the length supposed. The case may be applicable in bankruptcy, but certainly ought not to be extended generally so as to impair the protection which the law affords to infants. I think it cannot now be regarded as of general application: see *Reg.* v. *Wilson* (3); *Ex parte Jones* (4); *Lovell & Christmas* v. *Beauchamp.* (5)

If the cause of action for money had and received existed, I should expect to find ample authority for it, as, whenever an honest money-lender lends to an infant, he has probably been deceived as to the age of the borrower.

I think that this appeal should be allowed and judgment entered for the defendant.

Appeal allowed.

Solicitors for plaintiffs: *Dresser & Earl.*

Solicitor for defendant: *M. A. Jacobs.*

(1) 1 De G. & Sm. 90.
(2) 3 De G. & J. 63.
(3) 5 Q. B. D. 28.
(4) 18 Ch. D. 118.
(5) [1894] A. C. 607.

W. J. B.

SIDNEY *v.* NORTH EASTERN RAILWAY COMPANY.

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May 1, 4, 7.

Railway—Land compulsorily taken—Special Adaptability for Railway Purposes —Measure of Compensation.

Part of the main line of a railway was laid upon land in which the railway company had only a leasehold interest. The lease being about to expire the company obtained statutory powers to acquire it compulsorily. There were in the immediate neighbourhood two collieries, the only means of carrying coals from which to their port of shipment was over this particular piece of railway, and if on the expiry of the lease it had been offered for sale in the market it was possible that the colliery owners might have competed with the railway company for its purchase:—

Held, that for the purpose of assessing the compensation payable to the landowner the arbitrator was entitled to take into consideration the special adaptability for railway purposes arising out of the possible competition between the colliery owners and the railway company, but not that arising from the fact of the existence upon the land of an integral part of the railway company's main line.

Per Rowlatt J.: Where there is no competition or where the price has been raised by biddings to a point at which competition ceases there is no room for the application of the doctrine of special adaptability.

Case stated by an umpire under the Lands Clauses Act.

1. By an indenture of lease dated January 7, 1851, John Francis Sidney, the predecessor in title of the landowner, demised to the owners of the Bedlington Colliery in the county of Northumberland two pieces of land, the one containing about one acre and a half, and the other about three-quarters of an acre, for the purpose of making a railway for the conveyance of coals and other goods for the term of sixty-three years from Lady Day, 1850, at a yearly rent of 51*l*. By the lease the lessees covenanted that within twelve calendar months after the end or sooner determination of the term thereby granted they would remove all rails, sleepers, and other materials placed or fixed on the demised premises, and would also restore them to a state fit for agricultural purposes.

2. In exercise of the powers given by the said lease the lessees constructed on the demised premises a railway forming part of a colliery railway known as the Bedlington and Cowpen Railway, which formed the means of railway communication between

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the said colliery and another railway known as the Blyth and Tyne Railway.

3. By a special Act in 1854 the Blyth and Tyne Railway Company were authorized to acquire the said colliery railway.

4. In exercise of the powers conferred on them by that Act the Blyth and Tyne Railway Company acquired all the interest of the lessees in the said colliery railway, but did not acquire the interest of the landowner. The colliery railway so acquired became part of the Morpeth branch of the Blyth and Tyne Railway.

5. By the North Eastern Railway Act, 1874, the Blyth and Tyne Railway became vested in the North Eastern Railway Company, and by the North Eastern Railway Act, 1890, the North Eastern Railway Company were empowered to take among other lands the lands which were the subject of the above-mentioned wayleave lease.

6. On June 9, 1893, notice to treat was given by the North Eastern Railway Company to Henry Sidney, the owner of the said land, but notwithstanding such notice no steps were taken by either party to assess the compensation payable to the landowner, and the railway company continued to pay the annual rent of 51*l.* payable under the said wayleave lease.

7. Among other traffic conveyed over the said railway as part of the public railway there are conveyed to the port of South Blyth for shipment coals produced at the Bedlington Colliery and at another colliery called the Bebside Colliery, and there is no other railway by which such coals can be carried to South Blyth.

8. In 1910 arbitrators were appointed by the parties to assess the compensation payable to the landowner, and the arbitrators having differed the matter was referred to an umpire. It was contended before him on behalf of the landowner that in determining the amount to be paid in respect of the said land he should have regard (*a*) to the special adaptability of the land for railway purposes arising from the fact of the existence on it of an integral part of a public railway, and (*b*) to the fact that if the railway company had not exercised their statutory powers of taking the land in question it would have been necessary for them

or for the colliery company to have renewed the wayleave lease owing to the railway held under it forming part of the main line of the public railway over which a large traffic passes daily.

9. On behalf of the railway company it was contended that he ought to disregard entirely any value that the said land might have to the railway company, and that the umpire should treat the value to the landowner as being determined by the rent of 51*l.* paid by the railway company, and that under the circumstances above set forth there could not be any probability of any increased rent being obtainable by the landowner from the colliery company or any other party than the railway company.

10. The umpire found that if the railway company had not exercised their statutory powers and the wayleave lease had expired there would have been a reasonable probability that the landowner would have renewed the lease to the colliery company at an enhanced rent, if the lease had not been renewed to the railway company, and that such renewed lease could have been assigned to the railway company by the colliery company, thereby placing the railway company for a further term of years in the same position as they had been in for many years subject only to the payment of the increased rent.

11. He accordingly held that while he ought to disregard any special value which the land might have to the railway company by reason of its forming part of their public railway he ought to take into consideration the probability of the landowner being able to renew the wayleave lease to the colliery company at an enhanced rent, and that in assessing the compensation he ought to have regard to the enhanced rent which in his judgment the landowner might reasonably have expected to obtain as between a willing lessor and a willing lessee for such renewal if the railway company had not obtained and exercised statutory powers of taking the land.

12. It was also contended on behalf of the landowner that in assessing the compensation the umpire should include interest on the amount of the purchase-money assessed by him as from the date of the notice to treat, but the umpire was of opinion under the circumstances that the landowner was not entitled to claim interest.

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13. If the Court should be of opinion that the findings in paragraphs 10, 11, and 12 were correct he awarded and determined that the amount of the compensation payable to the landowner for the said land was 2200*l.*

14. If the Court should be of opinion that his findings were not correct and that the contention of the railway company was correct, then he awarded that the amount of the compensation payable was 1122*l.*

15. If the Court should be of opinion that his findings and also the contention of the railway company were incorrect he asked that the award might be remitted to him with such directions as the Court might think fit.

Gore-Browne, K.C., and *Disturnal, K.C.*, for the landowner. The umpire has not taken into account the railway company as a possible purchaser. He ought to have done so upon two grounds. 1. The railway company would, if they had not obtained powers to take the land and the lease had expired, have been potential competitors for it in the market. The umpire said that there would have been a probability of a renewal of the lease to the colliery lessees; he ought to have said to the colliery lessees or to the railway company. He only contemplated the railway company as assignees of a lease renewed to the colliery lessees, in which case the profit on such assignment would go into the pockets of the colliery lessees and could not be taken into account in considering the value to the lessor. 2. Apart from the question of competition, the umpire was bound to take into consideration the fact that this land was by reason of its being part of the physical track of the railway company's main line specially adaptable for use as a railway. No doubt where the value of land is enhanced by the fact of the statutory powers under which it is taken having been obtained, such enhancement must be disregarded in assessing its value. But here the value to the railway company was not in any way due to the powers conferred by the Act of 1890 under which the notice to treat was given. The land in question had been in fact part of the railway track for many years before 1890, and the special value which it had acquired was due to the unusual fact that the company had in 1874

forgotten to take powers to acquire it. The landowner is entitled to take advantage of that omission. The value to the seller is what he can reasonably expect to get without reference to the compulsory powers of the undertakers. He may always take advantage of the buyer's necessities so long as they are not created by the Act. The case of *Gough* v. *Aspatria, &c. Water Board* (1) establishes that where the land has peculiar natural advantages for the undertakers' purposes the fact that they are desirous of acquiring the site is not to be ignored. In *Lucas* v. *Chesterfield Gas and Water Board* (2), where the question was as to the value of land taken for a reservoir, Vaughan Williams L.J. agreed with the statement of Bray J. in the Court below that "land adjoining large works would in fact often have a special value because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the board desired to build a new reservoir, this was the most convenient site on which to build it?" Here the railway company would give a special price for this land in order that it might be linked up with their existing railway. There is nothing in the judgment of Fletcher Moulton L.J. in that case which is inconsistent with this contention. The test whether the element of value is to be excluded is, Was that value created by the statutory scheme? And here it was not.

Upjohn, K.C., and *Courthope-Munroe*, for the railway company. The duty of the umpire was confined to valuing the land with regard to the purposes for which it might be used by the parties who were in possible competition for it, that is for the purposes of a colliery railway. The colliery lessees could not be in competition with the railway company for the purposes of a public passenger railway, for they could not use it for those purposes. A distinction is to be drawn between special adaptability for particular purposes and special value to the particular undertakers. The former may be taken into consideration, the latter may not. In *Gough* v. *Aspatria, &c. Water Board* (1) and in *Lucas* v. *Chesterfield Gas and Water Board* (2) the land was

(1) [1904] 1 K. B. 417. (2) [1909] 1 K. B. 16.

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specially adapted for the storing of water. But there is no such thing as special adaptability for a railway as there is for a reservoir, for in the case of a railway the adjoining land would generally do equally well, whereas in the case of a reservoir it would not. Where there are no competitors for the particular purpose for which the undertakers want the land the doctrine of special adaptability has no application. This case stands on the same footing as land adjoining a railway in an agricultural district which is wanted to widen the railway. If that purpose cannot be taken into consideration, neither can the purpose for which the railway company want it here. The true principle is that stated by Fletcher Moulton L.J. in *Lucas's Case* (1) : "The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes." It is to be observed that in *Lucas's Case* (2) there were three possible competitors for the site as a reservoir. No doubt here the railway company may be treated as being in competition with the colliery lessees, but when the latter had reached their highest bid the railway company would only bid a further nominal sum just sufficient to overtop it; and that is the figure that the umpire ought to fix as the value. There is a very definite limit to what a colliery proprietor will give for a wayleave. The adjoining landowners would be only too glad to grant a substituted way over their land.

Gore-Browne, K.C., in reply.

Cur. adv. vult.

(1) [1909] 1 K. B. at p. 31. (2) [1909] 1 K. B. 16.

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May 7. AVORY J. read the following judgment:—The precise question raised between the parties in this case does not appear to have been determined in any of the decisions to which our attention has been called.

We think it advisable that the judgment of the Court should be given, in the light of those decisions, in the form of direct answers to the questions submitted by the umpire.

First, we think the contentions of the railway company in paragraph 9 of the special case are wrong. It was admitted at the Bar that they could not be supported.

Secondly, as to the contention of the landowner in paragraph 8 of the case, we think that the umpire should have regard to the special adaptability of the land to railway purposes but not to the fact of the existence on it of an integral part of a public railway, or to the fact of such railway forming part of the main line.

Thirdly, we think the umpire was entitled to find as he has done in paragraph 10 of the special case, and we see no reason for doubting the correctness of such finding.

Fourthly, as to paragraph 11 of the special case, assuming the amount of purchase-money and compensation is calculated on the basis of a rental under a new lease, as it legitimately may be, we think that although it is right to disregard the special value which the land has to the railway company by reason of it forming part of their public railway, the umpire ought to take into consideration, if he has not already done so, the enhanced rent which in his judgment the landowner might reasonably have expected to obtain in competition between the colliery owners and the railway company if the railway company had not obtained and exercised statutory powers of taking the land.

Fifthly, as to paragraph 12 of the case, upon which our opinion also was invited in the statement of the case, that has been abandoned by the consent of both parties on the ground that the point does not arise at this stage. My brethren will add anything which they consider necessary either to elucidate or to prevent these answers from being misunderstood.

ROWLATT J. I agree. It is well settled that the compensation must represent the value to the owner, not to the purchaser.

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But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme. It is quite clear that special adaptability for the purposes of the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market. But no case has raised directly for decision the precise point whether when the possibility of other competitors for the same purpose is negatived, or (what comes to the same thing) after the price has been raised to a point at which such competition ceases, there is any room in the former case or any further room in the latter for the factor of special adaptability. Fletcher Moulton L.J.'s reasoning in the *Chesterfield Gas and Water Board Case* (1)

(1) [1909] 1 K. B. 16.

unquestionably and expressly negatives any such proposition. The judgments of Vaughan Williams L.J. and Buckley L.J. in the same case contain phrases wide enough to affirm it, but they are not expressly directed to it. The *Aspatria, &c. Water Board Case* (1) does not really deal with it. "It seems to me we cannot shelter ourselves under authority, but must deal with the point by determining to which conclusion the true application of settled principles leads us.

Now, if and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owner need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them? There can be only one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

For these reasons I agree with the formal answers we propose to make to the arbitrator as read out by my brother Avory.

In conclusion I should like to draw attention to a fallacy in fact which underlies the contention of the owner in this case. He says he is entitled to special value for his property as part of a public railway. At the moment of the cesser of the wayleave right that is not its character; it is merely land in the track of a projected public railway and wanted for it. It seems to me elementary that the special want of the owner of that public

(1) [1904] 1 K. B. 417.

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railway for this piece of land cannot be taken into consideration in valuing it.

SHEARMAN J. I am of the same opinion. I agree entirely with the written judgment of my brother Avory which is intended to lay down a pronouncement of the entire Court as to the principles which in this case should guide the umpire in assessing compensation. I have also had an opportunity of reading the judgment which has been delivered by my brother Rowlatt, and I agree with it entirely. I only desire to add a few observations because I know there are a great many cases of this kind heard throughout the country, and almost entirely heard by arbitrators, and it is seldom that cases of this description come before the Courts. All those who have been practitioners in this class of business are aware how often arbitrators are puzzled by the problems that are put before them when the parties do not wish, because of the delay and expense, to have these problems put before the Court. I therefore desire to make a few observations as to the meaning of the phrase "special adaptability" and as to what I think was the entire fallacy which underlay the argument of the claimant in this case.

The facts of the present case are these: In the year 1851 the freeholders of the land granted a wayleave lease for a considerable number of years to certain persons for the purpose of making a private colliery railway. In the year 1854 a small railway company took over that undertaking and made it a public railway. Subsequently the North Eastern Railway Company absorbed the smaller railway company under one of their Acts and took over their entire undertaking. In those circumstances, as often happens when an entire undertaking is taken over, and I have no doubt this is only a type of a large bulk, the exact state of their title may well have escaped the notice of the railway company at the time; and by what I may call excusable inadvertence the railway company proceeded to run one of their main lines of railway over a portion of the land as to which they had no freehold title whatever, their only title to run over the land

resting upon the title which they had as assignees of the original holders of the wayleave lease. Somewhere prior to the year 1890 the North Eastern Railway Company discovered this defect in their title and they accordingly remedied it by obtaining compulsory powers to take this land by their Act of 1890; and I need scarcely point out that it was open to any landowner who objected to those compulsory powers to appear and be represented when that Bill was before Parliament. The railway company obtained their compulsory powers; and on June 9, 1893, they served notice to treat upon the freeholders. At that time the problem did not arise, no doubt owing to the friendly relations which existed between the landowner and the company, and to the fact that the wayleave lease was still running and had some considerable time to run before the question of the value of the land to be taken came up for settlement. It is quite clear on practice and on settled law that it is the duty of an arbitrator or umpire to find the value of the land at the time of the notice to treat, and in finding what is the value of the land it is well settled that he must find what is the value of the land to the seller and not what is the value to the person who has acquired compulsory power to take it. It appears to me that in this case the claimant has been trying in the circumstances to obtain an enhanced value from the railway company on the sole ground that the railway company are placed in great difficulty from the fact that if the wayleave expired they would be left, not with a main line on the premises, but with a bit of the main line ending at one place and another bit beginning at another place, because the moment the wayleave expired the railway company became mere trespassers with no title to run their railway over this land at all. It was of importance to the railway company to acquire this intermediate part in order to carry on their undertaking, but it appears to me that in fact this was entirely a value and a special value to the railway company and not in that sense a special value to the landowner. The only way in which the existence of the railway company gave any value to the owner was that they were one of several people who might have been willing to buy the land quite apart from the purposes of the Act by which they obtained compulsory powers. Looking at the

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facts of this case it appears to me that the arbitrator is only entitled in the manner laid down in the judgment read by my brother Avory to consider the value of the land upon the basis of the different colliery companies and the railway company being persons who would be likely to compete in fixing the price to the landowner if he was willing to sell and they were all willing to buy, apart from any statutory powers.

I only desire to make one other observation, and that is as to the meaning of the phrase "special adaptability." Long before the *Aspatria, &c. Water Board Case* (1) and the *Chesterfield Case* (2) were reported in the Courts practitioners in this class of business were well acquainted with what was known as the *Countess of Ossalinsky's Case* (3), the judgments in which have been reported in the books of practice on the subject; and from that time onward the ingenuity of claimants has been largely exercised in discovering or attempting to discover special adaptability of some sort in any kind of land compulsorily taken; and arbitrators have often had to deal with it. In my judgment the statements of Fletcher Moulton L.J. as to special adaptability in his judgment in *Lucas* v. *Chesterfield Gas and Water Board* (2) are those which should guide arbitrators. Special adaptability is nothing more than an element of market value. If land is taken on the borders of a navigable river, that is a recommendation, because a class of persons would be likely to take it for the purposes of a wharf, and that I daresay would be described as "special adaptability"; but special adaptability is merely one kind of special value which is likely in the market to attract a class of purchasers who would come into competition. In this case the special adaptability to the railway company ought to be taken into consideration because, owing to collieries round about and to the presence of the railways in the neighbourhood, it may well be that this land has a special value generally for the purposes of a railway apart altogether from any exigencies of the North Eastern Railway Company. Looked at in that light I think the expression "special adaptability" may be very

(1) [1904] 1 K. B. 417.
(2) [1909] 1 K. B. 16.
(3) Reported in Appendix to Browne and Allan on Compensation, 2nd ed., p. 659.

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well used as meaning nothing more than that it has a special value in the market. As regards the general question of competition, which was argued at considerable length by counsel, and from their arguments I have benefited a great deal, I should like to say that it appears to me that competition of buyers may be and very often is in the market competition between people who have themselves different objects in buying, but the value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

On these grounds I entirely agree with the judgment written by my brother Avory as laying down the principles upon which the arbitrator should be guided in this case.

Judgment accordingly.

Solicitors for claimant: *Flux, Leadbitter & Neighbour, for C. Alderson, Morpeth.*

Solicitor for North Eastern Railway Company: *R. F. Dunnell.*

J. F. C.

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[IN THE COURT OF APPEAL.]

LONDON COUNTY COUNCIL *v.* ALLEN AND OTHERS.

[1911 L. 1634.]

Covenant—Restrictive Covenant—Covenant restricting User of Land—Covenant not running with the Land at Law—Covenantee having no Adjoining Land—Sale of Land by Covenantor—Purchaser having Notice of Restrictive Covenant—Right of Covenantee to enforce Covenant against Purchaser.

An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of *Tulk* v. *Moxhay* (1848) 2 Ph. 774 does not apply.

The owner of certain land in the county of London applied to the plaintiffs, the London County Council, under s. 7 of the London Building Act, 1894, for their sanction to his laying out a new street on the land. The plaintiffs agreed to give their sanction on condition that the owner entered into a covenant not to build on a plot of land which lay across the end of the proposed street, so as to afford facilities for the continuation of the proposed street. The owner accordingly executed a deed whereby he covenanted with the plaintiffs for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land into whosesoever hands the same might come, not to erect or cause or permit to be erected upon the plot any building, structure, or other erection without the plaintiffs' consent. The plaintiffs did not possess nor were they interested in any neighbouring land for the benefit of which the covenant was imposed. It was admitted that the covenant did not run with the land at law. The owner subsequently sold the plot to the defendant who had notice of the restrictive covenant. The defendant proceeded to build houses on the land without the plaintiffs' consent:—

Held, that the plaintiffs were not entitled to enforce the covenant against the defendant, who was the assignee of the covenantor.

Catt v. *Tourle* (1869) L. R. 4 Ch. 654 and *Luker* v. *Dennis* (1877) 7 Ch. D. 227 considered.

APPEAL from the judgment of Avory J. at the trial without a jury of an action for breach of a covenant dated January 24, 1907.

In November, 1906, the defendant M. J. Allen, who was a builder, applied to the plaintiffs under s. 7 of the London

Building Act, 1894 (57 & 58 Vict. c. ccxiii.), for their sanction to form and lay out on certain land a new street, called Galloway Road, running from south to north, and a new street at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The plaintiffs, by their Building Act Committee, gave their sanction on condition that the applicant entered into a deed of covenant not to erect any building, structure, or other erection on two plots of land coloured green on the plan, the object being to afford facilities for the continuation of the proposed streets. Accordingly by an indenture dated January 24, 1907, and made between the plaintiffs and the defendant M. J. Allen (therein called the applicant), the latter entered into the following covenant: "The applicant doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan, without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The portions coloured green were two, namely, plot 1, being a continuation to the westward of Dunraven Street, and plot 2, being a continuation to the northward of Galloway Road. M. J. Allen was erroneously described in the deed as the owner in fee simple of the land, whereas at that date he had only an option to purchase it. (1)

With regard to plot 1, this plot was with certain other land conveyed to M. J. Allen in fee simple on July 3, 1908. On the same day he conveyed it together with other property to one Willcocks by way of mortgage as security for an advance. On

(1) No point was made upon this in the Court of Appeal, and M. J. Allen was treated as the owner of the land at the date of the covenant.

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August 1, 1911, the mortgage debt due to Willcocks was paid off, and Willcocks, with the concurrence of M. J. Allen, conveyed the land to the defendant Emily Allen, the wife of M. J. Allen, in fee simple freed and discharged from the mortgage. Meanwhile, in July, 1911, Emily Allen commenced to build and completed three houses on the plot, and on October 9, 1911, she conveyed the plot with the houses thereon to the defendant Norris in fee simple by way of mortgage as security for an advance. On August 5, 1911, the present action was brought against the defendant M. J. Allen. Emily Allen was added as a defendant on October 31, 1911, and subsequently Norris was also added as a defendant.

With regard to plot 2 the defendant M. J. Allen erected a wall, one brick thick and six feet high, on it at the northern end of Galloway Road, and he contended that this wall was not a "building, structure, or other erection" within the meaning of the covenant, and that it was erected solely for the purpose of protecting persons using the road, as the land at this point had a sharp fall in the surface of the ground.

The plaintiffs claimed as against the Allen defendants (1.) a declaration that neither M. J. Allen nor Emily Allen was entitled to erect or place or cause to be erected or placed any building, structure, or other erection upon either of the plots; (2.) an order directing M. J. Allen or alternatively Emily Allen to pull down and remove the houses erected on plot 1; (3.) an order directing M. J. Allen to pull down and remove the wall erected on plot 2; (4.) an injunction restraining M. J. Allen or alternatively Emily Allen from erecting, &c., any building, &c., upon plot 1, and a similar injunction against M. J. Allen as to plot 2; (5.) damages. The plaintiffs claimed as against the defendant Norris (1.) a declaration that he was not entitled to retain upon plot 1 the three houses or any other building, structure, or other erection; (2.) an order directing him to pull down and remove or to concur with the Allen defendants in pulling down and removing the houses.

The defendants Norris and Emily Allen pleaded (so far as material) (1.) that each of them was, as purchaser and mortgagee of plot 1 respectively, a purchaser for value without notice,

and acquired the legal estate and title therein through Willcocks, who was himself a purchaser for value without notice of the deed of covenant; (2.) that the statement of claim disclosed no cause of action against them. The contention upon this second plea was that, assuming that the defendants had notice of the covenant, inasmuch as the plaintiffs neither owned nor were interested in any adjoining or neighbouring land for the protection or benefit of which the covenant was imposed, the defendants, as derivative owners of plot 1, were not bound by the covenant.

It was admitted that the covenant did not run with the land at law.

With regard to plot 1, Avory J., upon the first plea, was not satisfied that Emily Allen had not notice of the restrictive covenant, and he came to the conclusion that Norris and Willcocks had constructive notice of the covenant. Upon the second plea he held that, having regard to the powers vested in the plaintiffs under ss. 7 and 9 of the London Building Act, 1894, the contention failed. He declined, however, in the circumstances, in the exercise of his discretion, to grant a mandatory injunction to pull down the houses, and he gave judgment for the plaintiffs as against the defendants M. J. Allen and Emily Allen for 40*s.* nominal damages and the costs of the action, and he gave judgment for the defendant Norris and ordered him to pay his own costs, giving him leave to appeal on the question of costs.

With regard to plot 2 the learned judge held that the wall was a "structure" or "erection" within the meaning of the covenant, and made an order against M. J. Allen to pull down and remove the wall.

All the defendants appealed.

Upon the appeal of the defendants Norris and Emily Allen the point of law was argued first, as to whether, assuming that they had notice of the restrictive covenant, the covenant was enforceable against them.

W. H. Cozens-Hardy, K.C., and *S. C. N. Goodman*, for the defendant Norris. The plaintiffs are not owners or occupiers of

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or otherwise interested in any land in the neighbourhood of plot 1 for the protection or benefit of which the restrictive covenant of January 24, 1907, was entered into by the defendant M. J. Allen. Norris is the owner of the legal estate in plot 1, deriving his title thereto through Emily Allen and Willcocks, the latter of whom derived the legal estate from M. J. Allen. Assuming for the purposes of this point that Norris had notice of the covenant when he acquired the legal estate in plot 1, inasmuch as the covenantees, the plaintiffs, had no land in the neighbourhood for the protection or benefit of which the covenant was entered into, they cannot enforce the covenant against Norris, who was not a party to the deed of covenant, but who derived title from the covenantor. It is not suggested on behalf of the plaintiffs that the covenant runs with the land. The plaintiffs rely upon the equitable doctrine laid down in *Tulk* v. *Moxhay*. (1) Lord Cottenham in that case decided that a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding on subsequent purchasers at law. That doctrine was there based upon the covenant being a burden on the conscience of the assignee of the land who had notice of it. Subsequent cases have placed this doctrine on a different basis. In *London and South Western Ry. Co.* v. *Gomm* (2) Jessel M.R., referring to *Tulk* v. *Moxhay* (1), said that "the doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (3) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light . . . . The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was

(1) 2 Ph. 774.
(2) (1882) 20 Ch. D. 562, at p. 583.
(3) (1583) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.

freed from the burden." Therefore the restrictive covenant is a burden on the land imposed for the benefit of some other land of the covenantee. The doctrine does not rest on notice, because, in the first place, if it did, it would apply to goods, and it clearly does not: *Taddy & Co.* v. *Sterious & Co.* (1); *McGruther* v. *Pitcher* (2); *National Phonograph Co. of Australia* v. *Menck* (3); and, in the second place, the covenant can be enforced against a person taking the equitable estate without notice of the covenant. Notice only becomes material, as Jessel M.R. said in *London and South Western Ry. Co.* v. *Gomm* (4), "to avoid the effect of the legal estate." In *In re Nisbet and Potts' Contract* (5) the Court of Appeal affirmed the view of Jessel M.R. and held that a restrictive covenant is in the nature of a negative easement, the covenant binding the land in equity. A negative easement requires both a servient and a dominant tenement: *Rangeley* v. *Midland Ry. Co.* (6) Therefore the covenant is in the nature of a negative easement and requires both a servient and a dominant tenement. The plaintiffs neither own nor possess land affected by this covenant, and therefore there is no dominant tenement. It is a personal covenant, which does not bind the covenantor's assigns. A covenant restrictive of the user of land is only enforceable against an assignee of the covenantor where it is imposed for the protection of other land: *Rogers* v. *Hosegood* (7); *Formby* v. *Barker* (8); *Millbourn* v. *Lyons.* (9) A right of way appendant to a house or land cannot be granted away, or made in gross; for no one can have such a way but he who has the land to which it is appendant; and if a way be granted in gross, it is personal only, and cannot be assigned: *Ackroyd* v. *Smith.* (10) The covenant therefore in the present case is merely a personal covenant, as there is no land to which it is annexed or for the benefit of which it was entered into.

(1) [1904] 1 Ch. 354.
(2) [1904] 2 Ch. 306.
(3) [1911] A. C. 336, at p. 347.
(4) 20 Ch. D. at p. 583.
(5) [1905] 1 Ch. 391; [1906] 1 Ch. 386.
(6) (1868) L. R. 3 Ch. 306, at p. 310.
(7) [1900] 2 Ch. 388.
(8) [1903] 2 Ch. 539.
(9) [1914] 1 Ch. 34; [1914] 2 Ch. 231.
(10) (1850) 10 C. B. 164, at p. 188.

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Avory J. considered that under ss. 7 and 9 of the London Building Act, 1894, the plaintiffs had such an interest in land for the benefit of which the covenant was imposed as entitled them to maintain the action. But they had no estate or interest in land; they had only certain powers of interfering with persons who owned land. The defendant Norris is therefore entitled to succeed in the action, and the case of the defendant Emily Allen stands in this respect upon the same footing. [*Renals* v. *Cowlishaw* (1) was also referred to.]

W. H. Cozens-Hardy, K.C., and *Chartres*, for Emily Allen, adopted the same arguments.

Dickens, K.C., and *F. F. Daldy*, for the plaintiffs. The defendants Norris and Emily Allen, assuming for the purpose of this point that they had notice of the restrictive covenant, are bound by the covenant even though the plaintiffs, the covenantees, do not own or possess any land for the benefit of which the covenant was imposed. The plaintiffs do not contend that the covenant runs with the land at law. The principle of *Tulk* v. *Moxhay* (2) is that a person who acquires the legal estate in land from the covenantor with notice of a covenant restricting its user is bound in equity by the covenant. The burden of the covenant in such a case passes with the land in equity. In order to enforce the covenant against such a person there must be some person entitled to the benefit of it. Usually that is a person who possesses some adjoining land for the benefit of which the covenant was imposed; but that is not essential. The covenantee himself can always sue. It is not necessary in the present case to consider whether the assignee of the covenantees could sue, because here the plaintiffs are the covenantees. It may be that the benefit of the covenant is personal to them. The question here is as to the burden of the covenant. Lord Cottenham puts the doctrine on the broad ground that it would be inequitable to allow a purchaser of the land with notice of the covenant to use the land contrary to the covenant. It is just as inequitable to allow him to do so if the covenantee does not possess any neighbouring land. It may be that the purchaser of the land paid less for it owing to the restrictive covenant, and it would be

(1) (1879) 9 Ch. D. 125; 11 Ch. D. 866. (2) 2 Ph. 774.

inequitable if it did not bind him. An equitable charge on land will bind an equitable assignee of the land whether he has notice of it or not, and a person who takes the legal estate with notice cannot set up the legal estate to get rid of the charge. That was well-known law when *Tulk* v. *Moxhay* (1) was decided. That case decided that a mere agreement affecting the land in equity came within this doctrine of an equitable charge. If so, the doctrine cannot be confined to a case where the covenantee possesses adjoining land. The true analogy is not to a negative easement which requires a servient and dominant tenement, as Jessel M.R. seems to have thought in *London and South Western Ry. Co.* v. *Gomm* (2), but to an equitable charge on land, which requires no land to support it. It may be treated as analogous to a covenant running with the land. In *Gomm's Case* (2) for the first time, by treating it as analogous to a negative easement, undue prominence was given to the supposed necessity of the covenantee having some land for the benefit of which the covenant was imposed. In *Formby* v. *Barker* (3) Vaughan Williams L.J. expressed the opinion that, as the covenant had not been entered into for the benefit of any land of the covenantee, it could not be enforced by the administratrix of the covenantee against an assignee of the covenantor. He was there discussing the right of the administratrix of the covenantee to sue on the covenant, that is to say, to take the benefit of it, and not whether the burden of the covenant passed to an assignee of the covenantor. This is made clear by the judgments of Romer and Stirling L.JJ. in the same case. In *In re Nisbet and Potts' Contract* (4) Farwell J. said (at p. 397) that the equity "stands on the same footing with and is completely analogous to an equitable charge on real estate"; and (at p. 398) that "the person entitled to the benefit of the restrictive negative covenant over Blackacre has an equitable interest in Blackacre, and that such interest has the same nature and qualities as any other equitable interest in land in respect of priority, notice, and the like." That judgment was affirmed in the Court of Appeal (5) where Romer L.J. said (at

(1) 2 Ph. 774.
(2) 20 Ch. D. 562, at p. 583.
(3) [1903] 2 Ch. 539, at p. 552.
(4) [1905] 1 Ch. 391.
(5) [1906] 1 Ch. 386.

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p. 405) that the negative covenant "binds the land in equity,"—though no doubt Collins M.R. and Romer L.J. quote Sir George Jessel's observations in *London and South Western Ry. Co.* v. *Gomm* (1) with approval. *De Mattos* v. *Gibson* (2), *Catt* v. *Tourle* (3), and *Luker* v. *Dennis* (4) all shew that a restrictive covenant is enforceable on the ground of notice, though the covenantee has no land for the protection of which it was imposed. *Luker* v. *Dennis* (4) was referred to with approval by Scrutton J. in *Wilkes* v. *Spooner*. (5) In *Fairclough* v. *Marshall* (6) Cotton L.J. said: "This suit is not brought to enforce a covenant, but on the ground that the defendant, having purchased land with notice of restrictions as to its use, is not in a position to use it in violation of those restrictions; and any one entitled to have the benefit of the restricting covenants may come to a Court of Equity to restrain the defendant, not on the ground that he is breaking a covenant which runs with the land, but on the ground that he is dealing with the land inequitably. And the plaintiff has an interest in the performance of the covenant." That places the doctrine on its true ground. In *Clegg* v. *Hands* (7) Cotton L.J. reaffirmed that as the true basis of the doctrine laid down in *Tulk* v. *Moxhay*. (8) In *Earl of Zetland* v. *Hislop* (9), which was an appeal from the Court of Session in Scotland, Lord Selborne L.C. said that "Lord Young's view, that a restrictive condition, to bind a singular successor, must create some known or lawful servitude for the benefit of some dominant tenement, converts that into a rule which seems to me to be (at best) an imperfect analogy." The plaintiffs have an interest in enforcing this covenant. They have no proprietary interest, but they have, as the public authority, a strong interest in seeing that this plot of land is kept open for the extension of the street. They represent the public in general and the owners of the neighbouring land in particular. The judgment of Avory J. on this point was therefore right. [*Stokes* v. *Russell* (10), *Attorney-General* v. *Biphosphated*

20 Ch. D. 562, at p. 583.
(2) (1858) 4 De G. & J. 276, at p. 282.
(3) L. R. 4 Ch. 654.
(4) 7 Ch. D. 227.
(5) [1911] 2 K. B. 473, at p. 479.
(6) (1878) 4 Ex. D. 37, at p. 48.
(7) (1890) 44 Ch. D. 503, at p. 519.
(8) 2 Ph. 774.
(9) (1882) 7 App. Cas. 427, at p. 446.
(10) (1790) 3 T. R. 678.

Guano Co. (1), and *Osborne* v. *Bradley* (2) were also referred to.]

S. C. N. Goodman in reply. The doctrine as laid down in *Tulk* v. *Moxhay* (3) proceeded upon the ground that the conscience of the assignee with notice was bound. That ground was recognized in subsequent cases down to *London and South Western Ry. Co.* v. *Gomm* (4), where the necessity for notice was denied except for the purpose of avoiding the effect of the legal estate, and the doctrine was based on the analogy of a negative easement. That analogy has been accepted since that time: see *Formby* v. *Barker* (5), *In re Nisbet and Potts' Contract* (6), and *Millbourn* v. *Lyons.* (7) Since those last three decisions of the Court of Appeal *Catt* v. *Tourle* (8) and *Luker* v. *Dennis* (9) can no longer be treated as good law. The restrictive covenant is not a charge upon the land: *Noakes & Co.* v. *Rice.* (10) In *Earl of Zetland* v. *Hislop* (11) Lord Selborne referred to *Catt* v. *Tourle* (8) without expressing approval of it.

Chartres, for the defendant M. J. Allen. (12)

Cur. adv. vult.

May 28. BUCKLEY L.J. read the following judgment:—This action is brought by the London County Council upon an indenture dated January 24, 1907, made between the defendant Morris Joseph Allen of the one part and the London County Council of the other part, claiming certain mandatory injunctions and damages for breach of a covenant contained in that indenture. Before the date of the execution of the deed the defendant M. J. Allen had applied to the London County Council for their permission under s. 7 of the London Building Act, 1894, to his laying out a certain new road, called Galloway Road, running from south

(1) (1879) 11 Ch. D. 327.
(2) [1903] 2 Ch. 446.
(3) 2 Ph. 774.
(4) 20 Ch. D. 562.
(5) [1903] 2 Ch. 539.
(6) [1906] 1 Ch. 386.
(7) [1914] 2 Ch. 231.
(8) L. R. 4 Ch. 654.
(9) 7 Ch. D. 227.
(10) [1902] A. C. 24, at pp. 32, 35.
(11) 7 App. Cas. 427, at p. 447.
(12) It is not considered necessary to report the arguments urged on behalf of M. J. Allen either in regard to plot 1 or plot 2, as no point of law was involved in them. They are sufficiently noticed in the judgments.

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to north, and a further small portion of road at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The London County Council gave their permission upon the terms, amongst other things, that this defendant should enter into a certain deed of covenant, and that was the deed of January 24, 1907. The covenant in question was as follows: "The applicant" (that is to say, the defendant M. J. Allen) "doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The deed recited (but contrary to the fact) that the applicant was the owner in fee simple of the land in question. He was not. He had at the date of this deed of covenant merely an option of purchase, which might or might not result in his becoming owner of the land. The portions coloured green were two, namely, plot No. 1, being the continuation of Dunraven Street to the west of Galloway Road, and plot No. 2, being the continuation of Galloway Road to the north of Dunraven Street. It is necessary to deal with these two plots separately.

First as regards plot No. 1. On July 3, 1908, this was conveyed to the defendant M. J. Allen in fee. On the same day he mortgaged it with other land to one Willcocks to secure a sum of 3600*l.* On August 1, 1911, the mortgage was redeemed, and Willcocks with the concurrence of Allen conveyed the land discharged from the incumbrance to the defendant Emily Allen in fee. On October 9, 1911, Mrs. Allen charged the land together with the three messuages then recently erected thereon to the defendant Norris in fee by way of mortgage. In the interval,

namely, in July, 1911, Mrs. Allen built on plot No. 1 and completed by the end of that month three houses. The writ in this action was issued on August 5, 1911.

By virtue of ss. 7 and 9 of the London Building Act, 1894, the London County Council have certain powers of control over land which the owner proposes to form or lay out in streets. But they have no estate or interest in such land. The plaintiffs at the date of the deed of covenant had no estate or interest in any land adjoining or in any manner affected by the observance or non-observance of the covenant contained in the deed. Under these circumstances the defendants Mrs. Allen and Norris, who were not covenanting parties, contend upon this appeal that as matter of law, assuming that there has been a breach of the covenant contained in the deed of January 24, 1907, and assuming (although as matter of separate contention they deny it as a fact) that they had notice of that covenant, the plaintiffs cannot as against them maintain any action upon the covenant contained in the deed. The short proposition is that as matter of law a derivative owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, is not bound by the covenant even if he took with notice of its existence if the covenantee has no land adjoining or affected by the observance or non-observance of the covenant. I proceed to examine how the law upon this point stands upon the authorities.

The respondents do not contend that the covenant here in question runs with the land. It is the better opinion, and in *Austerberry* v. *Oldham Corporation* (1) the Court of Appeal by way of opinion and not of decision held, that the burden of a covenant, not involving a grant, never runs with the land at law except as between landlord and tenant. Cotton L.J. at p. 776 said: "In order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee." The relation of landlord and tenant did not in the present case subsist between the plaintiffs, the covenantees, and M. J. Allen, the covenantor. Under these circumstances the plaintiffs admit that this covenant did not run with the land at law. As between the covenantee and the owner

(1) (1885) 29 Ch. D. 750.

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deriving title under the covenantor there is no privity of contract, and the law is that it is only where there is privity of estate between landlord and tenant that the burden of a covenant will run with the land. Ownership of land both by covenantor and covenantee must exist in order that *Spencer's Case* (1) shall apply, and that the covenant shall run with the land. But it does not follow that the covenantee is without remedy where the covenant does not run with the land. *Tulk* v. *Moxhay* (2) established that as between the grantor of a restrictive covenant affecting certain land and the owner of adjoining land the covenantee may in equity enforce the covenant against the derivative owner taking with notice. The reasoning of Lord Cottenham's judgment in *Tulk* v. *Moxhay* (2) is that if an owner of land sells part of it reserving the rest, and takes from his purchaser a covenant that the purchaser shall use or abstain from using the land purchased in a particular way, that covenant (being one for the protection of the land reserved) is enforceable against a sub-purchaser with notice. The reason given is that, if that were not so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. If the vendor has retained no land which can be protected by the restrictive covenant, the basis of the reasoning of the judgment is swept away. In *Haywood* v. *Brunswick Permanent Benefit Building Society* (3) the Court of Appeal declined to extend the doctrine of *Tulk* v. *Moxhay* (2) to covenants other than restrictive covenants. They rejected the doctrine that, inasmuch as the defendants took the land with notice of the covenants, they were bound in equity to perform them. That therefore is not the principle upon which the equitable doctrine rests. In the present case we are asked to extend the doctrine of *Tulk* v. *Moxhay* (2) so as to affirm that a restrictive covenant can be enforced against a derivative owner taking with notice by a person who never has had or who does not retain any land to be protected by the restrictive covenant in question. In my opinion the doctrine does not extend to that case. The doctrine is that a covenant not running

(1) 5 Rep. 16a; 1 Sm. L. C., 7th ed., p. 55.

(2) 2 Ph. 774.

(3) (1881) 8 Q. B. D. 403.

with the land, but being a negative covenant entered into by an owner of land with an adjoining owner, binds the land in equity and is enforceable against a derivative owner taking with notice. The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant. The fact of notice is in that case irrelevant.

The particular equity recognized in *Tulk* v. *Moxhay* (1) has been said to be analogous to an equitable charge upon land subsisting in the owner of the adjoining land, or to a negative easement enjoyed, not in gross, but by the adjoining land over the land to which the covenant relates. It arises from the possession by the covenantee of land enjoying the benefit of the negative covenant coupled with notice of the existence of the covenant. In *London and South Western Ry. Co.* v. *Gomm* (2) Sir George Jessel says: "The doctrine of *Tulk* v. *Moxhay* (1), rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (3) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* (1) was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement." At p. 587 Lindley L.J. says: "The first thing therefore the plaintiffs must shew is, upon what legal principle the defendant is bound by a contract into which he did not enter . . . . Upon what principle is it that he is bound in equity? It is said that he is bound in equity

(1) 2 Ph. 774.
(2) 20 Ch. D 62, at p. 583.
(3) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.

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because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in *Haywood* v. *Brunswick Permanent Benefit Building Society* (1), and because it was sought there to extend the doctrine of *Tulk* v. *Moxhay* (2) to a degree which was thought dangerous, considerable pains were taken by the Court to point out the limits of that doctrine."

In *In re Nisbet and Potts' Contract* (3) this view of the matter is I think accepted, and in *Formby* v. *Barker* (4) and *Millbourn* v. *Lyons* (5) (since affirmed by the Court of Appeal (6)) that view was, I think, definitely accepted by the Court of Appeal. In *Formby* v. *Barker* (4) the question arose between the assign of the covenantee and the derivative owner deriving title under the covenantor. So much of the judgment as relates to derivative title in the plaintiff is not pertinent to the present case. The London County Council have never assigned. They are original not derivative owners of the benefit of the easement. But the case is directly in point as regards the right of a proper plaintiff to sue the owner deriving title under the covenantor. There are interlocutory observations made during the argument which are important; for instance, at p. 543 Romer L.J., referring to *Spencer's Case* (7) and to *Stokes* v. *Russell* (8), says: "In equity you could only sue on such a covenant in respect of some land"; and Vaughan Williams L.J.: "The plaintiff has no estate for the benefit of which the covenant was entered into." Vaughan Williams L.J. in the course of his judgment, at p. 549, pointed out that the plaintiff's testator had conveyed his whole estate, and had no contiguous estate which would be benefited by the covenant, and at p. 550, after pointing out that the

(1) 8 Q. B. D. 403.
(2) 2 Ph. 774.
(3) [1905] 1 Ch. 391; [1906] 1 Ch. 386.
(4) [1903] 2 Ch. 539.
(5) [1914] 1 Ch. 34.
(6) [1914] 2 Ch. 231.
(7) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.
(8) 3 T. R. 678.

vendor had sold all his land, he goes on to say: "It becomes necessary therefore to ascertain whether the principle of *Tulk* v. *Moxhay* (1) applies to a case in which the vendor sells his whole estate. I have not been able to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, that the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance. It is a covenant which cannot run with the land either at law or in equity, and therefore the burden of the covenant cannot be enforced against an assignee of the purchaser." He then goes on to negative the proposition that the doctrine is based upon obligations on the conscience of the purchaser taking with notice of the covenant, quoting Collins L.J. in *Rogers* v. *Hosegood* (2): "The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion." There is a further passage, at p. 552, which I do not read at length. Romer L.J. gave judgment principally upon the question of the effect of the fact that the plaintiff was administratrix of the covenantee, but he says (at p. 554): "If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object." Stirling L.J. agreed with the other members of the Court and dwelt upon the fact that the covenantee was not entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. Upon these judgments, and particularly upon the principal judgment as delivered by Vaughan Williams L.J.,

(1) 2 Ph. 774.

(2) [1900] 2 Ch. 388, at p. 407.

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it seems to me that the Court of Appeal affirmed the view taken by Sir George Jessel that the doctrine of *Tulk* v. *Moxhay* (1) was either an extension of *Spencer's Case* (2), or of the equitable doctrine of negative easements, regarding it as something arising from the relation of two estates, the one to the other. In *Millbourn* v. *Lyons* (3) the decision rests upon a similar view. Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice. I have had the advantage of reading an advance copy of the judgments delivered in the Court of Appeal. They all adopt this view.

On the other hand the decisions of the Court of Appeal in *Catt* v. *Tourle* (4) and of Fry J. in *Luker* v. *Dennis* (5) undoubtedly create a difficulty. In *Catt* v. *Tourle* (4) Selwyn L.J. referred to *Wilson* v. *Hart.* (6) But that is a case upon which the difficulty, as it seems to me, does not arise. The land there was part of a building estate, and it would seem that there were other lands of the covenantee in respect of which the benefit of the covenant might be enjoyed. I do not, it is true, find that that was the case in *Catt* v. *Tourle.* (4) But on the other hand the Court do not seem to have considered and given judgment upon the exact point here raised, namely, whether the covenantee had any land in respect of which the benefit could be enjoyed. The question of fact, whether there was or not ownership of other land, is nowhere mentioned either affirmatively or negatively, and no decision was given upon the point now under consideration. The concluding words of Selwyn L.J.'s judgment are not consistent with later authorities. Upon the general abstract question, whether a person purchasing with such a covenant, as there mentioned, is to be bound by it, the answer must be in the negative. Notwithstanding what was said by Knight Bruce L.J. in *De Mattos* v. *Gibson* (7), it is not true as a general proposition

(1) 2 Ph. 774.
(2) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.
(3) [1914] 1 Ch. 34; 2 Ch. 231.
(4) L. R. 4 Ch. 654.
(5) 7 Ch. D. 227.
(6) (1866) L. R. 1 Ch. 463.
(7) 4 De G. & J. 276, at p. 282.

that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant. This may be illustrated by the cases relating to the sale of chattels, such as *Taddy & Co.* v. *Sterious & Co.* (1) and *McGruther* v. *Pitcher.* (2) The proposition is true only in certain cases, such as *Spencer's Case* (3) and *Tulk* v. *Moxhay.* (4) The passage already quoted from Lindley L.J. in *London and South Western Ry. Co.* v. *Gomm* (5) and the decision in *Haywood* v. *Brunswick Permanent Benefit Building Society* (6) are enough to dispose of this point. In *Luker* v. *Dennis* (7) the covenant related as well to a public-house which was leased by the brewer to the covenanting publican, as also to another public-house which the publican held under a different landlord, and Fry J. held that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant. The point here in question certainly arose, but the point which the learned judge expressly decided was another, namely, that *Keppell* v. *Bailey* (8) had been displaced by *Tulk* v. *Moxhay.* (4) The decision in *Luker* v. *Dennis* (7) was in 1877, and since that date this doctrine has been so examined and developed by *London and South Western Ry. Co.* v. *Gomm* (5), *Austerberry* v. *Oldham Corporation* (9), and quite recently by *Formby* v. *Barker* (10) and *Millbourn* v. *Lyons* (11), that it cannot I think be relied upon as now accurately stating the law. Further, as regards *Catt* v. *Tourle* (12), which was a decision of the Court of Appeal, we are of course bound by that decision, but again that was in 1869, and since that date the decisions to which I have referred seem to me to have recognized and established the principle to which we are bound to give effect, and, as I have already pointed out, the decision in *Catt* v. *Tourle* (12) does not deal with the exact point now in debate. As regards *Clegg* v. *Hands* (13) I do not feel any difficulty. The case was one as between lessor and lessee.

(1) [1904] 1 Ch. 354.
(2) [1904] 2 Ch. 306.
(3) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.
(4) 2 Ph. 774.
(5) 20 Ch. D. at p. 587.
(6) 8 Q. B. D. 403.
(7) 7 Ch. D. 227.
(8) (1834) 2 My. & K. 517.
(9) 29 Ch. D. 750.
(10) [1903] 2 Ch. 539.
(11) [1914] 1 Ch. 34; 2 Ch. 231.
(12) L. R. 4 Ch. 654.
(13) 44 Ch. D. 503.

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Upon the authorities, therefore, as a whole I am of opinion that the doctrine in *Tulk* v. *Moxhay* (1) does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant. The doctrine is either an extension in equity of the doctrine in *Spencer's Case* (2) (in which ownership of land by both covenantor and covenantee is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land. Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.

The appeal of Emily Allen and Norris upon the point of law in my opinion succeeds.

Under these circumstances it is not necessary to determine whether they had notice or not. Upon that question we have not heard the appellants. But if this case should go further, that point will be open to them in the House of Lords.

As regards the defendant M. J. Allen, he is not within the considerations above dealt with. He was the covenanting party. The erection of the three houses was a breach of covenant. The learned judge has refused any injunction but has given nominal damages for the technical breach. He has also given the plaintiffs, as against this defendant, the general costs of the action. The only matter which here requires observation is the question of costs. I will mention this presently.

Secondly as regards plot No. 2, the only defendant concerned in this matter is the defendant M. J. Allen. He contends first that the wall which he erected on this plot was not a building, erection, or other structure within the covenant. The object of the covenant was to secure that plot No. 2 should remain unobstructed so as to be available for the extension of Galloway Road to the north. The wall is an erection which creates such an obstruction. It is, within the literal words of the deed, an erection or structure, and it is within the object of the deed.

(1) 2 Ph. 774. (2) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p 55.

It is to my mind plain that its erection was a breach of the covenant. But further, this defendant says that there was at this place a sharp drop in the surface of the soil, and that a fence was necessary for the protection of the public; that the wall was only a 9-inch wall bonded into the walls on either side of the roadway to prevent it from falling, and was no more than a temporary fence. If this had been the case put forward at the trial there would have been no difficulty in the matter. This defendant might have offered an undertaking to remove this which he says is a mere temporary fence, if and when requested to do so. He did nothing of the sort. He maintained that it was no breach of the covenant, and that he was entitled to maintain it. In this, in my judgment, he was wrong. In the absence of such an undertaking or offer the order to pull down this wall was, I think, rightly made.

As regards the order for costs as against the defendant M. J. Allen, I have felt some doubt whether the costs ought not to have been divided as between the two plots. As regards plot No. 2 the defendant M. J. Allen was wrong, and would have to pay the plaintiffs' costs. As regards plot No. 1 the plaintiffs failed in obtaining the order to pull down for which they asked, and they recovered merely nominal damages. I have doubted whether in respect of this latter part of the action they ought to have costs against the defendant Allen, but I have arrived at the conclusion that the case is not one in which we ought to interfere. The learned judge in his discretion did not think proper to divide the costs as above suggested, and in giving the general costs as against the defendant M. J. Allen I think he was making an order which we ought not to review.

The result is that as against the defendants Emily Allen and Norris the action will be dismissed with costs, including their costs in this Court, and as regards M. J. Allen his appeal will be dismissed with costs.

KENNEDY L.J. read the following judgment:—I have had an opportunity of reading and considering the judgments in this case which have been prepared by Buckley L.J. and Scrutton J. I concur in the conclusions at which they have arrived. I only

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desire to add that, as regards plot No. 1 and the demurrer raised by Mrs. Allen and Mr. Norris to the plaintiffs' claim in regard to that property, I concur because, as the judgments of my colleagues point out, the most recent decisions of this Court, and especially the decision in *Formby* v. *Barker* (1), bind us, I think, so to hold, whatever might be my own opinion if I was not controlled by such recent decisions, but free, in accordance with judicial authority in earlier cases which Scrutton J. has cited in order of date, from *Tulk* v. *Moxhay* (2) down to the year 1882, to treat a restrictive covenant in regard to the use of land as enforceable in equity at the suit of the covenantee, although he may retain no other land which can be affected by the covenant, against an assign of the covenantor who has acquired the land with notice of the restrictive covenant.

SCRUTTON J. read the following judgment:—In this case the London County Council, on January 24, 1907, entered into an indenture with one Morris Joseph Allen, a builder, describing himself as "the owner in fee simple of certain land," by which he "doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan, without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The plots coloured green were two plots intended to be reserved for the making of roads. On plot No. 1, in July, 1911, three houses were built by Mrs. Allen; on plot No. 2 a wall was built by Allen. The London County Council thereupon issued a writ claiming a mandatory injunction to pull down the houses and wall respectively. There-

(1) [1903] 2 Ch. 539. (2) 2 Ph. 774.

upon it was alleged that as to plot No. 1 the legal estate was in one Norris as mortgagee, and the equity of redemption in Mrs. Allen, who had taken title from Mr. Allen and Willcocks, his mortgagee, who had no notice of the restrictive covenant; and it was contended (1.) by way of demurrer that as the London County Council were not neighbouring landowners, or grantors of the plot in question, a covenant by Allen in their favour was only a personal covenant, and could not affect the land when in the hands of assigns of Allen, whether they had notice of the covenant or not. It was said that to affect them the right must be in the nature of a negative easement; that an easement required both a dominant and a servient tenement; and that as the council had no land to which the benefit of the covenant could attach, there could be no dominant tenement, and therefore no negative easement binding on a servient tenement, but only an easement in gross, which did not bind assigns of the land. (2.) It was alleged that the defendants Mrs. Allen and Norris could prove they were purchasers for value of the legal estate without notice of the covenant, and therefore not bound by it. Avory J. found on the second contention as a fact that Mrs. Allen and Norris had not satisfied him they had not notice, actual or constructive, of the covenant. On the first contention he said: "It was contended before me that this restrictive covenant, being in the nature of a negative easement, the action would not lie except at the suit of a covenantee who was at the time of the covenant in possession of land which required protection, and that the plaintiffs were not at the time in possession of any such land. But having regard to the powers vested in the London County Council under ss. 7 and 9 of the London Building Act, 1894, and to the admission made in the argument before me that the conditions imposed in this case were not ultra vires, I think this contention fails." He apparently treated the duty and interest of the county council in the matter of new streets as sufficient to make the covenant bind the land in the hands of assigns from Allen. This Court determined to decide the first contention before hearing argument on the second, and we have now to decide on the first contention.

Counsel on each side agreed that the burden of this covenant

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would not run with the land at law, so as to bind assigns, for the reason stated in the notes to *Spencer's Case* (1) that "there appears to be no authority which has decided, apart from the equitable doctrine of notice" (by which is meant, as hereinafter explained, the doctrine identified with the case of *Tulk* v. *Moxhay* (2)) "that the burden of a covenant will run with land in any case except that of landlord and tenant." This opinion appears to be justified by the judgments of the Court of Appeal in *Austerberry* v. *Oldham Corporation* (3), especially that of Lindley L.J. at p. 781 and of Fry L.J. at p. 784.

The question then is whether it is essential to the doctrine of *Tulk* v. *Moxhay* (2) that the covenantee should have at the time of the creation of the covenant, and afterwards, land for the benefit of which the covenant is created, in order that the burden of the covenant may bind assigns of the land to which it relates. It is clear that the covenantee may sue the covenantor himself, though the former has parted with the land to which the covenant relates: *Stokes* v. *Russell.* (4) To answer the question as to the assigns of the covenantor, and the land in their hands, requires the investigation of the historical growth of the doctrine of *Tulk* v. *Moxhay.* (2) Though the covenantee in that case did hold adjacent land, there is no trace in the judgment of Lord Cottenham of the requirement that the covenantee should have and continue to hold land to be benefited by the covenant. I read Lord Cottenham's judgment as proceeding entirely on the question of notice of the covenant, and on the equitable ground that a man purchasing land with notice that there was a covenant not to use it in a particular way would not be allowed to violate the covenant he knew of when he bought the land. Lord Cottenham states the question, "Whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased," and answers it: "If there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the

(1) 1 Sm. L. C., 11th ed., at p. 88.
(2) 2 Ph. 774.
(3) 29 Ch. D. 750.
(4) 3 T. R. 678.

property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

Up to 1881, when counsel in *Haywood* v. *Brunswick Permanent Benefit Building Society* (1) stated (at p. 405) that *Tulk* v. *Moxhay* (2) had been applied in fifteen cases, I cannot trace, nor could counsel before us discover, that *Tulk* v. *Moxhay* (2) had been based on anything but notice of the covenant by the assignee. In the case cited, in which the Court of Appeal refused to extend the doctrine to an affirmative covenant to repair, Lindley L.J. said (at p. 410): "The result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice." Brett L.J. said (at p. 408): "That case" (*Tulk* v. *Moxhay* (2)) "decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced." Cotton L.J., after citing Lord Cottenham that "No one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased," said (at p. 409): "This lays down the real principle that an equity attaches to the owner of the land." Meanwhile in *De Mattos* v. *Gibson* (3), in 1858, Knight Bruce L.J. had put the principle as applying to all property thus: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller," resting the matter on knowledge of the previous contract, that is notice. In *Catt* v. *Tourle* (4), in 1869, A., a brewer, had sold land to B. with a covenant that he should have the exclusive

(1) 8 Q. B. D. 403.
(2) 2 Ph. 774.
(3) 4 De G. & J. 276, at p. 282.
(4) L. R. 4 Ch. 654.

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right to supply all ale consumed in any public-house erected on the land. C., with knowledge of the covenant, bought part of the land from B., erected a public-house on it, but did not take his beer from A. The Court of Appeal, citing *De Mattos* v. *Gibson* (1), restrained C., treating the covenant as negative, and resting the judgment on the ground (2) that C. "clearly purchased with notice of the present covenant, and . . . . cannot be heard to say that he is now entitled to disregard its provisions." It is to be noted that A. is not stated to have owned any land, and as he might brew beer anywhere, the covenant could not relate to any particular land of his.

In *Luker* v. *Dennis* (3), in 1877, A., a brewer, granted a lease to B. of public-house X., with a covenant that B. should take from him all beer consumed not only in X., but also in public-house Y., which B. held of a different landlord. C. took public-house Y. from B. with notice of the covenant, and did not take his beer from A. It was argued before Fry J. that notice was not enough unless the covenantee had some interest in the land bound by the covenant, either as vendor or lessor. That learned judge refused to accede to this argument, and, citing *De Mattos* v. *Gibson* (1) and *Catt* v. *Tourle* (4), granted the injunction, giving, as he said (at p. 236), "effect to the equitable doctrine of notice." I think up to this point the doctrine had been rested on notice, and did not depend on the covenantee having land in favour of which the covenant was created.

The first departure from this position occurs in the judgment of Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (5) in March, 1882. The contract to be enforced was one to reconvey land on notice, and clearly therefore an affirmative covenant, and, as such, within the doctrine laid down in *Haywood's Case* (6) in December, 1881, excluding such contracts from the doctrine of *Tulk* v. *Moxhay*. (7) The Court also held that the sale was ultra vires the railway company, and void for remoteness.

(1) 4 De G. & J. 276, at p. 282.
(2) L. R. 4 Ch. at p. 657.
(3) 7 Ch. D. 227.
(4) L. R. 4 Ch. 654.
(5) 20 Ch. D. 562, at p. 583.
(6) 8 Q. B. D. 403.
(7) 2 Ph. 774.

But Sir George Jessel, holding that the covenant did, but for its being ultra vires and void, create an interest in the land, discussed the nature of the right. He said: "The doctrine of that case,"—*Tulk* v. *Moxhay* (1)—"rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (2) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* (1) was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." It will be noticed that the equitable estate or burden was held to arise independent of notice; which I respectfully think was contrary to the previous authorities; and that in Sir George Jessel's view it did not matter whether it was by analogy to covenants running with the land, or on analogy to an easement. Both, however, had this in common, that some land belonging to the covenantee was required, either for him to let, that the covenant might run with the land, or as a dominant tenement for the easement, an easement in gross being merely a personal right. Whether the "analogy" or "extension" spoken of by Sir

(1) 2 Ph. 774. (2) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.

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George Jessel involved this condition as to land is not discussed. The other members of the Court did not discuss the foundation of *Tulk* v. *Moxhay* (1), though Lindley L.J. seems again to put it on notice. *Catt* v. *Tourle* (2)—a decision of the Court of Appeal—and *Luker* v. *Dennis* (3) were not cited to the Court.

In 1890, in *Clegg* v. *Hands* (4) the doctrine of *Tulk* v. *Moxhay* (1) was applied by the Court of Appeal to a case somewhat similar to *Catt* v. *Tourle* (2), without any discussion of Sir George Jessel's explanation of the doctrine, the case, however, being one of landlord and tenant. In *Rogers* v. *Hosegood* (5), in 1900, A., the mortgagor, and B., the mortgagee, of some land, conveyed plot X. to C., who entered into a restrictive covenant with the mortgagor only, who had not the legal estate in the land. This plot X. was purchased by D. with notice of the restrictive covenant. A. also conveyed some of his adjoining land, plot Y., to E., who had no notice of the restrictive covenant on plot X. D. then proceeded to erect buildings on plot X. said to contravene the restrictive covenant. E. then sued D. to enforce the covenant. Farwell J. (at p. 394) treated D. as obviously bound by the covenant. "He is obviously bound, by reason of notice, whether the covenant as regards him runs with the land or not." (This expression of the reason why he is bound does not harmonize with the later decisions, but does, I think, with all the earlier ones.) And he held that the benefit of the covenant passed to E. at law running with his land. There was an appeal. In the course of the argument of Mr. Haldane, Q.C., that the covenant ran with the land in equity, Rigby L.J. said: "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it"; a remark again which seems to me to harmonize with the earlier authorities. The Court held that the benefit of the covenant did not run with the land at law, as the covenantee, the mortgagor, had no legal interest in the land, but did run with the land in equity, as there was a clear intention to benefit that land, and equity would regard

(1) 2 Ph. 774.
(2) L. R. 4 Ch. 654.
(3) 7 Ch. D. 227.
(4) 44 Ch. D. 503.
(5) [1900] 2 Ch. 388.

the mortgagor as the owner, and, citing Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (1), continued at p. 405: "These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant." This makes land bound or benefited by the covenant essential to bind or benefit assigns. The judgment proceeds: "These authorities"—*Renals* v. *Cowlishaw* (2) and *Child* v. *Douglas* (3)—"establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion." This again appears to me to treat land as essential, on both sides of the covenant, to affect assigns whether of the benefit or burden.

This view seems to me to be adopted also by the Court of Appeal in *Formby* v. *Barker*. (4) A., the owner of land, conveyed

(1) 20 Ch. D. at p. 583.
(2) 9 Ch. D. 125, at p. 130.
(3) (1854) Kay, 560, at p. 571.
(4) [1903] 2 Ch. 539.

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all his land with a restrictive covenant against its being used in particular ways to B., who assigned it to C., who had notice of the covenant. A. died; C. began to use the land in a way forbidden by the covenant; the administratrix of A., who had no land, sued C. It was argued that the right to enforce such a covenant depended entirely on notice; members of the Court suggested in argument that the benefit of the covenant, if not pursued by the covenantee, must follow some land; and this was the argument put forward for the defendant, that without land the covenant was only one in gross. Romer L.J. asked (at p. 546), "Is there any case in which it has been held that such a covenant purporting to bind land for ever is valid except for the protection of an estate?" and counsel for the plaintiff did not refer him, as they might have done, to *Catt* v. *Tourle* (1) and *Luker* v. *Dennis* (2), in neither of which cases had the plaintiff an estate, but only a trade. In the judgments, Vaughan Williams L.J. points out that A. conveyed his whole estate and had no contiguous estate which would be benefited by the covenant in question. I refer to, but do not read, the Lord Justice's judgment on pp. 550—552, but it seems to me, adopting the language of Collins L.J. in *Rogers* v. *Hosegood* (3), to negative the view that the doctrine of *Tulk* v. *Moxhay* (4) depends on notice, and to make it depend, where there is no contractual privity, on a "relation of dominancy and serviency of lands" (p. 552), and to fail if the covenantee or his assign has no land to which the covenant relates. Romer L.J. thought that the assign of a covenantee could not sue unless the covenant related to or concerned some ascertainable property belonging to him or in which he was interested. Stirling L.J., while saying that different considerations would apply if the covenantee sued, a remark which leaves it doubtful whether he thought the covenantee could, though owning no land, have sued assigns of the land restricted, rested his judgment on the ground that damages, not injunction, would be the appropriate remedy.

The doctrine was again considered, and I think further

(1) L. R. 4 Ch. 654.
(2) 7 Ch. D. 227.
(3) [1900] 2 Ch. 388, at p. 407.
(4) 2 Ph. 774.

developed, in *In re Nisbet and Potts' Contract* (1) in 1905. The owner of certain land had entered into restrictive covenants with the vendor, who owned an adjoining estate. A squatter, without notice of these covenants, acquired a title by adverse possession, and sold to A., who did not require a forty years' title, which would have disclosed the restrictive covenants. A. sold to B., who, having reason to believe there were restrictive covenants, declined to complete. B. took out a summons for a declaration that the title was not one which he ought to be compelled to accept. Farwell J. treated the nature of the right of action created under the doctrine of *Tulk* v. *Moxhay* (2) as analogous to an equitable charge on real estate, not depending in any way on notice for its validity, but only defeated by a legal estate acquired for value and without notice. He held therefore that the squatter, though he had no notice and had the legal estate, was bound by the restrictive covenants, as apparently he only took the land subject to the equitable interest in it, and that as the purchaser from the squatter of the legal estate for value would, if he had required a forty years' title, have had notice of the covenants, he had constructive notice and was bound by the covenants. In the Court of Appeal (3) the appellant argued that notice was part of the cause of action, the respondent that the doctrine rested on an interest in land, binding on the land itself, with a dominant and servient tenement. The Court of Appeal adopted the latter argument, and held that the restrictive covenant was an equitable interest in the land, whether the occupier of the land had notice of it or not, unless he had purchased the legal estate for value without notice. They do not expressly refer to the necessity of there being a dominant tenement to enforce the interest, but there was in fact such a dominant tenement in the case.

Lastly, in *Millbourn* v. *Lyons* (4), where a person who had agreed to sell with a restrictive covenant died, and his personal representatives, having sold all their land, conveyed with a similar restrictive covenant, Neville J. enforced the title against a purchaser who knew of the restrictive covenant, and therefore

(1) [1905] 1 Ch. 391.
(2) 2 Ph. 774.
(3) [1906] 1 Ch. 386.
(4) [1914] 1 Ch. 34.

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objected to complete, on the ground that there was no restriction against him, as the vendors, at the date of the covenant, had no land to which the benefit of the covenant could be attached, and the Court of Appeal affirmed his judgment on similar grounds. (1)

I think the result of this long chain of authorities is that, whereas in my view, at the time of *Tulk* v. *Moxhay* (2) and for at least twenty years afterwards, the plaintiffs in this case would have succeeded against an assign on the ground that the assign had notice of the covenant, since *Formby* v. *Barker* (3), *In re Nisbet and Potts' Contract* (4), and *Millbourn* v. *Lyons* (5), three decisions of the Court of Appeal, the plaintiffs must fail on the ground that they have never had any land for the benefit of which this "equitable interest analogous to a negative easement" could be created, and therefore cannot sue a person who bought the land with knowledge that there was a restrictive covenant as to its use, which he proceeds to disregard, because he is not privy to the contract. I think the learned editors of Dart on Vendors and Purchasers, 7th ed., vol. ii., p. 769, are justified by the present state of the authorities in saying that "the question of notice to the purchaser has nothing whatever to do with the question whether the covenant binds him, except in so far as the absence of notice may enable him to raise the plea of purchaser for valuable consideration without notice." If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant. It may be, if the matter is considered by a higher tribunal, that tribunal may see its way to revert to what I think was the earlier doctrine of notice, or at any rate to treat it as co-existing with the later refinement of "an equitable interest analogous to a negative easement" binding on persons who are ignorant of it. The remarks of Lord Selborne in *Earl of Zetland* v. *Hislop* (6) are not favourable

(1) [1914] 2 Ch. 231.
(2) 2 Ph. 774.
(3) [1903] 2 Ch. 539.
(4) [1905] 1 Ch. 391; [1906] 1 Ch. 386.
(5) [1914] 1 Ch. 34; 2 Ch. 231.
(6) 7 App. Cas. 427, at pp. 446, 447.

to the too rigid development or enforcement of the latter alternative; and the observations of Lord Macnaghten (p. 32), Lord Davey (p. 35), and Lord Lindley (p. 36) in *Noakes & Co.* v. *Rice* (1) seem to suggest that the doctrine of *Tulk* v. *Moxhay* (2) may well be reconsidered and put on a proper footing. For I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this Court compel me so to hold.

In my opinion, therefore, the demurrer of Mr. Norris and of Mrs. Allen succeeds. The action against Mr. Norris must be dismissed with costs. I regret that I do not see my way to depriving Mrs. Allen of her costs, as, whatever may be her equitable rights, I am not at all favourably impressed with her conduct as a good citizen. I see no reason for interfering with the judgment against Mr. Allen in respect of plots No. 1 or No. 2, and his appeal must be dismissed with costs.

Appeal of Norris and Emily Allen allowed; appeal of M. J. Allen dismissed.

Solicitor for plaintiffs: *E. Tanner.*

Solicitors for defendant Norris: *Rodgers, Gilbert & Rodgers.*

Solicitors for defendants M. J. Allen and Emily Allen: *Hogan & Hughes.*

(1) [1902] A. C. 24. (2) 2 Ph. 774.

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1914
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SMITH, APPELLANT *v.* INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES, RESPONDENTS.

Revenue—Income Tax—Sched. D—Trade Profits—Deductions—Money exclusively expended for Purposes of Trade—Voluntary Gratuity to retiring Law Reporter—Finding of Fact—Evidence.

The respondents, the Incorporated Council of Law Reporting for England and Wales, were a limited company incorporated under s. 23 of the Companies Act, 1867, with no power to pay any portion of their earnings to their members by way of profits. In 1911 the respondents gave a gratuity of 1500*l.* to one of their reporting staff on his retirement after long service. The payment was not made under any contract between the respondents and the reporter, but it was within the powers conferred by the respondents' memorandum and articles of association, and it was the habit of the respondents, to give gratuities to reporters on retirement after long service. The 1500*l.* was included in the respondents' trading accounts for 1911 as an item of expenditure, and an additional assessment to income tax under Sched. D was in consequence made on the respondents of 500*l.*, i.e., one-third of 1500*l.*, in respect of their profits for that year. On appeal by the respondents to the Commissioners, they held that the 1500*l.* was allowable to the respondents as a business expense in calculating the profits of the year for income tax purposes.

On a case stated by the Commissioners :—

Held, that the question whether the 1500*l.* could be deducted from the respondents' profits as being "money wholly and exclusively laid out or expended for the purposes" of the respondents' business, within the meaning of r. 1 applying to first and second cases in Sched. D, was a question of fact for the Commissioners, and that, as there was evidence to support their finding of fact, their decision was final.

Dictum of Evans P. in *Usher's Wiltshire Brewery* v. *Bruce* [1914] 2 K. B. 891 considered.

CASE stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Lincoln's Inn in the county of Middlesex.

The case was as follows :—

1. At a meeting of the Commissioners held on June 27, 1913, and adjourned for consideration and judgment to July 4, 1913, the Incorporated Council of Law Reporting for England and Wales (hereinafter called the respondents) appealed against an

additional assessment of 500*l.* made upon them for the year ended April 5, 1913, under Sched. D of the Income Tax Acts in respect of their profits.

2. The following facts were found or admitted :—

The respondents were incorporated as a limited company on July 28, 1870, by licence of the Board of Trade under s. 23 of the Companies Act, 1867. Their memorandum of association provides, among other things, as follows :—

"(1.) The name of the association is 'The Incorporated Council of Law Reporting for England and Wales.'"

"(3.) The objects for which the association is established are :—

"1. The preparation and publication . . . . of Reports of Judicial Decisions of the Superior and Appellate Courts in England. . . . .

"3. The continuance (in furtherance of the above objects) of the series of Reports called 'The Law Reports' (now in course of publication by the present Council of Law Reporting).

"4. The doing of all other lawful things as are incidental or conducive to the attainment of the above objects."

"(4.) The income and property of the association whencesoever derived shall be applied solely towards the promotion of the objects of the association as set forth in this memorandum of association, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit, to the persons who at any time are or have been members of the association, or any of them, or to any person claiming through any of them: Provided, that nothing herein shall prevent the payment, in good faith, of remuneration to any editors, reporters, secretaries, officers or servants of the association, or to any member of the association, or other person in return for any services actually rendered to the association."

The articles of association provide, amongst other things, as follows :—

"(5.) The Incorporated Council is established for the purposes expressed in the memorandum of association."

"(13.) The reports shall be prepared by reporters, and, in

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cases where the Incorporated Council shall so direct, shall be under the supervision of editors, and the copyright shall be vested in the Incorporated Council, or in trustees to be named by them."

"(15.) The reporters shall be appointed and removable by the Incorporated Council. They shall be barristers . . . ."

"(16.) All . . . . reporters to be hereafter appointed shall be appointed for a term not exceeding five years, and shall be eligible for reappointment. Their particular duties shall, from time to time, be prescribed by the Incorporated Council, who shall have full power to . . . . adjust or alter their salaries and the mode of payment thereof, ..."

"(21.) The proceeds of the sale of reports and other profits therefrom shall be applied as follows:—

"1. In payment of the current expenses, costs, charges, and other disbursements of the Incorporated Council in the conduct and management of the affairs of the association . . . .

"2. In paying the salaries of the editors and reporters, secretary, and other officers, in such manner as shall from time to time be arranged or agreed upon with them. . . . .

"5. In augmenting the salaries of the editors and reporters, or such of them (if any) as the Incorporated Council shall consider proper to be augmented, or in constituting a reserve fund to meet future contingencies, or in reducing the cost of any publications of the Incorporated Council to subscribers or others, or in such other way as the Incorporated Council in their discretion shall from time to time consider best calculated to improve the system of law reporting, or otherwise to promote the purposes expressed in the memorandum of association."

"(22.) The application of the proceeds of the sale of reports, and other profits therefrom, may, without prejudice to subsisting engagements, be varied as the Incorporated Council shall from time to time determine, or as the course of their operations may from time to time require or render expedient, but so as always strictly to adhere to the rule prescribed by the memorandum of association, that the income and property of the association, whencesoever derived, shall be applied solely towards the

promotion of the objects of the association as set forth in the memorandum of association."

3. Among the reporters appointed by the respondents was a Mr. X.(1) He was appointed as a reporter on their staff in January, 1875. He retired from the service of the respondents after thirty-six years' service on June 3, 1911, and the respondents made him a retiring gratuity of a lump sum of 1500*l.*

The question arising in this case is whether that sum of 1500*l.* is allowable to the respondents as a business expense in calculating their profits for income tax purposes.

4. The respondents have been annually assessed under Sched. D in respect of the profits of their publications, and the first assessment for the year ending April 5, 1913, which was in the sum of 846*l.*, based on the respondents' trading accounts, was computed as follows :—

—	Year ending											
	31st December, 1909				31st December, 1910.				31st December, 1911.			
	£	s.	d.	£ s. d.	£	s.	d.	£ s. d.	£	s.	d.	£ s. d.
Gross receipts	—			23,659 1 7	—			24,618 3 10	—			23,938 3 7
Expenses :—												
Cost of printing, etc.	6,966	10	3		6,711	13	3		9,506	0	10	
Editors, reporters, salaries, etc.	12,788	10	0		14,948	3	10		14,937	14	7	
Office expenses	865	15	4	20,620 15 7	1,776	16	11	23,436 14 0	1,791	16	8	26,235 12 1
Profit for the year	—			3,038 6 0	Profit for the year			1,181 9 10	Loss for the year			2,297 8 6
Payments disallowed :—												
Interest on deposit	140	9	1		200	16	8		189	4	7	
do. do.	25	3	11	165 13 0	44	9	2	245 5 10	17	13	1	206 17 8
Net profit				3,203 19 0	Net profit			1,426 15 8	Net loss			2,090 10 10

Net Profit for the Year ending 31st December, 1909, £3,204
" " " " " " 1910, 1,427—£4,631
" Loss " " " " 1911, 2,091
3)2,540
£846

It was subsequently found by the surveyor of taxes that in the item "Editors, Reporters, Salaries, etc., 14,937*l.* 14*s.* 7*d.*" for the year ending December 31, 1911, was included the sum of 1500*l.* paid to Mr. X. as a retiring gratuity in the circumstances

(1) The name of the reporter was given in the case, but was not mentioned in Court.

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set forth above, and when this fact came to the notice of the surveyor of taxes the additional assessment of 500*l.*, i.e., one-third of the said 1500*l.*, the subject of this appeal, was made.

5. The respondents have eo nomine no pension or superannuation fund in connection with the retirement of members of their reporting staff, nor have such members any legal claim to pension or superannuation allowance. The appointments of reporters are from year to year and are subject to yearly revision. When a reporter is, or has been, placed on the respondents' staff, it is in no way a part of the contract of service that the reporter will be entitled to receive a retiring gratuity. At the same time it has been the habit of the respondents to give a gratuitous pension, or to make a gratuity of a lump sum, to a reporter on retirement after long service.

6. At the hearing of the appeal the respondents contended amongst other arguments:—

(*a*) That the grant made to Mr. X. on his retirement was in the nature of deferred salary, and allowable accordingly as a necessary expense.

(*b*) That though it was provided in effect by the articles of association that the Council were bound not to spend any moneys received except in the furtherance of their business, yet the remuneration of their staff and the increasing of such remuneration were specifically mentioned amongst the objects of expenditure allowable, and the payment to Mr. X. was a necessary expense of their business.

The appellant (the surveyor of taxes) contended, inter alia, on behalf of the Crown: (*a*) That the payment was a voluntary grant or gratuity, and, not being a necessary expense of earning the profits, was not admissible as a deduction in computing the profits assessable to income tax. (*b*) That even if it were a payment in respect of past services it was a lump sum in the nature of a capital payment, and on that account not admissible.

The Commissioners were of opinion that the 1500*l.* was allowable to the respondents as a business expense in calculating the profits of the year for income tax purposes.

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Sir J. A. Simon, A.-G., and *W. Finlay*, for the appellant. The payment of a gratuity to a reporter on his retirement was undoubtedly within the powers conferred on the respondents by the articles of association, but it was not "money wholly and exclusively laid out or expended for the purposes of" the respondents' undertaking within the meaning of r. 1 of the rules applying to the first and second cases, and therefore it cannot be deducted. The gratuity was not an expense incurred by the respondents in earning profits; it was an application of a part of the profits after they had been earned: *Strong* v. *Woodifield* (1); *Russell* v. *Town and County Bank* (2); *Smyth* v. *Stretton*. (3) The case of *Hampson* v. *Price's Patent Candle Co.* (4) affords a good illustration of the distinction. In that case, the defendant company having had a successful year's trading, the directors made a present of a week's wages to each of the company's employees. The payment was held to be intra vires, but it clearly could not be regarded as an expense of earning profits.

[SCRUTTON J. Have not the Commissioners decided the question by a finding of fact?]

The statement of the Commissioners' opinion is not a finding of fact, but of law. Even if the Commissioners had purported to decide the question as one of fact, it is open to the appellant to contend that on the facts as stated, as to which there has never been any dispute, the only conclusion which can be arrived at in law is that the deduction is not allowable. In *Usher's Wiltshire Brewery* v. *Bruce* (5) Evans P. said: "When the various circumstances and facts upon which the question depends are established and found, the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law." [*Rex* v. *General Commissioners of Taxes for Clerkenwell* (6) was also referred to.]

(1) [1905] 2 K. B. 350; [1906] A. C. 448.
(2) 1888) 13 App. Cas. 418.
(3) (1904) 5 Tax Cases, 36.
(4) (1876) 45 L. J. (Ch.) 437.
(5) [1914] 2 K. B. 891, at p. 901.
(6) [1901] 2 K. B. 879.

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Foote, K.C., and *Bremner*, for the respondents. If there was any evidence to support the Commissioners' finding of fact that the 1500*l.* was a business expense of the respondents, this Court has no power to reverse that finding. Having regard to the provisions of the memorandum and articles of association and to the statement in the case that it is the habit of the respondents to give gratuities to reporters on their retirement after long service, it cannot be said that there was no evidence to support the Commissioners' finding. In the case of a non-trading association, the necessary expenses which may be deducted are not confined to contractual expenses and include any voluntary expenditure in furtherance of the objects of the association in question which is necessary in the sense of being reasonably proper. It cannot be doubted but that the knowledge that the respondents will deal fairly and generously with their staff after long service must weigh with applicants for appointments. The statement of Sir Samuel Evans in *Usher's Wiltshire Brewery* v. *Bruce* (1) was merely obiter, because there was no finding in that case that the payments were wholly and exclusively expended for the purposes of the company's trade.

[SCRUTTON J. referred to *American Thread Co.* v. *Joyce.* (2)]

As the object of the respondents is not the earning of profits, the words of r. 1 cannot in this case be construed to mean necessary for earning profits as interpreted by Lord Herschell in *Russell* v. *Town and County Bank.* (3) [They also referred to *Cyclists' Touring Club* v. *Hopkinson* (4); *Guest, Keen & Nettlefolds* v. *Fowler.* (5)]

W. Finlay in reply. For the purpose of deductions no distinction can be drawn between profit earning and non-profit earning concerns. They are both assessable under Sched. D on a balance of profits and gains.

SCRUTTON J. This is an appeal on a case stated by the Commissioners of Income Tax for the Division of Lincoln's Inn. The question raised is this. The Incorporated Council of Law

(1) [1914] 2 K. B. at p. 901.
(2) (1912) 106 L. T. 171.
(3) 13 App. Cas. 418.
(4) [1910] 1 Ch. 179.
(5) [1910] 1 K. B. 713.

Reporting for England and Wales are a society incorporated under the Companies Act of 1867, on the terms that they do not divide any profit among their members, and they publish the *Law Reports* for the benefit of the profession. The Council have been assessed on an additional sum of 500*l.* a year. That 500*l.* is arrived at in the following manner. In a particular year, 1911, the Council gave a sum of 1500*l.* to a Mr. X., one of their reporters. Their profits assessable to income tax are assessed on an average of three years. Bringing the 1500*l.* into the three years' assessment, if it is to be brought in, would increase the assessment by 1500*l.* divided by 3; that is 500*l.* The question, therefore, which came before the Income Tax Commissioners was: Is that 1500*l.* to be included in the profits assessable to income tax or not? The Commissioners decided that it was not. The Crown appealed against that decision.

The first thing I have to ascertain is what is the question which has to be decided; what settles the point whether this 1500*l.* is to be included in the assessable profits? The Council are taxed under Sched. D as a person residing in the United Kingdom making profits from a profession, trade, employment, or vocation. They are to be assessed on those profits under certain rules. They are to be assessed under the first rule of the first case on the balance of the profits or gains of such trade on a fair and just average of three years ending on the day of the year immediately preceding the year of assessment, and they are to be assessed at a charge without any deduction other than as thereinafter allowed. That form of words contemplates that certain deductions are to be allowed; what one finds is that certain deductions are prohibited, but in some cases the prohibition is in this form: "No deduction shall be made except"; and from that system of exceptions one ascertains, rather unscientifically as it seems to me, what deductions are in fact allowed.

Turning to the first rule applying to the first and second cases, I find that "No sum shall be deducted for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," from which prohibition of deduction with an exception one gets an allowance

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of deduction of money wholly and exclusively laid out or expended for the purposes of such trade.

Having ascertained that that is the question to be decided, the next question is: Who is to decide it? It is clear that the Commissioners are to decide questions of fact, and from their findings of fact there is no appeal. There is an appeal on questions of law.

I take the state of the law on this point from the decision of the Court of Appeal in the case of *American Thread Co.* v. *Joyce.* (1) The question there was whether a particular company was resident in the United Kingdom. The Commissioners had found that it was. There was an appeal to Hamilton J., the present Lord Sumner, and an appeal from him to the Court of Appeal. In the Court of Appeal the Master of the Rolls said: "He"—that is Hamilton J.—"has likewise gone through the statements of fact in the case in order, not to ascertain whether in his judgment, the company was resident here, but whether there was or was not evidence upon which the Commissioners of Income Tax could arrive at that conclusion. For, if there was such evidence, that is a fact which it is not competent for this Court to review; and the only thing that is competent for the Court to consider is, given that state of facts, what is the conclusion of law which follows upon it."

The same view had been stated in the Court of Appeal in *New Zealand Shipping Co.* v. *Stephens* (2) and in *Gramophone and Typewriter* v. *Stanley.* (3) The same rule is laid down as to residence by the House of Lords in the *De Beers Case* (4), where Lord Loreburn pointed out that the conclusions of fact found by the Commissioners cannot be impugned.

The only thing which at first sight seems to be contrary to these statements of the law is a passage in the judgment of the President of the Probate, Divorce, and Admiralty Division, delivering the judgment of the Court of Appeal, in the recent case of *Usher's Wiltshire Brewery* v. *Bruce*, where he said (5): "It was contended with reference to all the heads that

(1) 106 L. T. 171.
(2) (1906) 96 L. T. 50.
(3) [1908] 2 K. B. 89.
(4) [1906] A. C. 455, at p. 459.
(5) [1914] 2 K. B. at p. 901.

it was found, and stated as a fact in the case, that they were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the company's trade or concern in respect of the profits or gains of which they were assessed. We see no such finding or statement in the case." That statement, so far, shews that it was not necessary to determine what would have been the case if there had been a finding or statement in the case; but the learned President went on to make a remark which, in view of his previous statement, must be taken to be obiter. He said: "But even if there were such a statement, that would by no means settle the question to be determined. When the various circumstances and facts upon which the question depends are established and found, the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law."

The numerous previous decisions of the Court on the question of residence were not cited to the Court of Appeal in that case, and in my opinion the Court cannot have intended to overrule what had been said by itself in three previous cases, and had no power to overrule what had been said in the House of Lords in the *De Beers Case* (1), and I can only read this obiter dictum of the President, in view of his previous statement that there was no finding of fact in the case, as meaning the same as had been said by the Court of Appeal in previous cases. If the facts stated are such that it is not possible from them to come to the particular conclusion of fact found, the Court is not bound by the conclusion of fact which the Commissioners have found with no evidence to support it; but if the facts stated are such that you may come to one conclusion or the other, the fact that the Court itself would have come to a different conclusion from that which the Commissioners have come to is no reason for disturbing the decision of the Commissioners. Therefore, the question which has to be considered in this case appears to me to be this: First of all, have the Commissioners come to a finding of fact; secondly, was there evidence on which they could come to that finding?

(1) [1906] A. C. 455, at p. 459.

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It seems to me that the question whether money is wholly and exclusively laid out or expended for the purposes of a trade is a question of fact. Judges of the High Court may know, by the accident of their previous training, something about a particular trade. To take a personal instance, I may be assumed to know something about shipping, but there are many trades about which I know absolutely nothing, and there are equally many trades about which any of my learned brethren would know nothing except what they were told by the Commissioners. In many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of the trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, of the effect of payments made in that trade, all of which are questions of fact. There may be cases where it is clear even to a judge who knows nothing about the trade, that a particular payment could not be wholly or exclusively laid out for the purposes of the trade. I do not desire to discuss politics, but I take examples which seem to me fairly clear. Payments for political purposes might conceivably be for the purposes of trade. It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade; but one can easily imagine cases, such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade. There may be cases in which the Court would have to say there is no evidence on which any tribunal could find that this sum was laid out or expended for the purposes of such trade, but in most cases it appears to me that it depends on the facts of the trade of which the Court has no knowledge, and for which it must depend on the findings of the Commissioners.

The question being, in my opinion, a question of fact, what have the Commissioners found? The Commissioners are a very distinguished body, and I must assume that when they use different words about the same question they mean the same

thing. As I have pointed out, they had to answer the question, Was this 1500*l.* money wholly and exclusively laid out or expended for the purposes of such trade? They state their case in this way: "The respondents contended . . . . that the payment to Mr. X. was a necessary expense of their business." "The appellant contended that the payment was a voluntary grant or gratuity, and, not being a necessary expense of earning the profits, was not admissible as a deduction in computing the profits." The Commissioners were of opinion that the 1500*l.* was allowable "as a business expense." The three gentlemen, whose very distinguished names are affixed to this case, must all have looked at the statute which they were interpreting, and I must take it that when they used those three different forms of language they were using them all as equivalent to the phrase "money wholly or exclusively laid out or expended for the purposes of such trade," which they shortened in their finding into the phrase "a business expense."

Under those circumstances I think the Commissioners have found what, as I have pointed out, is a fact, namely, that the 1500*l.* was money wholly and exclusively laid out or expended for the purposes of the trade.

The only remaining question is: Was there evidence upon which they could find that? The case states that though the reporters have no legal right to a payment on retirement, it has been the habit of the respondents to give a gratuitous pension or to make a gratuity of a lump sum on retirement to a reporter after long service. One cannot help using one's ordinary knowledge of human nature to know that in some cases the expectation of gratuities may materially affect the amount of salary. If I may compare a very small and insignificant profession with a very great and dignified one, waiters, to the common knowledge, take much less salary because of the gratuities they expect to receive; and when I find that the Commissioners have found that it is the habit of these employers to give their reporters gratuitous pensions or gratuities of lump sums I cannot help seeing that there is evidence upon which the Commissioners judging facts may find that those payments were made in the way of their trade because they at any rate may affect

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the amount of ordinary salary which they pay to their reporters. It is immaterial in my view to consider whether I should have come to the same conclusion, because if there is evidence on which the Commissioners can decide this question of fact they, and not I, are the persons to decide the question of fact. They have, in my view, decided the question of fact; there is evidence on which they could have decided it; their decision of fact, there being evidence on which they could have decided it, is not a matter which can be reversed on appeal. In my opinion, therefore, the appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Linklater, Addison & Brown.*

F. O. R.

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June 11.

BARTLETT, APPELLANT *v.* INLAND REVENUE COMMISSIONERS, RESPONDENTS.

Revenue—Super-tax—Trade Profits—Actual Amount or Average—Evidence—Sched. D Assessment—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 2—*Trade—Discontinuance—Sale of Business—Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 24, *sub-s.* 3.

For the purpose of assessment to super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the amount of the profits derived by the taxpayer from his business during the year preceding the year of assessment to super-tax is not to be ascertained by taking the actual amount of the profits made in that year, but by taking the average of the profits for the three years preceding; and if, on the hearing of an appeal against an assessment to super-tax, it is admitted by the taxpayer that the amount of the profits for the year in question, ascertained in that way, is correctly stated in an assessment to income tax made on the taxpayer under Sched. D, the Special Commissioners are entitled, without taking evidence, to adopt that assessment for the purposes of the super-tax assessment.

If the owner of a business sells it to a company, the business is not "discontinued" within the meaning of s. 24, sub-s. 3, of the Finance Act, 1907.

CASE stated under the Finance (1909-10) Act, 1910, s. 72, sub-s. 6, and 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

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The case was as follows:—

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at 49, Wellington Street, in the city of Westminster, on July 18, 1912, Mr. Herbert Henry Bartlett, now Sir Herbert Henry Bartlett, Bart., of 54, Cornwall Gardens, London, S.W. (hereinafter called the appellant), appealed against an assessment to the super-tax made upon him for the year ending April 5, 1910, on the sum of 62,962*l.*, less the statutory deduction of 3000*l.*

2. In computing the total income of the appellant from all sources for the previous year at the sum of 62,962*l.*, the Special Commissioners, by whom the assessment was made, included inter alia a sum of 42,951*l.*, arrived at as set out in paragraphs 5 to 9 of this case, in respect of the appellant's trade profits.

3. The appeal related solely to this sum of 42,951*l.*, no question arising as to any other of the several sources of income comprised in the aggregate of 62,962*l.*

4 The super-tax assessment under appeal being for the year ending April 5, 1910, the "previous year" (see the Finance (1909-10) Act, 1910, s. 66, sub-s. 2) was the year ending April 5, 1909.

5. For the period commencing April 6, 1908, and ending December 28, 1908, the appellant was, as sole proprietor, carrying on the business of a builder and contractor under the style of Perry & Co., and in respect of his profits of that business an assessment was made on him for the year ending April 5, 1909, under Sched. D of the Income Tax Act, 1853.

6. The said assessment was reduced on appeal and the amount of his liability on the average of his profits for the three preceding years in accordance with the provisions of the Income Tax Acts was fixed at 58,716*l.* The duty charged on the said sum of 58,716*l.* was duly paid. At the hearing of the super-tax appeal to which this case relates it was not contended by the appellant that the said sum of 58,716*l.* did not correctly represent the profits of the appellant's business for one year on an average of the three years preceding April 6, 1908.

7. In the year 1908 a company was formed under the Companies Acts with the title of Perry & Co. (Bow), Limited.

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8. The company was registered on December 9, 1908. By an agreement dated December 29, 1908, the appellant as vendor assigned to the company all his rights and liabilities as proprietor of the business, together with all trading profits as from January 1, 1908.

The agreement provided that the consideration for the sale should be the sum of 250,000*l.*, which should be satisfied by the allotment and issue to the vendor or his nominees of 25,000 shares of 10*l.* each in the original capital of the company credited as having been fully paid up.

9. The sum of 42,951*l.* specified in paragraph 2 of this case is the proportionate part, $\frac{267}{365}$, of the sum of 58,716*l.* mentioned in paragraph 6 applicable to the period April 6, 1908, to December 28, 1908, both days inclusive.

10. Counsel for the appellant contended that the assessment for super-tax for the year April 6, 1909, to April 6, 1910, was erroneous in law, inasmuch as the Commissioners did not:—

(*a*) In compliance with the Finance (1909-10) Act, 1910, ss. 66 and 72, make an independent assessment of their own according to the facts and figures before them.

(*b*) Apply ss. 66 and 72 of the Finance (1909-10) Act, 1910, s. 18, sub-s. 2, s. 24, sub-s. 3, and s. 30 of the Finance Act, 1907, and s. 163 of the Income Tax Act, 1842, and assess the appellant only on his actual profits (if any) made from the trade of Perry & Co. during the year 1908-9 while the appellant was himself carrying on that trade and no longer.

(*c*) Hold that during the year 1908-9 the profits of the appellant from the trade of Perry & Co. were nil and did not in fact belong to the appellant as an individual within the true intent and meaning of s. 66 of the Finance (1909-10) Act, 1910.

(*d*) Hold that the profits from Perry & Co. during the year 1908-9 belonged to Perry & Co. (Bow), Limited, and not, within the true intent and meaning of s. 66 of the Act of 1910, to the appellant as an individual.

11. For the respondents it was contended that the appellant did in fact as sole proprietor carry on the business from April 6, 1908, to December 28, 1908, that the business itself and all profits arising therefrom up to and including December 28, 1908,

belonged to the appellant, that the subsequent sale of those profits to the company did not in any way affect the appellant's liability under the Income Tax Acts, and the Act imposing the super-tax, and that s. 24, sub-s. 3, of the Finance Act, 1907, was not applicable.

The Commissioners, having considered the facts and arguments adduced before them at the hearing of the appeal, were of opinion that the assessment was correctly made, and that s. 24, sub-s. 3, of the Finance Act, 1907, did not apply. They, therefore, without taking evidence as to the amount of the actual trading profits for the period from April 6, 1908, to December 28, 1908, confirmed the assessment.

Gore-Browne, K.C., and *W. Allen*, for the appellant. First, the Commissioners were wrong in taking the amount of the Sched. D assessment as the estimate of the appellant's income from his business for the purpose of super-tax. The sum at which the taxpayer has been assessed to income tax under Sched. D is not conclusive for the purpose of assessment to super-tax: *Brooks* v. *Inland Revenue Commissioners.*(1) Super-tax "is not calculated, like Sched. D, upon an average of three years. It is payable on a figure arrived at by reference to the income of the year previous to the payment": *Brooks* v. *Inland Revenue Commissioners*, per Cozens-Hardy M.R.(2). The appellant was, therefore, entitled to be heard before the Commissioners as to what his actual income from the business was for the preceding year. Secondly, under s. 24, sub-s. 3, of the Finance Act, 1907, "where a . . . . trade . . . . is discontinued in any year, any person chargeable with income tax in respect of that . . . . trade, ... shall be entitled to be charged on the actual amount of the profits" arising from the trade in that year. The appellant's business, having been sold to a company in December, 1908, was "discontinued" by him within the meaning of that section. He has been assessed on a proportionate part of the profits for the year 1908-9 which were based on the average profits of the three preceding years. That is not the right method. Under s. 24, sub-s. 3, he is only chargeable on

(1) [1914] 1 K. B. 579. (2) Ibid. at p. 584.

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the actual profits derived by him from the business during that part of the year 1908 in which he was carrying on the business. In fact there were no profits received by the appellant from the business during that period, because all the profits as from January 1, 1908, were sold by him to the company.

Sir S. O. Buckmaster, *S.-G.*, and *W. Finlay*, for the respondents. Super-tax is by s. 66, sub-s. 1, of the Act of 1910 payable in respect of incomes "the total of which from all sources exceeds 5000*l.*," and by sub-s. 2 the total income "is to be estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." Therefore, if the profits derived from a trade or business constitute one source of the total income, the amount of those profits for the year in question must for the purpose of super-tax be ascertained in the same way as they are for the purpose of income tax, that is, by taking the average of the three preceding years. There is nothing in the language of s. 66 to suggest that the actual profits for the year in question are to be taken, nor does the decision in *Brooks* v. *Inland Revenue Commissioners* (1) support that view. The only point decided in that case was that the Sched. D assessment is not final and conclusive for the purpose of the assessment to super-tax; the amount of the Sched. D assessment may be challenged by the taxpayer when he is being charged with super-tax although he has not challenged it when assessed under Sched. D. But the decision in *Brooks' Case* (1) proceeded on the assumption that the Sched. D assessment was prima facie the basis for super-tax, and as this case, as stated, finds as a fact that the appellant did not contend at the hearing of the super-tax appeal that the assessment under Sched. D did not correctly represent the year's profits from the business on the average of the three preceding years, it is not now open to him to say that the Commissioners were bound to hear evidence and make a separate and independent assessment for the purpose of the super-tax. With regard to the second point, the sale of the business by the appellant to the company did not cause the business to be "discontinued" within

(1) [1914] 1 K. B. 579.

the meaning of s. 24, sub-s. 3, of the Finance Act, 1907. The case is one which is dealt with by s. 62 of the Taxes Management Act, 1880, which provides that where a person "ceases within the year of assessment to carry on the concern in respect of which the assessment is made, and is succeeded therein by another person," the Commissioners "shall adjust the assessment by charging the successor with a fair proportion thereof from the period of his succeeding to the concern and relieving the person originally assessed from a like amount." The Commissioners have acted under that section and have assessed the appellant on the amount of the profits proportionate to the period during which he carried on the business. No question was raised before the Commissioners as to the apportionment being wrong in amount, and therefore the appellant cannot raise that question on this appeal.

W. Allen replied.

SCRUTTON J. This is a case stated by the Special Commissioners as to the liability to super-tax of the appellant, Sir Herbert Bartlett. The assessment of super-tax made upon the appellant was for the year April 5, 1909, to April 5, 1910. Sect. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, provides that "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." That refers one back to s. 163 of the Income Tax Act, 1842, which provides that "Any person . . . . who shall prove . . . . that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than" so much "shall be exempted from the said duties."

The annual amount of a man's income who is engaged in trade may be made up in at least two ways. There may be his profit from the trade on which he has to be assessed under Sched. D. There may be dividends and other money payments taxed at the source. When, therefore, for the purpose of

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exemptions or abatement, the annual amount of his income is ascertained, it will be ascertained by adding together a conventional income from trade, based on the average of the three preceding years, and the actual income, taxed at the source, which will be actual and not conventional, and will be the sum actually received in the year under investigation. To get, therefore, at the income for the previous year for super-tax, in the case where a man has an income both from trade and from investments, you will have to have two things. You will ascertain his trade income from the average of the three preceding years; his income from investments will be the actual sums received by him during the year. The income of the appellant for the year 1908-9 assessed on the average of the three preceding years is a figure which is named in the case, and the case finds that it was not contended by the appellant that that sum did not correctly represent the profits of the business for one year on the average of the three years preceding April 6. But for that finding, as a result of the decision of the Court of Appeal in the case of *Brooks* v. *Commissioners of Inland Revenue* (1), the Special Commissioners would have been required to investigate for themselves what was the correct figure derived from the average of three years, and would not have been entitled to say "We are bound by the determination arrived at by the General Commissioners for Income Tax." That is the result of the decision in *Brooks' Case.* (1)

In this case that point was not raised. It was not said, "This three years' average is wrong." What was said at the hearing was: "Never mind about the three years; you are to look at my income for the previous year without having regard to any average." In view of the provisions of the statute that I have referred to, that contention is wrong; because the total income for the previous year is to be estimated in the same manner as the total income is estimated for the purpose of exemptions, and for the purpose of exemptions you do, in the case of trade income, look at the average of the three preceding years, though in the case of income taxed at the source you look at the actual receipts. That point therefore fails. The Commissioners were right in

(1) [1914] 1 K. B. 579.

starting with the income for the year 1908-9 based on the average of the three preceding years from trade.

The Commissioners then, following the provisions of s. 62 of the Taxes Management Act, 1880, inasmuch as during the year the appellant had ceased to carry on the business himself, having sold it to a company, proceeded to apportion or "adjust the assessment by charging the successor with a fair proportion thereof from the period of his succeeding to the concern, and relieving the person originally assessed from a like amount." It would have been open to the appellant's counsel to have said, "A fair proportion, having regard to the facts of the year, is not the arithmetical proportion which you are proposing to proceed on, the proportion of the number of days for which the appellant was carrying on business, as compared with the whole of the year, but is less, and I tender the evidence to that effect." If he had done that, the Commissioners would have been bound to consider the evidence tendered and come to a conclusion, and, as I read the section, their decision would have been final, and not subject to appeal. But no contention of that sort, as Mr. Allen very frankly tells me, was raised before the Commissioners at all. What the appellant, by his counsel, was saying before the Commissioners was: "I have nothing to do with this three years' average of the sum which is mentioned in the case. I have only to do with the actual income of the year 1908-9, which is much less than a three years' average." That, as I have held, is wrong.

The last point, as I understand, taken in the case is this. Sect. 24, sub-s. 3, of the Finance Act, 1907, provides that "Where a profession, trade, or vocation is discontinued in any year, any person charged or chargeable with income tax in respect of that profession, trade, or vocation shall be entitled to be charged on the actual amount of the profits or gains arising from the profession, trade, or vocation in that year." It is said that the appellant's trade having been discontinued in the year, he was only chargeable on the actual amount made in that year, and there was no power to go back to the three years' average. The answer to that appears to me to be very simple. The trade was not discontinued in the year. The trade

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was sold to a company and continued during the whole year; and in my view, therefore, s. 24 of the Act of 1907 has no application to this case.

That, as far as I can understand, exhausts all the points raised by the appellant, and the appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Munns & Longden.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

F. O. R.

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[IN THE COURT OF APPEAL.]

THOMPSON *v.* RICHARD JOHNSON & NEPHEW, LIMITED.

Employer and Workman—Compensation—Partial Incapacity from Accident—Incapacity caused by Outside Influence—Trade Union's Interference—Average Weekly Earnings—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

In a claim for compensation under the Workmen's Compensation Act, 1906, it appeared that the claimant was employed as a wire stripper at 21*s.* 6*d.* a week, and about fifteen months before the accident he and some other labourers were selected to take charge of some new machines. He worked at a particular machine, shewed that he was thoroughly competent to manage it, and earned 37*s.* 6*d.* a week till he met with an accident and lost two fingers of his right hand. He received compensation during incapacity and then wished to return to his employment at the machine which his employers were willing to restore to him. In the meantime the trade union of the wire workers had interfered and insisted that the employers should remove from the machines all workmen who were only labourers and not skilled workmen and members of the union. The labourers who had been selected to work the machines were therefore relegated to their former positions and wages, and the claimant was unable to return to work at his machine:—

Held, on a claim by him for compensation, that he was not entitled to compensation on the basis of his earning 37*s.* 6*d.* a week, for the fall in his wages was due to the action of the trade union and not to the accident; and that in the circumstances and in the absence of evidence of his present position the Court could do no more than make a declaration of the employers' liability.

APPEAL from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Thomas Thompson was a workman employed as a wire stripper by Richard Johnson & Nephew, Limited, and started work with them as a labourer at 21*s.* 6*d.* a week. About fifteen months before the accident the respondents put into their factory some new wire-drawing machines, and the manager was instructed, if he knew of any of the labourers or other people connected with the works who were capable, to make a choice of and put certain of them to these machines if he thought they were quite competent to manage them.

Among the men chosen was the applicant, and for about fifteen months he worked at this machine. While working there he shewed that he was thoroughly competent to manage this particular machine. In fact, the manager said he was a highly skilled man and fully capable, and he conducted it properly and with satisfaction to his employers. On May 13, 1913, his right hand was caught in the machine and badly crushed so that eventually two fingers had to be amputated. His average weekly earnings at the time of the accident were 37*s.* 6*d.*, and his employers paid him 18*s.* 9*d.* a week during incapacity. When his hand was healed he came back and asked that he might go back to the machines. The employers were willing that he should do so, but while he was away from the works the trade union of the wire workers interfered. They gave notice to the employers that unless they removed from these machines all the men who were not members of the union, they would call out all the men under their jurisdiction. The employers accordingly put back all the selected men to their former work and wages as labourers and the applicant was treated in the same way. He was perfectly willing to join the trade union, but under the rules of that society he was too old to do so. He applied for compensation, and the learned judge held that he was a skilled workman and his working capacity in the labour market was worth more than 21*s.* 6*d.* a week; the average weekly wages in that district of skilled workmen were, according to the learned judge's experience, 32*s.* to 34*s.* a week; and he awarded 5*s.* a week compensation, being half the difference between what he was earning now and what he would earn in the labour market if not damaged.

The employers appealed.

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F. Brocklehurst, for the appellants. The applicant is only entitled to compensation at the rate of 21*s.* 6*d.* per week and he can get employment at those wages. There was no evidence on which the learned judge was justified in holding that he was a skilled workman. The incapacity was not caused and his wages were not lowered by the accident, but by the interference of the trade union; and their action was not in any way caused by the accident. In fact there is at present no incapacity, and the liability of employers cannot be increased by the action of trade unions. A declaration of liability is not objected to, to enable the applicant to make a fresh claim on proper materials, but this award cannot stand. The learned judge has made a similar mistake to that made in *Bevan* v. *Energlyn Colliery Co.* (1) and has ignored the intervention of the trade union, which caused a reduction in wages.

J. W. J. Cremlyn, for the applicant. All the facts were before the learned judge, and this Court will not interfere with his decision. The applicant was a skilled workman, as is shewn by his having managed this machine satisfactorily and made 37*s.* 6*d.* a week at piece-work. He asked that his average weekly earnings should be taken at 37*s.* 6*d.* and compensation calculated on that footing. The degradation of others as well as the applicant is immaterial. The test is what he is able to earn now.

Brocklehurst replied.

COZENS-HARDY M.R. In this case we are in a difficulty from want of information as to what took place before the learned judge. [His Lordship stated the facts and continued.] We are left entirely in the dark as to what the man is now doing and what wages he is able to get in the market; and it is left so uncertain that it is extremely difficult to see what ought to be done. It is clear that the man is not entitled to say "You are liable to pay me on the footing of my wages being 37*s.* 6*d.* for this work," when in fact these particular employers cannot put him back to that work and therefore are not liable to pay him those particular wages. But the amount which he would have been able to earn in the works of the respondents is not the true

(1) [1912] 1 K. B. 63.

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test, and, in the language of Sched. I., paragraph 3, regard must be had to the amount of the weekly earnings before the accident and the "average weekly amount which he is earning or is able to earn in some suitable employment after the accident." Strange to say, we have no evidence whatever tendered on that point. We do not know whether he is in employment as an ordinary labourer. We do not know whether he has sought to obtain employment as a skilled labourer. I think therefore that the applicant has not furnished the Court with sufficient information on the point to what extent if at all he is prejudiced by reason of the accident which resulted in the loss of two fingers. It may be, and I think it is true, speaking only for myself, that he is certainly beyond the grade of an ordinary labourer. That being so, admitting that there is no evidence whatever that the loss of the two fingers prevents him from earning any particular definite sum—of course the employer never guarantees the state of the market, and he is not bound to guarantee the state of the market in which the man works—I think with regret that all we can do is to allow the appeal, inserting a declaration of liability, and then when the man is in a position to come to the Court and say "Since I have left this work I have sought in various places to obtain work equal to my abilities, that is to say work of a skilled nature, and I find that by this loss of two fingers I am prejudiced in my chance," he can do so and ask for an award. When he makes such an application as that the Court will be in a position to know what is fair and right between the parties. At present I think the learned judge was wrong in saying that in fact it was the result of this accident that he was not getting the full wages which a skilled man gets. That is not the true test. I have hesitated whether it was a case which we ought to send for a new trial, but upon the whole I think justice will be done by a declaration which will leave the workman fully at liberty to make a fresh application founded upon evidence that the effect of the accident has been to diminish his chances.

SWINFEN EADY L.J. I am of the same opinion. I can find no evidence that there was any partial incapacity for

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work resulting from the injury. For a time there was total incapacity and the workman who was injured was paid on that basis. His injury was healed so far as it could be healed. He had two fingers amputated, but after that had been done he returned to work. The evidence was that so far as he was concerned he was able and willing to do his own work but for the intervention of the trade union; and it is said that he and others, being persons who were originally labourers and had not been apprenticed to the trade, had to be withdrawn, and were not permitted to work the machines upon which they were previously engaged by reason of the intervention of the trade union. I can find no evidence of any partial incapacity for work resulting from the injury. So far as the man is concerned he can do the work which he was doing before the accident. Under those circumstances I think that the appeal should be allowed and the proper order is that indicated by the Master of the Rolls.

PICKFORD L.J. I am of the same opinion. There were two points raised: First, whether there was any evidence upon which the learned county court judge could find that this man was better than the ordinary labourer in the market and worth more. I am inclined to think that there was evidence upon which he could find that; whether he was right in putting the class or grade of work as high as he did or not is a matter for him and not for us. Then arises the more important question whether there was evidence upon which the 5*s.* a week which he has given as compensation to the applicant could be allowed. I do not think there was, and when I say I do not think there was, I mean to say this: I do not think I can find it upon the very insufficient note we have before us. We do not know all that passed at the county court. The note is very short, and I do not think upon that note that there is any evidence upon which that finding can be supported. It is clear that the actual fall in the applicant's wages, when he returned to work after the accident, was not due to his injury, but was due to the action of the trade union; and whether after that he has been prevented from earning what he was worth in the

labour market by the accident is not shewn by any materials that are before us. Therefore I agree that the justice of the case will be met by allowing the appeal and giving a declaration of liability under which, if he can shew loss of earnings which he would otherwise have made, he can do so, and will not be precluded from compensation for the result of the injury.

Appeal allowed.

Solicitors: *Busk, Mellor & Norris, for Payne, Galloway & Co., Manchester; Fraser Sutton, Manchester.*

H. C. R.

[IN THE COURT OF APPEAL.]

MORTIMER *v.* WISKER.

Employer and Workman—Compensation—Seaman—Ship registered in United Kingdom — Registry cancelled — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1—*Merchant Shipping Act*, 1894 (57 *& 58 Vict. c.* 60), *ss.* 2, 3.

A seaman was employed on a smack which sailed from Lowestoft for Norway on March 18, 1913, and was never heard of again. His dependants claimed compensation under the Workmen's Compensation Act, 1906. The respondent repudiated liability on the ground that he was not the owner of the smack or the employer of the deceased, and that the deceased was not a workman to whom the Act applied. It appeared that the respondent had been the registered owner of the smack, but the registration was cancelled on March 8, 1913, with a view to the sale of the ship by C. (who was alleged to be the true owner) to foreigners. The respondent contended that inasmuch as when the ship sailed she was no longer registered in the United Kingdom the deceased was not a member of the crew of a ship registered in the United Kingdom or of any other British ship or vessel of which the owner resided in the United Kingdom within s. 7, sub-s. 1, of the Act. The learned judge refused to accept the submission that the registration had been properly cancelled and awarded compensation to the dependants:—

Held, that inasmuch as the registration was vacated before the ship sailed the deceased was not within the protection of the Act; and that, whatever the learned judge might have thought of the merits of the case, it was not open to him to go behind the cancellation of registration.

APPEAL from an award of the judge of the Lowestoft County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

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C. C. Mortimer was a seaman employed on the sailing drifter *Girl's Own* which sailed from Lowestoft for Norway on March 18, 1913, and was never heard of again. His father applied as a partial dependant and acting on behalf of other dependants for compensation from Ernest Wisker, whom he alleged to be the owner of the *Girl's Own* and the employer of C. C. Mortimer. Wisker disclaimed any interest in the subject-matter of the arbitration, and by a further answer disputed his liability on the ground that the deceased was not employed by him and was not a workman to whom the Act applied.

Wisker alleged that he had been in the habit of advancing money to one Chenery, whose business consisted of buying old fishing smacks with a view to selling them in Norway. His custom was to bring the smacks to Lowestoft, where he sold the iron ballast and replaced it with shingle, engaged his own crew, took the vessels to Norway himself, and sold them to foreigners for use in the Fiords. On February 22, 1913, Wisker lent to Chenery money to buy the *Girl's Own.* Chenery said that he was in difficulties and might have to call his creditors together, and it was arranged that the vessel should be transferred to Wisker. Chenery gave him a bill of sale and Wisker was registered as the owner on February 25. Chenery repaid the loan, and on March 7 Wisker wrote to the Collector of Customs at Great Yarmouth that the vessel was sold to Norway and requested him to cancel the register, which was done on March 8. Wisker gave Chenery a bill of sale to enable him to get the ship's papers made out in his name with a view to the sale in Norway. The transcript of the register of the *Girl's Own* bore a note by the registrar as follows: "Certificate cancelled and registry closed 8th March, 1913, on sale of the ship to foreigners (Norwegian subjects). Advice received from managing owner the 8th day of March, 1913." The vessel was posted as a total loss at Lloyd's about three months after she sailed.

At the hearing in the county court the learned judge overruled Wisker's contentions that the deceased was not a seaman within the Act because the *Girl's Own* was not at the time a registered British ship, and that there was no evidence that the deceased

was employed by him. He gave judgment for the applicants and assessed compensation at 30*l.*

Wisker appealed, on the grounds that there was no evidence that the deceased was a seaman within the meaning of s. 7 of the Workmen's Compensation Act, 1906, inasmuch as there was no evidence that the deceased, at the time of his death, was a member of the crew of any ship registered in the United Kingdom or of any other British ship or vessel of which the owner, or the managing owner, or manager resided, or had his principal place of business, in the United Kingdom; that there was no evidence that the deceased was ever employed by the appellant; and that the learned county court judge was wrong in law in admitting certain hearsay evidence.

Gerald Dodson, for the appellant. On the evidence it is clear that the deceased was not employed by the appellant. Secondly, the deceased was not entitled to compensation under the Act of 1906. Formerly a seaman was not a "workman"; and his only claim to protection now is under s. 7 (1) of the Act of 1906, by sub-s. 1 of which the Act is to apply to seamen "provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner" resides in the United Kingdom. Therefore the applicants must shew that the deceased was in the position described in that sub-section, and they cannot do so, for the registry was cancelled before the *Girl's Own* sailed, and at the time of the

(1) Workmen's Compensation Act, 1906, s. 7, sub-s. 1: "This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications."

Merchant Shipping Act, 1894, s. 2: "(1.) Every British ship shall, unless exempted from registry, be registered under this Act.

"(2.) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship."

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accident she was not registered at all. The Court will take into consideration all the circumstances of the case: *Myers* v. *Willis*. (1) By s. 13 the words "ship" and "seaman" have the same meaning as in the Merchant Shipping Act, 1894. By s. 2 of that Act, sub-s. 1, "Every British ship shall, unless exempted from registry, be registered under this Act," and by sub-s. 2, "If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship." The *Girl's Own* exceeded thirty tons and was not within the exemptions of s. 3 and when she sailed she was not a British ship. Therefore the deceased was not within s. 7 of the Act of 1906 and his dependants cannot recover.

Walter Stewart, for the dependants. The learned judge was of opinion that there had been some irregularity in the registration and did not believe the appellant's story. [He was stopped on this point.] The *Girl's Own* was a British ship and her registry was closed by the act of the appellant himself. A man cannot be permitted to trifle with a public document in order to evade liability under the Workmen's Compensation Act; and the Court is not bound by such proceedings. The *Girl's Own* came within the words "any other British ship" in s. 7, sub-s. 1, and she was still a British ship when she sank. The change of ownership (if any) ought to have been indorsed on the certificate and made known to the crew. It was not their duty to inspect the register; and the appellant is estopped from setting up the absence of registry.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from the decision of the learned county court judge of Lowestoft, and, as opened by the appellant's counsel, raises several points upon which I do not think it is necessary or desirable to give a decision. Without expressing any opinion upon it, I assume in favour of the respondents, who are the dependants of the deceased workman, that there was a contract of employment between the deceased seaman and Wisker. But it must be remembered that under the original Workmen's Compensation Act seamen were not

(1) (1855) 17 C. B. 77.

entitled to the benefit of the Act at all. Then came the Amendment Act of 1906, which brought seamen into the Act to a certain extent and to a certain extent only. The language of s. 7, which is the first section dealing with this, defines with great minuteness and accuracy what class and what class only of seamen are entitled to benefit under this Act. It is not a case of the Act taking away any benefit which the seaman had before; it is a new benefit conferred upon a particular class of seamen, and the dependants must make out that the circumstances of this accident—the loss of this ship—entitled the workman or his dependants to compensation.

The Act says: "This Act shall apply"—I am only reading the material words—"to seamen," with a proviso that they are workmen within the meaning of this Act and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications, which are not material here. That section obviously refers to the Merchant Shipping Act, 1894. That is apparent on the face of the section itself, but if we look at the definition clause, s. 13 of the Act of 1906, it is expressed that "ship" shall have the same meaning as in the Merchant Shipping Act, 1894. On turning to the Merchant Shipping Act, s. 2, we find that "2.—(1.) Every British ship shall, unless exempted from registry, be registered under this Act. (2.) If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship." Then come the exemption clauses of s. 3. "The following ships are exempted from registry under this Act:—(1.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident:" and (2.) refers to ships not exceeding thirty tons elsewhere. The Act therefore contemplates some vessels which are required to be registered and if not registered are not British ships at all. It also contemplates certain ships which do not require registration and are exempted.

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In the first place we are dealing here with a ship of thirty-five tons. She was therefore a ship of which registration was necessary. She was duly registered until a certain date, March 8, 1913, when the certificate was cancelled and the register was closed according to the provisions of the Merchant Shipping Act. The vessel sailed upon the voyage on which she was lost on March 18. Prior to that date, on March 8, she had ceased to be a registered ship, for on that date the ship's certificate was cancelled and the register closed. That being so, it seems to me on that ground that the workman's dependants' application must fail because the deceased man was a member of the crew of a ship which was not entitled to the benefit of compensation under the Act of 1906. It was said that the cancellation was somewhat irregular and ought not to have been allowed. That is not for the learned county court judge to go into. The question is, was she or was she not registered? There may or may not be a possibility of changing a registry fraudulently; there may be or there may not be means for setting that registration right; but I am clear that that is not a matter open to the learned county court judge in dealing with a workmen's compensation claim like this. I therefore think the learned county court judge was wrong. We cannot listen to any suggestion of estoppel here. We cannot listen to any suggestion that the applicants make as against the employer, that the deceased was engaged before the registry, and that it was a sort of fraud on the employer's part to cancel the registry. I can see no ground for that either in fact or in law. Assuming every other point in favour of the employer, I think the application must be dismissed and the appeal allowed.

SWINFEN EADY L.J. I am of the same opinion. In order that the applicants may succeed in the present case it must be shewn that the workman, whose death has arisen from the loss of the *Girl's Own*, was a workman within the meaning of the Workmen's Compensation Act, 1906, and a member of the crew of a ship registered in the United Kingdom. That is the first thing. The ship, the *Girl's Own*, was not at the date when she sailed a ship registered in the United Kingdom, the register having been closed. It is said that she may come within the words of

s. 7 "or of any other British ship or vessel" although she was not registered and was neither a British ship nor vessel. There are British ships or vessels not registered because they are exempted by the Merchant Shipping Act from registration and exempted ships must not exceed in the one case fifteen tons and in the other case thirty tons. In the present case the registered tonnage of the *Girl's Own* was over thirty-five tons, so that she was not an exempted ship, and she was required by the Merchant Shipping Act to be registered.

Then s. 2, sub-s. 2, of that Act provides: "If a ship required by this Act to be registered is not registered under this Act she shall not be recognised as a British ship." Therefore this workman cannot be brought within the description of being a member of a crew of a British ship. He is not a member of a crew of a ship registered in the United Kingdom or of any ship which the Court can recognize as a British ship. Therefore he does not come within s. 7, sub-s. 1, of the Workmen's Compensation Act. Then it was said that the county court judge overruled that contention and stated that the cancellation of the registration was hocus-pocus. Upon the materials before us there is nothing to indicate that the cancellation of the registration was fraudulent or hocus-pocus. Apparently this sailing drifter had been purchased with a view to a sale to foreigners—Norwegians. She had been brought round from Yarmouth to Lowestoft, and on March 18 had sailed with the deceased on board from Lowestoft for a Norwegian port, not intending to return, but with a view to being delivered to some Norwegian person. We have no evidence before us of any contract of sale, whether the ship had been then actually sold or agreed to be sold, or whether it was intended to sell her on the other side; but it is consistent with the evidence that there was an agreement for sale. At all events the certificate was cancelled and the register closed as on the occasion of a sale to a foreigner, on which occasion the registry is properly terminated. But even if there were any improper transactions with regard to the closing of this register, so far as this Court is concerned the register stands as it does. There were no proceedings to rectify the register. This Court cannot assume that there was anything irregular or wrongful in

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the transaction and must treat the matter as it stands. The register was closed before the date of the ship sailing. Under those circumstances the claim of the applicants fails.

PICKFORD L.J. I agree. I do not wish to add anything except this: that I express no opinion as to what might be the rights of the parties here by the closing of the register if it was done fraudulently. In my opinion there is no evidence whatever in support of any estoppel as against the present respondent in the arbitration.

Appeal allowed.

Solicitors: *Grundy, Izod & Co., for Wiltshire. Sons & Jordan, Lowestoft; Seth J. Bailey, Lowestoft.*

H. C. R.

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[IN THE COURT OF APPEAL.]

RUSHTON *v.* GEORGE SKEY & CO., LIMITED.

Employer and Workman—Compensation—Injury arising out of and in the Course of the Employment—Omission of Workman to take Proceedings to enforce Claim—Right of Approved Society to take Proceedings in his Name—"Unreasonably refuse or neglect"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1—*National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

By the National Insurance Act, 1911, s. 11, sub-s. 2, "Where an insured person appears to be entitled to any . . . . compensation or damages . . . . and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society . . . concerned . . . . (*a*) at its own expense to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society . . . . as trustee for the insured person. . . . ."

Held, that the word "neglects" in the sub-section connotes the not doing of something which there was a legal or moral obligation to do, or the not doing of that which a person has been requested to do by another who had a right to make the request.

In January, 1913, a workman met with an accident whilst working in a mine. He was away from his work in consequence of the accident for three weeks, during which period his employers paid him compensation at the rate of 17*s.* 2*d.* a week. Early in February he returned to his work and worked continuously until the following July, when he was again unwell and underwent an operation. From July 6 to

September 22, when he returned to his work, he was paid 10*s.* a week by the approved society of which he was a member. In respect of his second illness he made no claim on his employers and took no proceedings against them for compensation, being satisfied with the 10*s.* a week he received from the approved society. In September, shortly before he returned to work, the approved society sent him a document to fill up and sign in which various questions were asked as to the accident and injury and as to whether he proposed to take proceedings against his employers to recover compensation. The document contained the following note to one of the questions: "In the event of a member through lack of means or other cause neglecting to enforce his claim the society, if of opinion there is a good claim, will take proceedings on his behalf." In his answers the workman stated that in his view his illness in July was not the result of the accident in the previous January and that he did not propose to take proceedings. In November, 1913, the approved society took proceedings in the workman's name under s. 11, sub-s. 2, of the Act of 1911 to recover compensation:—

Held, that the workman had not unreasonably refused or neglected to take proceedings to recover compensation within the meaning of the sub-section, and therefore that it was not competent to the approved society to take them in his name.

APPEAL from an award of the judge of the Staffordshire (Tamworth) County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

Edwin Rushton was employed as a road repairer at the respondent company's Wilnecote Colliery, and on January 3, 1913, whilst engaged below ground in road repairing he met with an accident through slipping on a plate by his stall in the mine. On the following day he reported the accident to the colliery undermanager, but continued to work till January 9, when he consulted his doctor about a swelling in his groin which was causing him pain. The doctor found that he was suffering from acute hydrocele and gave relief by tapping the hydrocele and withdrawing the fluid. The workman was incapacitated for work from January 9 to February 3, 1913, during which period the respondent company paid him compensation at the rate of 17*s.* 2*d.* a week. On February 3, 1913, he returned to work apparently cured and continued to work till July 6, 1913, when he again suffered from hydrocele. He was again tapped by his doctor and ultimately went to the Queen's Hospital, Birmingham, where he was operated on by Mr. Leedham Green. On

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July 15, 1913, he was examined by the respondent company's doctor, who reported that he was suffering from hydrocele, but that the hydrocele was due to hydropathic causes and was not the result of accident. In consequence of this report the respondent company denied liability to pay compensation in respect of the incapacity. He returned to work on September 22, 1913. During the period of his incapacity from July 6 to September 22, 1913, he received sick pay of 10*s.* a week from the National Amalgamated Approved Society, of which he was a member.

On September 2, 1913, the workman filled up and signed a form entitled "Declaration as to Accident or Industrial Disease" which had been sent to him for that purpose by the approved society. The material questions and answers thereto were the following:—

"State:—

"1. Nature of accident or industrial disease	1. I slipped on a plate by stall in mine Jan. 10th, 1913 (*sic*).
2. (a) Date and (b) time of accident or occurrence of industrial disease.	2a. Friday the 10 day of Jan. 1913 (*sic*) (Day of week) b. Time 11 A.M.
3. Exact address or place where accident or disease occurred.	3. Skeys Pit, Wilnecote.
4. (a) Describe as fully as possible how the accident happened; and	4a. I slipped on a plate by stall in coal mine but worked 8 days after then I had 3 weeks compensation and then went back to work.
(b) Whether the same was met with during the course of your employment; and	b. Up to July 6th and then I began with swellings in my bowels. I don't think the illness is the result of my accident in January last.
(c) Names and addresses of any witnesses . . . ."	c. No one saw it for it was away from the face of the coal and no one was about."

"7. Names and addresses of person or persons whom you allege are liable for the accident or disease.

7. If any one Skey & Co., Wilnecote, Tamworth.

8. (a) Whether you have given notice in writing of your accident or disease to such person or persons.

8a. Not this time because I don't think it has anything to do with my accident in January 1913.

(b) If so, has the claim been admitted (1.) in writing or (2.) verbally? Please supply a copy if in writing.

b. (1.) No. (2.) No.

9. (a) Whether you have received any weekly or other sum in respect of compensation or damages;

9a. No.

(b) Or have you entered into any agreement in respect thereto? . . . ."

b. No."

"12. (a) Whether you have taken proceedings to enforce your claim: if so, give name and address of solicitor (if any); or

12a. No.

(b) If not, do you propose to take proceedings to enforce your claim? (*In the event of a member through lack of means or other cause neglecting to enforce his claim, the society, if of opinion there is a good claim, will take proceedings on his behalf.*)

b. No.

(c) If not, and in the event of the society taking proceedings on your behalf, (1.) Will you give full particulars and assistance to the society in

(c) (1.) Yes.

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relation thereto? and (2.) Do you give full authority to the society to act on your behalf in relation to the conduct and settlement (if any) of such proceedings?" (2.) Yes."

At the foot of this document was a declaration in the following terms: "I declare that the foregoing particulars are true in every respect and I have made full disclosure of all material facts. (And I hereby give notice to the society that I have not and do not propose, to take proceedings to enforce my claim.)" This declaration was signed by the workman and attested.

On September 18, 1913, the secretary of the approved society wrote to the respondent company making a claim on behalf of the workman in respect of the further period of incapacity from July 6, which he stated was due to hydrocele the result of the accident in January.

On October 1, 1913, the solicitor of the respondent company in reply wrote denying liability.

Further correspondence ensued and ultimately on November 27, 1913, the present proceedings were commenced by the approved society in the name of the workman against the respondent company.

On December 9, 1913, subsequently to the commencement of these proceedings, the workman was examined by Mr. Leedham Green, who expressed the opinion that the hydrocele was the result of a venereal disease.

On February 2, 1914, the arbitration proceedings took place before the county court judge. The workman was called as a witness and gave evidence as to the accident on January 3, 1913, and in cross-examination stated that when he got back to work on September 22 the approved society stated that they would take proceedings; that he made no claim for compensation after he came out of the hospital; that he took no proceedings, but did not refuse to take any; and that he was satisfied with the 10s. a week which he received from the approved society.

The county court judge found that the injury was caused by an accident arising out of and in the course of the employment

within the meaning of the Workmen's Compensation Act, 1906; but he held on the construction of s. 11, sub-s. 2, of the National Insurance Act, 1911, and on the facts proved and the form signed by the workman that the workman did not unreasonably refuse or neglect to take proceedings to enforce his claim and that it was not therefore competent for the society to take the present proceedings in his name. He accordingly dismissed the application and ordered the approved society to pay the costs.

In the reasons for his judgment the learned county court judge said: "Now Rushton was not asked to take proceedings, so he could not have refused to do so, and I found that he did not unreasonably or at all neglect to do so. He stated that he took no proceedings and was satisfied with what he got. Why he did not I think is clear from the evidence of Mr. Leedham Green, the eminent surgeon, who explained to him that the hydrocele was due to a clap, the existence of which he did not deny. I found after being advised by the medical assessor that the hydrocele was caused by accident &c., and did not adopt Mr. Green's theory, there not being in my judgment sufficient evidence to justify it. But having regard to what Mr. Leedham Green told Rushton, in my opinion so far from neglecting to take proceedings he exercised a wise discretion in not doing so, and that although he knew that he had never suffered from venereal disease. If he had obtained an award in his favour it could only have been for about 9*l.* and on the hearing he would have had the formidable opinion of Mr. Leedham Green against him, and would be right in apprehending that the arbitrator might find against him and order him to pay the costs of the arbitration."

The approved society appealed.

Gordon Hewart, K.C., and *L. J. Sturge*, for the appellants. The workman "neglected" to take proceedings to enforce his claim within the meaning of s. 11, sub-s. 2, of the National Insurance Act, 1911. (1) There was no evidence before the county

(1) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11, sub-s. 2: "Where an insured person appears to be entitled to any such compensation or damages as aforesaid"—i.e., under the Workmen's Compensation

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court judge that the workman's neglect to take proceedings to enforce his claim resulted from the assertion of the respondents' surgeon that the incapacity was due to a venereal disease. The statement was not made until after the arbitration proceedings had been commenced.

The words of sub-s. 2 of s. 11 of the Act are "unreasonably refuses or neglects to take proceedings to enforce his claim." It is submitted that the word "unreasonably" only qualifies "refuses" and does not qualify "neglects." It will no doubt be contended that "neglect" means an omission to perform a duty. "Neglect" it is submitted is intended to and does in fact cover cases in which no request to take proceedings has been made. In the present case the workman was receiving payments from the approved society and it was therefore his duty to take proceedings against his employers in order to relieve the society of the burden of making those payments. Sect. 11 of the Act is a provision for the benefit of approved societies. The answers given by the workman in the document signed by him amounted to a refusal by him to take proceedings based on the belief that the illness from which he was then suffering was not due to the original accident. In taking upon himself to decide as to the cause of his illness the workman acted wrongly. He ought to have been guided in the matter by the opinion of his doctor. It is submitted that "neglects" is equivalent to "omits." It is the omission to do something which the person omitting has the ability to do.

[PICKFORD L.J. If that is so the words "unreasonably refuses" would be superfluous.]

Act, 1906, or any scheme certified thereunder, or under the Employers' Liability Act, 1880, or at common law, in respect of any injury or disease—"and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either—(*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society or committee as trustee for the insured person; or (*b*) to withhold payment of any benefit to which apart from this section such person would be entitled.

"In the event of the society or committee concerned taking proceedings as aforesaid and failing in the proceedings, it shall be responsible for the costs of the proceedings as if it were claiming on its own account."

In *Clapp* v. *Carter* (1) the meaning suggested was given to the word "neglect." There an action had been brought by an approved society in the name of a workman who had become mentally incapacitated by reason of the accident. The Court of Appeal in dismissing the appeal inserted the following words in the order: "The applicant having neglected to take proceedings and the Prudential Society admitting that they took proceedings in his name and on his behalf" order to pay costs. There the man being deranged there was no question of his doing anything by design. In *King* v. *Burrell* (2) Patteson J. said, "What then is neglect? It is the omission to do some duty which the party is able to do." See also *Willoughby* v. *Willoughby*. (3)

Sanderson, K.C., and *E. W. Cave*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal which raises a curious and, it may be, an important point under the National Insurance Act, 1911. Sub-s. 2 of s. 11 of that Act is a sub-section which gives, subject to compliance with certain conditions, a right to an approved society to take proceedings under the Workmen's Compensation Act, 1906, against an employer in the name and on behalf of the workman. Of course, apart from that sub-section, it is quite clear that no third person could take proceedings of this nature at all, but the sub-section seems to me to be very clear indeed in its language. It says: "Where an insured person appears to be entitled to any such compensation or damages as aforesaid"—that is under the Workmen's Compensation Act, 1906, or the Employers' Liability Act, 1880—"and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either—(*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society or committee as trustee for the insured person; or (*b*) to withhold payment of any benefit to which apart from this section such person would be entitled. In the event of the society or committee

(1) (1914) 7 B. W. C. C. 28, 36. (2) (1840) 12 Ad. & E. 460, 468.
(3) (1847) 9 Q. B. 923.

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concerned taking proceedings as aforesaid and failing in the proceedings, it shall be responsible for the costs of the proceedings as if it were claiming on its own account."

In January, 1913, the workman in this case strained himself in some way which affected his capacity. He received compensation for three weeks and returned to work in February. He was taken ill again in July, and for some time he was away at the hospital. During this time he received 10*s.* a week from his approved society. Subsequently the approved society commenced these proceedings in his name, and the view they take is that the employers are really liable to pay compensation for the accident, although it occurred a long time ago, and the workman had returned to work for a considerable interval, and that the burden ought to be thrown not upon the approved society but upon the employers. In order to succeed in this application it is necessary for the approved society to satisfy the Court that what I call the condition precedent has been complied with, that is to say that the workman has unreasonably refused or neglected to take proceedings to enforce his claim. Has the workman refused to take proceedings? I think plainly not. That is not suggested, and certainly he has not unreasonably refused to take proceedings. The truth is that he has never been asked to take them. Has he neglected to take proceedings? Now what does neglect connote? It seems to me that it connotes not doing that which it is a legal or moral duty to do, or not doing that which a man has been requested to do by some person who had the right to make the request, and to whom he has omitted to give any answer. I will put a very simple instance of that. In a case like this the approved society might say "You have had an accident; we request you to take proceedings against the employers." The man might say "No, I will not." In that case it is necessary to go further and say it is an unreasonable refusal, the mere refusal alone is not enough. It is quite plain we cannot shut out the word "unreasonably," at least from the case of refusal.

Now we come to neglect. Whether "unreasonably" applies to neglect as well as to refusal, it is not, in my opinion, necessary to decide in the present case. At present I am inclined to be of

opinion that it applies to both, but I do not think it is necessary to decide that here, because the very word "neglect" implies something more than the mere omission, the mere doing nothing; it must, as I said just now, imply the failure to do that which is a matter of legal or moral obligation or a failure to comply with a request which has been made by a person who is entitled to make the request.

In the present case the document entitled "Declaration as to Accident or Industrial Disease" which was put in in re-examination of the workman by the society in the name of the applicant seems to me really to conclude the case against them. [His Lordship read the material parts of the document and continued:] It will be observed that the society there reserve to themselves the fullest right to elect whether they will or will not take proceedings against the employers. There is no reason to suppose that it is not a statement by the workman whose signature to it is admitted. The document was put to him in re-examination and there is not and could not be any question of that kind. It seems to me that it is quite clear that he never was asked to take proceedings, and it seems to me also quite clear that he never neglected to take them. The learned county court judge, who took the view that the case was not brought within s. 11, sub-s. 2, was influenced considerably by a point which was a bad point. He thought that the man's failure to take proceedings was due to the fact that his doctor, who was a skilled surgeon, was of opinion that what he was suffering from might be due to a venereal disease. That opinion was, however, expressed by the doctor after the application for arbitration had been made and not before. That, however, does not dispose of the matter because, in view of what appears on the face of the document signed by the man himself, I cannot say that it was unreasonable for him to neglect to take proceedings against the employers, it being his own honest opinion that what he was suffering from was not the result of the accident. It is said he was an uneducated man and that there is no evidence that he was so advised by his doctor. I do not know why we should draw any inference one way or the other. There is no legal or moral obligation on every workman to sue every employer for every

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imaginable accident. A man is entitled to say "I do not think my injury is due to this accident and the reason I have not given notice of the accident is because I do not think that that from which I am at present suffering has anything to do with the accident." One cannot fail to observe that while the workman was getting 10*s.* a week from the approved society, he would, if he had taken proceedings under the Workmen's Compensation Act and succeeded, in all probability have got a larger sum. It is not then a case in which the workman could not have got more under the Workmen's Compensation Act than he was getting from the approved society. I think, though not for the reasons given by the learned county court judge, that this is a case in which the action fails because it is not shewn that the workman unreasonably refused or neglected to take proceedings to enforce his claim. That being so, the order of the learned county court judge is right, and the society must pay the costs.

SWINFEN EADY L.J. I am of the same opinion. This is an appeal brought by an approved society in the name of the workman.

The facts are very short. On January 3 of last year the workman sustained an accident; he was away from his work in consequence of the accident for three weeks. He claimed compensation from his employers and was paid without any proceedings. He was paid for three weeks 17*s.* 2*d.* a week in respect of that accident. Early in February he returned to his work and worked continuously from February until July. In July he was again unwell and underwent an operation, and he was away from work, part of the time in hospital, from July 6 to September 22. During that time he was paid 10*s.* a week by the approved society and then returned to his work, when the payment of 10*s.* a week ceased. In respect of his second illness in July he made no claim upon his employers. The maximum sum he might have received from his employers was the sum he had been paid in the previous January, namely, 17*s.* 2*d.* a week. He was paid by the approved society 10*s.* a week, and with that he was satisfied. He took no proceedings against his employers, Shortly before he returned to his work, that is to say in the

month of September, a form was sent to him by the approved society and he has answered the various questions. It is manifest on reading the man's answers that his view was that his illness in July was not the result of the accident in the previous January. His answer to one of the questions is: "I don't think the illness is the result of my accident in January last." Then, again, when asked whether he had given any notice he said, "Not this time because I don't think it has anything to do with my accident in January, 1913." After working six months no further notice had been given by the workman to his employers, his opinion being that his illness was not attributable to the previous accident, and upon that he was satisfied with the 10*s*. a week allowance which he obtained from the approved society. Then the society took proceedings in his name under the statute and he was called as a witness. It is not suggested that he refused to take proceedings whether reasonably or unreasonably. The question was put to him and he said, "I took no proceedings, but I did not refuse to take them; I was satisfied with what I had." Under those circumstances, were the approved society entitled to take proceedings in the name of the workman? That depends upon the true construction of s. 11, sub-s. 2, of the National Insurance Act, 1911. It was argued in substance that the provision in sub-s. 2 which says "Where an insured person appears to be entitled to any such compensation or damages as aforesaid and unreasonably refuses or neglects to take proceedings to enforce his claim" is to be construed and must be read as if the word "omits" was used; that is to say "where an insured person appears to be entitled to any such compensation or damages as aforesaid and omits to take proceedings to enforce his claim." It is quite clear that it cannot be read in this way and that this is not what the statute means. The language, to my mind, is reasonably clear. It begins "Where an insured person appears to be entitled to any such compensation or damages as aforesaid and unreasonably refuses"; that means refuses without reasonable grounds for such refusal. In the present case there was no refusal at all, so that branch of the section does not apply. Then the next part of the section is "or neglects to take

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proceedings." Here he has omitted to take proceedings. He has not been requested to take proceedings, but he merely omitted to do so. Is that a neglect? I incline to the same view as the Master of the Rolls that the word "unreasonably" applies to and governs both the word "refuses" and the word "neglects," but it is not necessary to determine that point in the present case, and, therefore, I express no concluded opinion upon it. It is sufficient to say that the words "neglects to take proceedings" are not equivalent to "omits to take proceedings." The neglect involves a failure by the workman to discharge some duty, some obligation of either a legal or a moral character omitting to do something which he ought to do, and not a case of simple omission only. In the present case the workman had never been requested to take proceedings. The approved society in the form they sent to him for his signature themselves put it in this way. They ask him under 12 (b): "Do you propose to take proceedings to enforce your claim?" and then in italics they say: "In the event of a member through lack of means or other cause neglecting to enforce his claim, the society, if of opinion there is a good claim, will take proceedings on his behalf." This must mean that before the society take proceedings they will look into the facts and only take proceedings if in their opinion there appears to be a good claim. The workman in the present case was not only never requested to take proceedings, but was never informed by the society that in their opinion the case was such as afforded him a good claim for compensation or damages. Nothing of the sort. They merely on his omitting to take proceedings instituted them themselves. He omitted to take proceedings, and the first ground he states was that he thought he was not entitled to take them because the illness he suffered from in July was not the result of the accident in January. The learned county court judge said the man "was not asked to take proceedings, so he could not have refused to do so, and I find that he did not unreasonably or at all neglect to do so." True it is that the judge afterwards gave an additional ground, which was a bad point as the Master of the Rolls has already pointed out. He found, however, as a fact that the workman did not either unreasonably refuse or

unreasonably or at all neglect to take proceedings. In my opinion, there was sufficient ground for his arriving at that conclusion, and I can see from beginning to end of the transaction nothing unreasonable or improper in the conduct of the workman, nothing to throw any doubt at all upon his statement which was put in evidence by the approved society as to the reason for not taking proceedings. He thought he was not entitled to take them, so he did not take them. In my opinion, the approved society have failed to establish the condition precedent under which alone they are entitled to take proceedings in the name of the workman. For these reasons, I think the claim fails.

PICKFORD L.J. I am of the same opinion. In order to be entitled to sue, the approved society have to establish that the workman has unreasonably refused or neglected to take proceedings to enforce his claim. The learned county court judge upon reasons which would be quite sufficient if they existed has found that he did not unreasonably refuse or neglect. But one of the grounds upon which he has found that does not exist in fact, because one ground upon which he bases his conclusion is that the man had been told by the doctor before signing the document in which he stated that he was not going to take proceedings that his illness did not arise from the accident. That was not the case; he was not told so by the doctor until afterwards. The learned county court judge has found that he did not unreasonably refuse or neglect. The argument for the appellants is really in substance based upon two propositions. One was that neglect means simply omit, and that this section may be read: "Where an insured person unreasonably refuses or omits to take proceedings," or, to put it more shortly, "does not take proceedings"; and it was said, therefore, that the fact that a man does not take the proceedings is quite sufficient to satisfy the section. That seems to me to be entirely opposed to the whole framing of the section. I do not think it is possible to say that "neglect" always means the same wherever it occurs. It may be that there are provisions in which neglect may mean nothing more than omit; I do not say there are not, but looking at the whole of this section it seems to me perfectly

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obvious it must mean something more. The section would be, as I ventured to say during the argument, a silly section if it said that a man must unreasonably refuse, that is, that there must be unreasonableness in his refusal, if he is asked, but then went on to say that, if he is not asked, the mere omission, whether reasonable or unreasonable, is sufficient to give jurisdiction. It would be quite unnecessary to put in any words about unreasonable refusal, if it was meant to say the jurisdiction or the right to sue by the approved society arose whenever there was an omission. Whether "unreasonably" applies to the word "neglects" as well as to "refuses" or not, "neglects" in this section means, in my opinion, something more than mere omission; therefore I think the contention is wrong.

It was also contended, as I understood the argument, that, assuming the workman merely failed to take proceedings, there was something more than mere omission, some neglect of a duty, in every case in which an insured person was receiving money from an approved society and had received it in respect of an incapacity which the society thought or might think was due to an accident during his service, and that it was his duty to sue his employers and a neglect of duty not to do so. I cannot assent to that proposition either. It must be shewn that he had neglected in the sense that I have mentioned.

The facts here are that the insured person said he did not take proceedings because he did not believe he had any right to take them; he did not believe his illness arose from the accident. It is not found that this was not a perfectly bona fide opinion. Of course bona fides may not be enough. A man may honestly be of opinion that his illness did not arise from an accident and yet be unreasonable; but the mere fact of his not being a doctor and of his taking upon himself to say the illness did not arise from the accident is not unreasonable. In this case nothing was done to point out to him that he was unreasonable and his opinion wrong. He was never confronted with the doctor's opinion or applied to by the society, and the fact remains that he said he did not think the illness arose from the accident. There were facts here upon which the learned county court judge might if he chose have found that was not his real reason for not

taking proceedings. He has not so found. He has found he did not neglect, and although he has found that upon wrong grounds to a certain extent at any rate, yet we do not know that that ground was the whole of his grounds. Although to some extent he has so found on wrong grounds, we cannot interfere with his finding unless we can say upon the admitted facts that any reasonable person would have inferred that the omission to take proceedings was a neglect in the sense I have mentioned. I do not think we can say so. I think these facts are perfectly consistent with a bona fide opinion formed upon reasonable grounds that the illness did not arise from the accident; and, if that were the reason for not taking proceedings, that is not neglect, in my opinion, within the meaning of this section.

I agree, therefore, that this appeal must be dismissed.

COZENS-HARDY M.R. The appeal will be dismissed with costs to be paid by the approved society.

Appeal dismissed.

Solicitors: *Kingsley Wood & Co.; Ullithorne, Currey & Co., for C. F. Elliot Smith, Mansfield.*

W. I. C.

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June 27, 30.

WELLS *v.* SMITH.

[1913 W. 3038.]

Principal and Agent—Fraudulent Misrepresentation—Knowledge of Agent not imputed to Principal.

The defendant made a statement to the plaintiff's agent, which was untrue to the knowledge of the defendant and of the agent, in order to induce the plaintiff, whom the defendant did not believe to know its untruth, to act upon it. The agent communicated the defendant's statement to the plaintiff, who, relying on the truth of the statement, acted on it to her damage. In an action by the plaintiff against the defendant to recover damages for false and fraudulent misrepresentation :—

Held, that the knowledge of the plaintiff's agent of the untruth of the defendant's statement could not be imputed to the plaintiff, and that the plaintiff was, therefore, entitled to recover damages from the defendant.

Further Consideration of an action tried by Scrutton J. with a common jury.

The following statement of facts is taken from the learned judge's written judgment :—

" Mrs. Wells, the owner of a furnished house, 36, Westbourne Park Villas, was desirous to let it, and put it in the hands of Messrs. Braham, Roberts & Co., house agents. She had known the principal partner in that firm for some time, but had not employed him as a house agent before that transaction. A Mrs. Pridgeon called on Mrs. Wells about the house, and was referred by her to the agents, who asked her for a reference. She gave the name of Mr. H. P. Smith, the defendant. The agents accordingly wrote him on October 19 a letter in the following terms : ' Mr. H. P. Smith. Dear Sir,—Mrs. Pridgeon of Blandford House has applied to us for a furnished house at a rental of four guineas per week, and has kindly given your name as a reference. We should feel obliged if you would inform us in strict confidence whether you consider her a thoroughly responsible and in all ways a desirable tenant. Yours faithfully, Braham, Roberts & Co.' The defendant wrote on this letter the following memorandum : ' I know nothing of

Mrs. Pridgeon's financial standing, but if I had a house to let at the figure you mention I should not hesitate to let it to her. H. P. S.' This memorandum was shewn to Mrs. Wells, who, in reliance on the statement made, let the house to Mrs. Pridgeon. The latter was in fact a woman of immoral character, receiving allowances from and visited for immoral purposes by several men, including the defendant. She did not pay her rent, and she and her lodgers or visitors did considerable damage to the house and furniture. Mrs. Wells thereupon brought an action against H. P. Smith for fraudulent misrepresentation, claiming damages which the jury assessed at 60*l.*

"The defence was the somewhat cynical one that though to any one who did not know the character of Mrs. Pridgeon the reference would be misleading, it was not misleading to the plaintiff or her agents, both of whom knew the character of the woman and were quite willing that the house should be used for immoral purposes. The defendant, as I understood, said in the box that he would not let a house of his to a kept woman like Mrs. Pridgeon, but the recommendation meant nothing as Mrs. Wells and her agents knew all about the woman. The plaintiff was vigorously cross-examined as to this; she emphatically denied the suggestion, and the jury found, in answer to the second question left to them, that the plaintiff did not know at the time of the letting that Mrs. Pridgeon was not a respectable woman, and that the defendant did not believe that the plaintiff knew. It was in evidence, however, that the plaintiff's agents, Braham, Roberts & Co., acting for other people, had let flats to Mrs. Pridgeon in a house of doubtful reputation, and the jury found in answer to the third question that the plaintiff's agents knew at the time of the letting that Mrs. Pridgeon was not a respectable person. The questions put to the jury were submitted to counsel, who suggested no further questions, but it was agreed that if any other questions turned out to be relevant I should find the facts answering such questions. I accordingly find in relation to the third finding of the jury that the knowledge of the agents of the character of Mrs. Pridgeon was not acquired while acting as agents for the plaintiff, but as agents for other employers. The jury also found that the defendant knew that

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the reference might be shewn to the owner of the house, supplementing which I find that the defendant intended the owner of the house to act on his representation. The fourth finding of the jury was that the plaintiff relied on the defendant's representation in letting the house. The fifth finding was that the defendant made an untrue representation of fact fraudulently, i.e., knowing it to be untrue."

Patrick Hastings, for the defendant. The jury have found that the plaintiff's agents knew that Mrs. Pridgeon was not a respectable person; the agents therefore knew that the defendant's representation was untrue. It was the duty of the agents to inform their principal, the plaintiff, of everything that they knew concerning the business with which they had been entrusted, and that being so, the knowledge of the agents is the knowledge of the principal: *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1); *Thompson* v. *Cartwright.* (2) Although constructive notice is no defence in a case of misrepresentation, yet in this case the principal must be taken to have had by her agents actual knowledge that the statement of the defendant was untrue, and therefore it cannot be said that the plaintiff was induced by the defendant's misrepresentation to let her house to the tenant in question. Judgment ought therefore to be entered for the defendant.

Enness, for the plaintiff. Where the agent is himself a party to the fraudulent misrepresentation, as this agent was, his knowledge cannot be imputed to the principal. *Bawden's Case* (1) is distinguishable, for the assured was not a party to the misrepresentation. [He cited *In re Marseilles Extension Ry. Co.* (3), *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.* (4), *In re Fitzroy Bessemer Steel Co.* (5), and *Sharpe* v. *Foy.* (6)]

Hastings, in reply, referred to *Bradley* v. *Riches.* (7)

Cur. adv. vult.

(1) [1892] 2 Q. B. 534.
(2) (1863) 33 Beav. 178.
(3) (1871) L. R. 7 Ch. 161.
(4) [1900] 2 Ch. 1.
(5) (1884) 50 L. T. 144.
(6) (1868) L. R. 4 Ch. 35
(7) (1878) 9 Ch. D. 189.

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June 30. SCRUTTON J. read the following judgment, in which, after stating the facts as above set out, he continued as follows: On these findings Mr. Hastings, who argued for the defendant with his usual clearness and brevity, contended that the knowledge of the agent must be imputed to the principal, and, consequently, that there was no fraudulent representation to a principal who, through her agent, knew the untruth of the representation and could not be deemed to rely on its truth. I hope it is not unjudicial to say that I am glad this ingenious argument cannot protect a defendant of whose conduct I strongly disapprove. I think it cannot prevail. In the first place I am not satisfied that knowledge of the agent not acquired in the course of his employment for the principal should be imputed to the principal: see by the Court of Appeal in *Welsbach Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.* (1); *Bolckow, Vaughan & Co.* v. *Fisher* (2); *Société Générale de Paris* v. *Tramways Union Co.* (3); and I do not think the judgment in the peculiar case of *Bradley* v. *Riches* (4) disturbs this position.

In the second place, I am not aware of any case, and counsel did not refer me to one, where, when a man has made a statement untrue to his knowledge to induce another, whom he does not believe to know its untruth, to act upon it, and that other has acted upon it in ignorance and to his damage, the maker of the false representation has been allowed to protect himself by proving that an agent of the other knew of the untruth. Mr. Smith has made a statement which he knew to be untrue, believing it might be shewn to Mrs. Wells and intending her to act upon it, while he did not believe she knew its untruth. This is fraud, and I should be very slow to allow the effects of actual fraud to be nullified by constructive notice. The case of *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (5) would, I think, have been decided differently if the one-eyed assured had actually put on the proposal a statement that he had the sight of two eyes. Just as in *Redgrave* v. *Hurd* (6) a man who told a

(1) [1900] 2 Ch. 1, at p. 11.
(2) (1882) 10 Q. B. D. 161, at p. 169.
(3) (1884) 14 Q. B. D. 424, at pp. 443, 450.
(4) 9 Ch. D. 189.
(5) [1892] 2 Q. B. 534.
(6) (1881) 20 Ch. D. 1.

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lie as to his earnings was not allowed to protect himself by shewing that he had offered the books for inspection, which, if carefully inspected, would have shewn the untruth of his statement, so, I think, a man who tells a lie to another cannot protect himself by saying "Your agent should have warned you of my lie."

For these reasons I think the defendant is on the facts legally liable as, I am clear, he is morally liable. There must be judgment for the plaintiff for 60*l.* and costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Baker & Savigny.*
Solicitors for defendant: *Benham, Barrett & Synnott.*

F. O. R.

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May 26.

In re A DEBTOR (No. 37 OF 1914).

Bankruptcy—Bankruptcy Notice—Counter-claim exceeding Amount of Judgment Debt and which Debtor could not set up in Action in which Judgment obtained—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

By s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy if "a creditor has obtained a final judgment against him for any amount, and . . . . has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

A judgment creditor served a bankruptcy notice upon the debtor in respect of the judgment debt. The debtor after the service of the bankruptcy notice obtained an assignment to himself of a debt due from the judgment creditor to a firm of which the debtor was a member which was alleged by the debtor to exceed the amount of the judgment debt, and applied to set aside the bankruptcy notice on the ground that he had a counter-claim which exceeded the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained:—

Held that, even assuming that the debtor could, had he so chosen, have obtained the assignment in time to set up the counter-claim in the

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action, the bankruptcy notice must be set aside inasmuch as the debtor could not as matters stood at the time the action was proceeding have set up the counter-claim.

APPEAL by judgment creditors against the decision of the registrar of the Manchester County Court setting aside a bankruptcy notice.

The debtor was a partner in a firm of consulting engineers and architects which had been employed by the judgment creditors (a joint stock company) in the construction of certain cotton spinning mills. In respect of work done by the debtor's firm in construction of the mills between 1908 and 1910 a sum of nearly 10,000*l.* was claimed by the firm as having become due to them in July, 1910, and the debtor's firm alleged that between July, 1910, and March 31, 1914, further sums became due to them from the judgment creditors in respect of additional work and interest on the unpaid 10,000*l.* which (after allowing for a payment on account of 2550*l.*) amounted to a sum of upwards of 12,000*l.* due to the firm on March 31, 1914.

In February, 1914, the judgment creditors obtained an order for judgment for 1142*l.* 18*s.* 4*d.* against the debtor in respect of unpaid calls on shares in the company, the writ having been issued in May, 1913, and judgment was entered against the debtor on April 1, 1914. On April 8, 1914, the judgment creditors served a bankruptcy notice upon the debtor, and on April 15, 1914, the debtor obtained an assignment from his firm of the sum due to it from the judgment creditors, and on the same day filed (under r. 138, clause 2, of the Bankruptcy Rules, 1886 and 1890) an affidavit with the registrar that he had a counter-claim which exceeded the amount of the judgment debt and which he could not have set up in the action in which the judgment was obtained. The filing of this affidavit operated under r. 139 as an application to set aside the bankruptcy notice. It was admitted that having regard to r. 4 the application was in time. The application came on for hearing before the registrar on April 21, 1914, when he set aside the bankruptcy notice.

The judgment creditors appealed upon the ground (inter alia) that the alleged counter-claim, set-off, or cross-demand was not

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one which the respondent could not set up in the action in which the judgment was obtained.

E. W. Hansell, for the appellants. The order of the registrar was wrong. In order to justify the registrar under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883 (1), in setting aside the bankruptcy notice it was necessary for the debtor to shew that he could not have set up his counter-claim in the action in which the judgment was obtained. The debtor did not shew that. As the alleged debt to the firm from the petitioning creditors had existed since 1910, he could have obtained its assignment from the firm to himself in ample time to enable him to set it up against the petitioning creditors in the action in which they obtained judgment against him. He could have taken the steps which he took on April 15, 1914, at any time between 1910 and February, 1914, when the order for judgment was obtained in the action against him. A debtor cannot refrain from putting himself into a position to set up a counter-claim and then say that he could not set it up. It is true that until he obtained the assignment he could not as a matter of law set up the counter-claim. But the meaning of the section is that if as a matter of business it would have been possible for him to place himself in a position to set up the debt in the action, it is not a counter-claim "which he could not set up in the action in which the judgment was obtained." The question is whether the debtor

(1) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1: "A debtor commits an act of bankruptcy in each of the following cases:—

. . . . .

"(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:"

could have taken steps which would have enabled him to avail himself of this particular counter-claim and to set it up in the action.

[HORRIDGE J. The section says "which he could not set up," not "which he could not get in and set up."]

The debtor is in effect setting up his own negligence. He has no right to abstain from getting in the debt and then to say that he could not set it up.

Barrington-Ward, for the respondent, was not called upon to argue.

AVORY J. I am of opinion that the order of the registrar setting aside the bankruptcy notice must stand. He had to determine whether the debtor had brought himself within the provisions contained in s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, by satisfying him that he had a counter-claim, set-off, or cross-demand which equalled or exceeded the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained. For the purposes of my judgment I will assume that the assignment dated April 15, 1914, was executed for the purpose of enabling the debtor to raise the matter before the registrar at the hearing of the application to set aside the bankruptcy notice. But it was in fact an assignment to the debtor of the debt which was due to the partnership, and on April 21, when the application came before the registrar, there was in fact in existence an assignment which transferred to the debtor the debt which had formerly belonged to the partnership. There was ample evidence before the registrar that the defendant then had a counter-claim which exceeded the amount of the judgment debt and which he could not as a matter of law have set up in the action in which the judgment was obtained. On behalf of the appellants it is contended by Mr. Hansell that even if that be true, the debtor did not shew that he was within the last words of s. 4, sub-s. 1 (*g*), "which he could not set up in the action in which the judgment was obtained" because he did not shew that he could not as a matter of fact have obtained an assignment of the debt in time to set it up by way of counter-claim in the action in which the judgment was obtained. This

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was a debt which until the assignment to the debtor was executed was a debt due to the partnership and not to the debtor, and, therefore, as the assignment was not executed until after the date of the judgment the debtor could not set it up in the action in which the judgment was obtained.

Mr. Hansell does not dispute that proposition as a matter of law, but he contends that if as a fact the debtor could have obtained the assignment earlier than he did he ought to have done so, and that he could therefore have set it up in the action in which the judgment was obtained within the meaning of s. 4, sub-s. 1 (*g*). In my judgment that is not the meaning of the section. I think that upon the true interpretation of the section a debtor is entitled to set up in answer to a bankruptcy notice a counter-claim which rebus sic stantibus he could not in law have set up in the action in which the judgment was obtained, even though he could, if he had chosen, have taken steps which would have rendered the counter-claim available to him in the action.

I think it means a counter-claim which as things then stood the debtor could not set up in the action.

HORRIDGE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Alec Wright & Co., Bacup.*

Solicitors for respondent: *Evelyn, Jones & Co., for R. Barrow-Sicree, Manchester.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1913

Nov. 13, 14, 17, 18, 19, 20, 21, 25, 26, 27;

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Feb. 9.

RYAN *v.* THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED.

[1912 R. 1111.]

O'CONNELL *v.* SAME.

[1912 O. 759.]

SCANLON *v.* SAME.

[1912 S. 2216.]

O'BRIEN *v.* SAME.

[1912 O. 760.]

Shipping—Steerage Passenger—Contract Ticket—Form of—"Form approved by the Board of Trade"—Exception of Negligence on Back of Ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 320.

By s. 320, sub-s. 1, of the Merchant Shipping Act, 1894, a person receiving money from any person for a passage as a steerage passenger in any ship proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters. By sub-s. 2, "the contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section."

The form approved by the Board of Trade contained a "direction" that "a contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The contract ticket issued by the defendants for a passage for a steerage passenger in their steamship from the United Kingdom to New York contained all that was in the approved form, but in addition it contained on the front thereof the words "See back," and on the back thereof there were a number of conditions which had not been approved by the Board of Trade, one of which exempted the defendants from loss, damage, or delay to the passenger or his luggage arising from (inter alia) the negligence of the shipowners' servants. During the voyage the steamship, owing to the negligence of the defendants' servants, collided with an iceberg and sank, and the passenger was drowned. In an action under the Fatal Accidents Act, 1846, to recover damages for his death, the defendants contended that the above condition relieved them from liability:—

Held by Vaughan Williams and Kennedy L.JJ., Buckley L.J., dissenting, affirming the decision of Bailhache J., that the above

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condition, not having been approved by the Board of Trade, was invalid, and that therefore the defendants were not entitled by reason of s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, to rely upon it to protect themselves from liability.

APPLICATION by the defendants for judgment or a new trial in four actions tried together before Bailhache J. and a jury.

The actions were brought under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), by relatives of four deceased passengers of the names of Ryan, O'Connell, Scanlon, and O'Brien, who were being carried on board the defendants' steamship *Titanic* on a voyage from Queenstown to New York, and who were drowned owing to the alleged negligence of the defendants' servants in consequence of the ship colliding with an iceberg in the North Atlantic Ocean and foundering on April 15, 1912.

The negligence alleged (so far as material) was that the *Titanic* was being navigated at an excessive speed, namely, at the rate of twenty-two knots per hour, in the conditions prevailing at the time, namely, the exceptional darkness of the night, the hazy condition of the atmosphere, and the absence of wind and of movement of the sea, and in the presence of icebergs and fields of ice in the course of the ship, of which the defendants' servants knew by wireless messages, and in failing to provide a sufficient and proper look-out.

The defendants, in their defence in each action, denied that they were guilty of negligence. They further pleaded that, if their servants were guilty of negligence, they were not liable for the consequences of such negligence or the loss of the passenger by reason of the terms of condition 3 on the back of the passenger contract ticket, hereinafter set out.

The plaintiff in each case in his reply pleaded that, if the terms of the contract were as alleged in the defence, the passenger did not know that the contract contained the said terms or any conditions relating to the terms of the contract of carriage, and/or that the defendants failed to take reasonably sufficient steps to bring the existence of such terms or conditions to the knowledge of the passenger; and, alternatively, that the said terms were illegal and not binding on the passenger

by virtue of s. 320 of the Merchant Shipping Act, 1894 (1), and the statutory rule and direction issued by the Board of Trade thereunder, in that the contract ticket was not in the form approved by the Board of Trade and dated February 15, 1908 (set out in the Statutory Rules and Orders, 1908, p. 615), and the contract ticket was issued in disobedience to direction No. 7 therein contained.

The form approved and issued by the Board of Trade was headed "Steerage Passenger's Contract Ticket"; immediately underneath were printed seven "directions," and in the left-hand margin were these words: "These directions and the notice to steerage passengers below form part of, and must appear on, each contract ticket." The directions were as follows:

"1. A contract ticket in this form must be given to every person engaging a passage as a steerage passenger in any ship proceeding from the British Islands to any port out of Europe, and not within the Mediterranean Sea, immediately on the payment or deposit by such steerage passenger of the whole or any part of the passage money, for or in respect of the passage engaged.

"2. The victualling scale for the voyage must be printed in the body of the ticket.

"3. All the blanks must be correctly filled in, and the ticket must be printed in plain and legible characters and legibly

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 320: "(1.) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters.

"(2.) The contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket, not being inconsistent with this Act, shall be obeyed as if set forth in this section.

"(3.) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding fifty pounds.

"(4.) Contract tickets under this section shall not be liable to stamp duty."

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signed with the christian names and surname and address in full of the person who issues it.

"4. The day of the month on which the steerage passengers are to embark must be inserted in words and not in figures.

"5. When once issued, this ticket must not be withdrawn from the passenger, nor any alteration, addition, or erasure made in it.

"6. This ticket is not transferable.

"7. A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form."

Then, after a blank left for the name of the ship and the place where and date on which the passengers were to embark, came the following clause:—"I engage that the person named in the margin shall be provided with a steerage passage to, and shall be landed at, the port of in in the ship with not less than ten cubic feet for luggage for each statute adult, and shall be victualled during the voyage and the time of detention at any place before its termination, according to the subjoined scale for the sum of £ including Government dues before embarkation, and head money, if any, at the place of landing, and every other charge, except freight for excess of luggage beyond the quantity above specified, and I hereby acknowledge to have received the sum of £ in {full / part} payment.

"The luggage carried under this engagement, whether in excess of ten cubic feet or not, shall be deemed to be of a value not exceeding 10*l.*, unless the value in excess of that sum be declared and paid for.

"The following quantities, at least, of water and provisions will be supplied by the master of the ship, as required by law, viz:—

"[Here insert the statutory dietary scale.]

"[If mess utensils and bedding are to be provided by the ship, it must be so stated here.]

"Signature in full

"Place Date

"[If signed by a broker or agent, state on whose behalf.]

"Notice to Steerage Passengers. (1)

"1. If steerage passengers, through no default of their own, are not received on board on the day named in their contract tickets, or fail to obtain a passage in the ship, they should apply to the emigration officer at the port, who will assist in obtaining redress under the Merchant Shipping Acts.

"2. Steerage passengers should carefully keep this part of their contract ticket (2) till after the end of the voyage.

"This contract ticket is exempt from stamp duty."

The ticket issued to each of the four passengers was made out on its face in accordance with the above form (except that the words in the left-hand margin, "These directions" &c., were omitted), with the addition of the words, in large type at the foot thereof, "See back," and a separate slip was attached on the face thereof with the following words printed on it in red ink:—

"Notice.

"Your attention is specially directed to the conditions of transportation in the annexed contract.

"The company's liability for baggage is strictly limited, but passengers can protect themselves by insurance, which may be effected at this or any of the company's offices or agencies." (3)

On the back of the ticket there were ten printed conditions under the heading "Notice to Passengers," of which condition 3 was as follows: "Neither the shipowner, agent or passage broker shall be liable to any passenger carried under this contract, for loss, damage or delay to the passenger or his baggage, arising from the act of God, public enemies, arrests or restraints of princes, rulers or people, fire, collision, stranding, perils of the seas, rivers, or of navigation of any kind, accidents to or from machinery, boilers, steam, latent defects, even though

(1) In the tickets issued to the passengers in the present case this "notice to steerage passengers" was printed in the margin.

(2) The contract ticket contained a counterpart, which was to be separated from the part to be kept by the passenger and to be delivered by the passenger to the emigration officer at the port of embarkation, or, in his absence, to the officer of Customs or to any one appointed by him to receive it.

(3) There was evidence that the passenger would not be allowed to go on board unless he produced his ticket with the red ink slip upon it.

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existing at the beginning of the voyage, or from causes of any kind, beyond the carrier's control even though the loss, damage or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible, and whether occurring on board this or any other vessel on which the passenger may be forwarded under this contract. All questions arising under this paragraph of the contract shall be decided according to English law with reference to which it is made."

The conditions on the back had never been approved by the Board of Trade.

At the trial the jury found in answer to questions put to them by the learned judge that the navigation of the *Titanic* was negligent in respect of speed but was not negligent in respect of look-out. They also found that the defendants did not do what was reasonably sufficient to give the passengers Ryan, O'Connell, and Scanlon notice of the conditions on the ticket, but that the defendants did what was reasonably sufficient to give O'Brien notice thereof, and the damages were assessed by consent in each case at 100*l.*

The learned judge directed judgment to be entered for each of the plaintiffs Ryan, O'Connell, and Scanlon for 100*l.*, and in O'Brien's case he held, upon further consideration, that the ticket was not in the form approved by the Board within the meaning of s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, by reason of the insertion of condition 3 therein; that therefore the defendants were not entitled to rely upon that condition; and that the plaintiff was entitled to judgment.

The defendants appealed in all the four actions, and asked for judgment, or in the alternative for a new trial upon the grounds of misdirection and that the verdict was against the weight of the evidence.

Duke, K.C., and *Maurice Hill, K.C.* (*Raeburn* with them), for the defendants. With regard to the finding of the jury in the three cases of Ryan, O'Connell, and Scanlon that the defendants did not do what was reasonably sufficient to give the passenger in each of those cases notice of the conditions upon the back of the ticket, it is submitted that where a document in clear

language is given and received as containing the terms of the contract between the parties, it is conclusive as to those terms, and there is no question for the jury. The person taking the document is bound by the conditions on it. It was so held in the case of a railway ticket in *Zunz* v. *South Eastern Ry. Co.* (1) and *Burke* v. *South Eastern Ry. Co.* (2) In *Henderson* v. *Stevenson* (3) the ticket was complete on the face of it, and the passenger did not know that there were any conditions on the back of it. As Lord Coleridge C.J. and Lindley J. said in *Burke* v. *South Eastern Ry. Co.* (2), the House of Lords in *Henderson* v. *Stevenson* (3) held that on the facts of that case it must be taken that the contract was contained on the face of the ticket. In the present case the ticket had on its face the words "See back," which make the conditions on the back part of the contract, and moreover the passengers had every opportunity of examining the conditions before sailing. The case comes within the decisions in the railway cases which are not affected by the decision in *Henderson* v. *Stevenson*. (3) In *Richardson, Spence & Co.* v. *Rowntree* (4) the passenger did not know that the ticket contained conditions, and the ticket was handed to her folded up so that no writing was visible unless she opened it, and nothing was said to draw her attention to the fact that the ticket contained conditions. Each case must to a large extent depend upon its own facts. In *Harris* v. *Great Western Ry. Co.* (5), the case of a railway cloak-room ticket, it was held that the defendants were protected by a condition on the back of the ticket, the plaintiff knowing that there were conditions but not knowing what those conditions were. That case was approved in *Parker* v. *South Eastern Ry. Co.* (6), which also related to a railway cloak-room ticket, and in which the proper questions for the jury were first formulated. In this last case the plaintiff's evidence was that he knew there was printed matter on the back of the ticket, but that he did not read it and did not know or believe that it contained conditions, and Mellish L.J. stated (at p. 423) that the proper direction to leave to the jury was that, if the

(1) (1869) L. R. 4 Q. B. 539.
(2) (1879) 5 C. P. D. 1.
(3) (1875) L. R. 2 H. L. (Sc.) 470.
(4) [1894] A. C. 217.
(5) (1876) 1 Q. B. D. 515.
(6) (1877) 2 C. P. D. 416.

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person receiving the ticket did not see or know that there was any writing on it, he was not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, he was bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see that there was writing upon it was, in the opinion of the jury, reasonable notice that the writing contained conditions. This direction was approved by the House of Lords in *Richardson, Spence & Co.* v. *Rowntree.* (1) It is not necessary that the passenger should know the conditions so long as he appreciates the fact that the ticket contains conditions or stipulations. The ticket in the present case was in common form, and it obviously contained printed matter on both sides, and it was given to and accepted by each of the plaintiffs as the contract binding upon them, their attention being called to the conditions thereon by the red ink slip attached to it, and they had every opportunity of reading the conditions and took no objection to them, and they were therefore bound by them: *Acton* v. *Castle Mail Packets Co.* (2); *Watkins* v. *Rymill* (3); *Marriott* v. *Yeoward Brothers.* (4) The defendants therefore had satisfied the onus which lay upon them, and there was no evidence to the contrary. The presumption of fact is that the conditions were part of the contract between the plaintiffs and the defendants, and no evidence was given to rebut that presumption as was given in the cases of *Henderson* v. *Stevenson* (5) and *Richardson, Spence & Co.* v. *Rowntree.* (1) The evidence was all one way, and the learned judge ought either to have held that there was no question for the jury or to have directed the jury that they could not find that reasonable notice that the ticket contained conditions had not been given to the passengers. [*Haigh* v. *Royal Mail Steam Packet Co.* (6) and *Thompson* v. *Royal Mail Steam Packet Co.* (7) were also referred to.]

(1) [1894] A. C. 217.
(2) (1895) 73 L. T. 158.
(3) (1883) 10 Q. B. D. 178.
(4) [1909] 2 K. B. 987.
(5) L. R. 2 H. L. (Sc.) 470.
(6) (1883) 52 L. J. (Q.B.) 395, 640; 5 Asp. M. L. C. 189.
(7) (1875) 5 Asp. M. L. C. 190, n.

The next question is whether condition 3 on the back of the ticket is binding upon the plaintiffs. This depends upon the true construction of s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, and the powers given to the Board of Trade under that section, and the exercise of those powers by the Board of Trade. That sub-section provides that "the contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section." The terms of condition 3 are not prohibited at common law. The Act does not expressly prohibit them, and if they are prohibited it can only be by implication from the words of s. 320, sub-s. 2, that "the contract ticket shall be in a form approved by the Board of Trade." These words do not prevent the parties from making such stipulations as they have done in condition 3. Since 43 Geo. 3, c. 56, passed in 1803, various Acts have been passed for the protection and comfort of passengers in the matter of accommodation and victualling on ocean-going ships, and by 4 Geo. 4, c. 84, passed in 1823, those Acts were repealed and their provisions were amended and consolidated. None of those Acts dealt with the form of the passenger's ticket. The Passengers Act, 1842 (5 & 6 Vict. c. 107), s. 19, provided for the first time for the giving of a "passengers contract ticket" to passengers in merchant vessels on a voyage to North America in the form in Sched. B to the Act. The Passengers Act, 1849 (12 & 13 Vict. c. 33), s. 1, repealed this last Act, and s. 47 provided for the giving to each passenger to any port in North America of a contract ticket in plain and legible characters, and made out upon a printed form, which should be in all respects according to the form in Sched. H to the Act, or according to such other form as might from time to time be prescribed by the Colonial Land and Emigration Commissioners by notice published in the *London Gazette*, "and shall also comply with all the directions contained on the face of such form." The form in the schedule is headed "Passengers Contract Ticket." By s. 71 of the Passengers Act, 1855 (18 & 19 Vict. c. 119), a contract ticket had to be given to every passenger in a passenger ship proceeding

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to a place out of Europe (except the Mediterranean), made out in plain and legible characters on a printed form, which in the case of cabin passengers was to be according to the form in Sched. K, and in the case of all other passengers in the form in Sched. L, or according to such other form as might from time to time be prescribed by the Emigration Commissioners in any notice published in the *London Gazette*; "and any directions contained on the face of such form of contract ticket shall be obeyed in the same manner as if herein set forth." The form of cabin passengers' ticket in that Act is substantially the same as that now in force, but the form of steerage passengers' ticket is different because clauses 6 and 7 of the "directions" which appear on the face of the present form of ticket are not there. By s. 5 of the Merchant Shipping Act, 1872 (35 & 36 Vict. c. 73), all the powers and duties of the Emigration Commissioners under the Passengers Act, 1855, were transferred to the Board of Trade; and under s. 71 of the Act of 1855 the Board of Trade by an order dated August 19, 1888, and published in the *London Gazette* of August 24, 1888, prescribed a form of passengers' contract ticket (in substitution for the form prescribed by them and published in the *London Gazette* of July 17, 1883) for a voyage from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea, which for the first time contained in clause 6 (corresponding to clause 7 of the contract ticket in the present case) a provision that "a contract ticket shall not contain either on the face or on the back thereof, or have annexed thereto, any condition, stipulation, or exception not contained in or required by this form." By an order of the Board of Trade dated February 19, 1889, and published in the *London Gazette* of February 22, 1889, this form was withdrawn and a new form of passengers' contract ticket (1) was substituted for it, which provided in clause 6 that "a contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The words "or on the back thereof or

(1) By s. 3 of the Passengers Act, 1855, the expression "passengers" included all passengers except cabin passengers; and the forms of passenger's contract ticket of 1888 and 1889 did not deal with cabin passengers.

have annexed thereto," which appeared in the form of 1888, were omitted from the form prescribed on February 19, 1889, and this clause has been continued to the present day in all forms of steerage passengers' tickets: see the form dated December 13, 1894, and made under s. 320 of the Merchant Shipping Act, 1894, in the Statutory Rules and Orders Revised, vol. 8, title Merchant Shipping, p. 94 (1); and the later forms of February 15, 1908, and February 26, 1912 (2), which are identical. In these two later forms clause 6 becomes clause 7, and clause 6 runs, "This ticket is not transferable." This shews that the words "on the back thereof or have annexed thereto" were necessary to prevent conditions being inserted elsewhere than "on the face" of the ticket. Inferentially the words "on the face thereof" permit of stipulations being inserted on the back of the ticket. Clause 5, which prohibits the alteration of the ticket when once issued, refers to an alteration after the contract has been made, and is for the protection of the steerage passenger, whereas in the case of a cabin passengers' ticket an alteration may be made with his consent. (3) Therefore according to the form now in use no other conditions than those appearing in the Board of Trade form must appear "on the face" of the ticket. The Board of Trade, who are given this legislative power, have drawn a distinction between the face and the back of the ticket, and have supplied a means of construing their later forms. Unless there is some prohibition the parties are free to contract with each other. There is no object in saying "on the face" if the prohibition is absolute. The words mean that if the shipowner wishes to insert conditions he must not do so on the face of the ticket so as to interfere with the Board of Trade's stipulations, but must insert them on the back or in a separate document. Condition 3 on the back of the ticket

(1) This form is also set out in Temperley's Merchant Shipping Acts, 2nd ed., pp. 638, 639.

(2) These two forms are given in the Statutory Rules and Orders for 1908, p. 615, and 1912, p. 467, respectively. The form of February 26, 1912, came into operation on July 1, 1912.

(3) The Board of Trade under s. 320 of the Merchant Shipping Act, 1894, prescribed a form for a "cabin passenger's contract ticket," and for a "steerage passenger's contract ticket," respectively.

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in the present case is therefore not prohibited by the form prescribed by the Board of Trade and is valid.

Further, if "on the face thereof" includes a condition on the back, s. 320 of the Merchant Shipping Act, 1894, does not empower the Board of Trade to prescribe that no other conditions except those expressed in their own form shall be inserted in the ticket. Sect. 320, sub-s. 2, only says that "the contract ticket shall be in a form approved by the Board of Trade." There is no prohibition in the Act against the parties contracting as they please, and the Board of Trade have prohibited the making of such a contract by enacting clause 7 of the "Directions." That is inconsistent with the terms of the Act. The Legislature might have said that a contract ticket should be void if not made in accordance with the form approved by the Board of Trade, as it does in s. 395 of the Act in the case of apprenticeship agreements, and as it does in the case of bills of sale by s. 9 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43). It has not done that. Sub-s. 3 of s. 320 imposes a penalty for failing to comply with any requirement of the section, but it does not make the contract void. So too the Legislature might have said that any stipulation not in the approved form shall be void, but it has not done so. "The contract ticket" in sub-s. 2 means the document referred to in sub-s. 1, and not the contract itself, and the Board of Trade have only power to prescribe its form. Sect. 320 applies to all steerage passengers, and also to cabin passengers in an emigrant ship, which is defined in s. 268 as meaning every sea-going ship carrying (so far as material) more than fifty steerage passengers. It is impossible to suppose that s. 320 is meant to exclude a condition which the parties may agree to and which is not in the approved form. There is nothing to prevent the shipowner from adding to the protection of the passenger, and if so he can take something away from the protection. The argument on the other side must go to this length, that if a cabin passenger in an emigrant ship takes a contract ticket with a clause in it which has not been approved by the Board of Trade, by virtue of sub-s. 3 (*d*) of s. 268 of the Act he ceases to be a cabin passenger. That cannot have been intended. When the Act means to refer to the terms of a contract as

distinguished from its form, it does so in plain language, as in s. 395, sub-s. 5, which provides that indentures of apprenticeship "shall be in such form and contain such covenants, provisions, stipulations" as are prescribed by Order in Council. By s. 31 a mortgage of a ship "shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit." The universal practice is to insert all the detailed stipulations of the mortgage in a separate collateral instrument which is not registered and which is often not referred to in the form registered. This practice has been expressly recognized by the Courts in *The Benwell Tower* (1) and *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade.* (2) When the Act says that a document shall be in a certain form it does not exclude a collateral agreement. The Act therefore does not prohibit the insertion of conditions in the ticket. The decision of the learned judge was therefore wrong.

J. H. Campbell, K.C., T. Scanlan, and *J. D. Casswell* for the plaintiffs in the first three cases; and *J. H. Campbell, K.C., T. Scanlan,* and *Jackson Wolfe* for the plaintiff (O'Brien) in the fourth case. (3) With regard to the finding of the jury in the first three cases that the defendants did not do what was reasonably necessary to give the passengers notice of condition 3 on the back of the ticket, that is a question of fact, and the onus of shewing that such notice had been given lay on the defendants. It is a question for the jury: *Richardson, Spence & Co.* v. *Rowntree* (4); and the Court will not interfere with their finding.

With reference to O'Brien's case, there is no appeal against the finding of the jury that the defendants did what was reasonably sufficient to give him notice of the conditions. Condition 3, however, is invalid under s. 320, sub-s. 2, of the Merchant Shipping Act, 1894. The meaning of the sub-section is that the ticket is to be the evidence of the contract of carriage, and that

(1) (1895) 8 Asp. M. L. C. 13, at p. 18.
(2) [1905] 1 K. B. 815.
(3) The arguments for all the plaintiffs were heard together and therefore they are so reported.
(4) [1894] A. C. 217.

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it is to contain no contractual obligations which have not been approved by the Board of Trade. The Legislature has delegated to the Board of Trade the duty of supervising the conditions which the shipowner can impose upon passengers. There is nothing in the section qualifying the duty of the Board of Trade. Nor is there any ground for the contention that the duty is confined to an approval of a portion of the contents of the ticket, namely, the statutory conditions as to accommodation and victualling. The approval of the Board of Trade is not confined to the frame or skeleton of the ticket, which the shipowner may fill in as he pleases. Sect. 320, sub-s. 2, provides that "the contract ticket shall be in a form approved by the Board of Trade." This is a deliberate departure from the language of s. 71 of the Passengers Act, 1855, where the words are that the contract ticket shall be "in the form contained in Schedule L hereto annexed, or according to such other form as . . . . may from time to time be prescribed by the said Emigration Commissioners." "According to" a prescribed form is not the same as "in" a form. Sect. 9 of the Bills of Sale Act, 1882, enacts that a bill of sale shall be "in accordance with the form," and the House of Lords in *Thomas* v. *Kelly* (1) held that those words did not require the forms to be literally reproduced, Lord Macnaghten (at p. 520) pointing out that "the words of the Act are 'in accordance with the form,' not 'in the form.'" "In accordance with the form" means substantially in accordance with it: *Ex parte Stanford* (2); and even so Lord Halsbury L.C. in *Thomas* v. *Kelly* (1) said (at p. 511) that "the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain." The change of language in s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, from that used in s. 71 of the Passengers Act, 1855, shews the intention of the Legislature that the form approved by the Board of Trade shall be strictly followed. The intention of the Legislature is to prevent the insertion in these steerage passengers' contract tickets of conditions or stipulations adverse to the passenger without the sanction of the Board of Trade.

The words "on the face thereof" in clause 7 of the directions

(1) (1888) 13 App. Cas. 506. (2) (1886) 17 Q. B. D. 259, at p. 270.

do not mean on the front as contrasted with the back of the paper. They mean anywhere in the document. They do not inferentially give the defendants power to add any conditions or stipulations they please so long as they appear on the back of the paper. The object is not merely to reserve the front page of the document for the stipulations approved by the Board of Trade, but to protect the passenger against having stipulations imposed upon him which have not been approved by the Board of Trade. Otherwise the form approved by the Board of Trade would be rendered valueless. The contract is that contained on the face of the document.

Condition 3 on the back of the ticket is therefore invalid, and the plaintiff (O'Brien) in the fourth action is entitled to recover.

Duke, K.C., in reply. There is nothing in s. 320 which endows the Board of Trade with legislative authority to provide what shall be the substance of contracts made between carriers of emigrants and the emigrants themselves. The Legislature has laid down in the Act most minute provisions for the protection and comfort of emigrants. Sect. 320 deals with form and not with substance. It regulates the character and form of the documents used in the making of a contract with a passenger. The Board of Trade only purport to deal with matters of form, and if they go beyond that they act ultra vires. The power to make "directions" in the form of contract ticket is a power ancillary to the making of the form. The directions relate to form. The Board of Trade have nothing to say to substance. No doubt the words on the face of the ticket "I engage" &c. impose a duty to carry the passenger in a ship navigated with due care, but condition 3 on the back of the ticket relieves the defendants from liability for negligence.

Cur. adv. vult.

1914. Feb. 9. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal in the cases of four judgments obtained by relatives of four steerage passengers respectively against the Ocean Steam Navigation Company for loss of lives brought about by the collision of the *Titanic* with an iceberg. The names of the four passengers were Ryan, O'Connell,

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Scanlon, and O'Brien. There was one question common to all these cases, namely, whether the loss of the *Titanic* was due to negligent navigation, and the jury found it was.

The defendant company, notwithstanding the finding of negligence, claim exemption from liability by reason of clause 3 of the "Notice to Passengers" printed upon the back of the contract ticket, which by s. 320, sub-s. 1, of the Merchant Shipping Act, 1894, the shipowner is bound to give to the person who pays for the steerage passage, which notice includes a so-called condition that the shipowner inter alia shall not be liable to any passenger carried under this contract, even though the loss or damage may have been caused or contributed to by the neglect or default of the shipowner's servants. This condition is printed on the back of the contract ticket, and is referred to on the face of the ticket by the words "See back," and is headed on the back of the ticket with the words "Notice to Passengers."

The answers put forward by the plaintiffs to this exemption clause are: (1.) That the words, constituting what has been called the exemption clause, are not in fact part and parcel of the contract set forth in the contract ticket. (2.) That even if the exemption clause is part and parcel of the contract under which the passenger is to be carried, yet the operation of such exemption clause is excluded by s. 320 of the Merchant Shipping Act, 1894. (3.) That even if the exemption clause is in fact part and parcel of the contract set forth in the contract ticket, no sufficient notice of this exemption clause, which appears only at the back of the ticket, was given to the respective steerage passengers.

In the respective cases of Ryan, O'Connell, and Scanlon the jury found that no sufficient notice had been given by the defendants. In the case of O'Brien they found that sufficient notice had been given.

In the view which I take of this case it is unnecessary to consider further the finding of the jury as to the insufficiency of the notice, which is only material in case the exemption clause is valid and part and parcel of the contract.

I will first consider answer (1.) to the claim on the exemption clause, namely, that the words constituting what has been called

the exemption clause are not in fact part and parcel of the contract.

The exemption clause which appears only under the heading "Notice to Passengers" runs in these words: "Neither the shipowner, agent or passage broker shall be liable to any passenger carried under this contract, for loss, damage or delay to the passenger or his baggage, arising from the act of God, public enemies, arrests or restraints of princes, rulers or people, fire, collision, stranding, perils of the seas, rivers, or of navigation of any kind, accidents to or from machinery, boilers, steam, latent defects, even though existing at the beginning of the voyage, or from causes of any kind, beyond the carrier's control even though the loss, damage or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible, and whether occurring on board this or any other vessel on which the passenger may be forwarded under this contract. All questions arising under this paragraph of the contract shall be decided according to English law with reference to which it is made."

On the face of the ticket appear certain "directions" which in the form of contract issued by the Board of Trade in February, 1908, are stated to "form part of and must appear on each contract ticket." The words, it is to be observed, are "form part of and must appear on each contract ticket," and not "must form part of the contract."

In my judgment, neither the directions which precede the contract, nor the notice to steerage passengers which follows the contract, are part and parcel of the contract in the statutory form contained. The contrast on the face of the ticket between the respective positions of the "directions" and the "notice to steerage passengers" with the position of the words of the contract itself placed as it is between the words "I engage" and the signature of "Joseph Bruce Ismay for and on behalf of the Oceanic Steam Navigation Company Limited of Great Britain" is itself indicative of the limit of the words in the contract ticket constituting the contract. The words "See back" appear lower down than the signature of Joseph Bruce

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Ismay in a position detached from the words of the contract, and in quite a different type.

The intention and meaning of "Notice to Steerage Passengers" are elucidated by consideration of the forms issued: first, under the Passengers Act, 1842 (5 & 6 Vict. c. 107), s. 19; and then under the Passengers Act, 1849 (12 & 13 Vict. c. 33), one finds in Sched. H appended to that Act under the head "Notices to Passengers" these words, appearing below the contract on the passenger's contract ticket: "(1.) If the ship do not proceed to sea on the day specified above, passengers, if ready to go on board and proceed in the vessel, are entitled to subsistence money at the rate of one shilling a day." The money may be recovered by summary process before two magistrates. This notice is clearly not the subject of contract, but of legislation contained in ss. 33 and 52 of the Passengers Act, 1849. Notices dealing with penalties for not complying with the provisions for the protection of passengers first appear in s. 47 of the Act of 1849, and are always printed below the contract and not in it. This form is continued throughout the forms of ticket, whether issued by the Emigration Commissioners or by the Board of Trade, and spoken of as appearing on the face of the form of ticket, and in the form issued in 1908 by the Board of Trade the notice to passengers appears, as it always had done under the forms of ticket prescribed and sanctioned by previous orders, below the contract and not in it. All this shews that the notices refer, not to matters contractual, but to matters outside the contract. It is remarkable that in the steerage passenger's contract ticket form, dated February, 1908, the notices to steerage passengers are still printed below the contract, but in the actual ticket issued to steerage passengers on board the *Titanic* the clause referring to penalties is no longer printed with the other clauses now appearing at the back of the ticket, but is transferred to the side margin of the ticket. It seems to me that this dissociation of the penalty clause from the group under the heading "Notice to Passengers" at the back of the ticket, and the printing of the penalty notice by itself on the face of the ticket, is a departure from the form prescribed and sanctioned in February, 1908. So long as the heading "Notice to Passengers"

comprised notice of a statutory right, there was ground for saying that the matters included under this heading were not intended to be part of the actual contract between the passenger and the ship. It is this consideration which makes the departure from the contract form by placing the penalty clause for the first time in the margin a material alteration. It is not easy to say with what object this notice was transferred to the margin of the face of the ticket. So far as the directions preceding the contract are concerned, I do not think that it was seriously argued that these were part of the contract. The result is, in my judgment, that the exemption clause is not part and parcel of the contract.

I may here point out, as Kennedy L.J. does in his judgment, which he has allowed me to read, that the so-called contract contained in the exemption clause is inconsistent with that part of the contract sanctioned by the Board of Trade, which included an unqualified engagement, signed by the defendants' representative, to carry the passenger to his destination, to the legal effect of which I have already referred, and an agreement that his luggage shall be deemed to be of a value not exceeding 10*l.* unless the value in excess of that sum be declared and paid for. It cannot be open to the shipowner to qualify these terms by added terms such as the defendants have sought to annex by the conditions on the back of this ticket, which take away from the passenger all right of remedy for damage caused by the negligence of the defendants' servants, alike in respect of life and property.

I will now deal with the case upon the basis that the exemption clause in the "Notice to Passengers" is part and parcel of the contract between the passenger and the ship, and the question is whether its operation is excluded by the terms of s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, which runs as follows: "The contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section." When I first read the section I was of opinion that the form prescribed by these words was a general form, and not the form applicable to a particular passenger contract ticket of a particular ship

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tendered to the Board of Trade for approval. The publication in the *London Gazette* certainly, prima facie, looks as if the form of contract was not to be applied to the particular contract tickets of individual ships, and I will deal with the form prescribed by s. 320 on this basis.

The words "in a form approved by the Board of Trade" may, in my opinion, be interpreted in the light of the provisions that follow in the approved form. Now the approved form contains, beyond a doubt, substantive provisions, and it seems to me that these substantive provisions are of such a character that if nothing is added to them certain implied conditions follow as a matter of course, as, for instance, the contract to use all reasonable skill and care in the carriage in the ship of the passenger or his luggage. It is true that this implied condition may be excluded at common law by express words, but inasmuch as that exclusion would be the exclusion of a condition contained by implication in the form of contract requiring the approval of the Board of Trade, the exclusion could only be made by the addition of a clause approved by the Board of Trade. Such an exclusion would, though not inconsistent with the approved statutory form, be absolutely inconsistent with the contract to be implied by common law from the approved form as it stands. I do not go the length of saying that the form of contract cannot be added to in respect of matters of substance, but I do say that this can only be done with the express particular approval of the Board of Trade. It is clear that in the present case there has been no such particular approval. I see nothing ultra vires in the general form prescribed and sanctioned by the Board of Trade on February 15, 1908, if one ascribes to it the meaning that I ascribe to it, namely, that the form of contract cannot be added to in respect of matters of substance without the express particular approval of the Board of Trade, at all events in cases where the addition is inconsistent with the contract, which though not expressed would be implied from the words of the contract as it stands.

This being so, in my opinion we have only to deal with the question of actual negligence. [His Lordship then discussed the evidence, and came to the conclusion that it was impossible to say that there was no evidence upon which the jury might find,

as they did, negligence in the defendants. With regard to the alleged misdirection in the learned judge having confused the evidence upon a certain matter of fact, his Lordship thought that the evidence itself was very confused upon the point, and said: "And moreover in my judgment a mistaken view expressed by the judge in his summing-up as to the effect of the evidence which the jury have heard is certainly not a ground for a new trial in a case in which the jury have heard the evidence, and the judge has warned them that 'on the questions of fact they were the judges, and if the opinion he expressed did not appear right they were to reject it.'"]

As, therefore, I have come to the conclusion that there was evidence of negligence to go to the jury, I think that these appeals fail; for, as I have already stated, I think that the clause exempting the defendants from liability for negligent navigation is invalid, for the reasons I have given. Consequently, it is unnecessary to consider the question whether the defendants did all that was reasonable to bring that clause to the notice of the passengers.

For these reasons I think that these appeals must be dismissed.

BUCKLEY L.J. read the following judgment:—In O'Brien's action the jury found that the defendants did what was reasonably sufficient to give O'Brien notice of the conditions having regard to his condition in life. Those conditions included a stipulation found in article 3 on the back of the ticket, that the shipowner should not be liable to the passenger for negligence. The learned judge has held that that condition not having been approved by the Board of Trade is not binding upon O'Brien upon the ground that by virtue of s. 320 of the Merchant Shipping Act, 1894, the passenger could not so contract; that the condition was invalid. The question is whether this is right.

Sect. 320 is a section which provides by sub-s. 1 that there shall be given to the passenger a contract ticket. Sub-s. 2 then provides two things, namely, first, that the contract ticket shall be in a form approved by the Board of Trade, and published in the *London Gazette*, and, secondly, that any directions contained

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in that form of contract ticket not being inconsistent with the Act shall be obeyed as if set forth in that section. I shall deal with these two provisions separately.

The statute contains a number of provisions which are to have effect as between the shipowner and the passenger. The latter is by the statute protected in numerous detailed particulars, but, except as thus provided by the statute, the Act contains nothing fettering the liberty of the parties to make such contract as shall be satisfactory to them. The argument presented to us, and which has succeeded below, is addressed to shew that this sub-section remits it to the Board of Trade to determine, not the form, but all the terms and conditions of the contract: that the parties have no power to make additional or different terms. In my opinion it has not that effect. For instance, the Board of Trade might think it desirable to throw upon the shipowner the same liability as if he were an insurer of the passenger and his goods, and might in their approved form introduce a contractual term to that effect. In my opinion they have no power to do so and impose that term upon the parties, if the parties are minded to contract to some other effect. The words of the statute which authorize the Board of Trade to approve the form give them, I think, no power to determine the substance of the contract so far as the substance is not dictated by the Act itself. By way of illustration on the question of construction, suppose that upon an intended marriage heads of settlement are prepared indicating briefly the nature of the trusts and the outline of the intended provisions, and that they contain a clause that the settlement to be executed shall be in such form as shall be approved by a named member of the Bar. The person thus authorized to determine the form of the settlement has no power to vary or add to the trusts and provisions indicated in the heads. His province is to give effect to them by provisions apt for that purpose. The same is in my opinion true of s. 320, sub-s. 2. The Board of Trade may demand that the terms which by virtue of the statute are to be obeyed shall be expressed in such form as to them seems right, and can no doubt deal with such matters as the configuration of the document as regards containing tabular statements, or numbered clauses, or being

printed in some defined type, or any matters of that description. But in my judgment they have no power to affect the substance. It is unnecessary to consider whether the parties could by contract affect, modify, or alter those rights which are created by the statute. The argument is that they cannot affect, modify, or alter any conditions or terms not found in the statute but introduced by the Board of Trade into their approved form. The contention is that from the fact that the Board of Trade have statutory power to approve the form it results that the contract ticket must contain such terms, conditions, and stipulations as the Board of Trade approve and none others. In my opinion the Act has not so provided. The function of the Board of Trade is not to legislate but to formulate.

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Then as to the "directions" being the word employed in the second provision of this sub-section. That word "directions" was first used in s. 47 of the Passengers Act, 1849, a section which provided that the person receiving passage money shall give a contract ticket in plain and legible characters, and made out upon a printed form which shall be in all respects according to a form scheduled to the Act, or according to such other form as may from time to time be prescribed as there mentioned, and shall also comply with all the directions contained on the face of such form. The form scheduled to that Act contained words which have appeared in every subsequent statutory form and Board of Trade form down to and including the latest Board of Trade form, namely, that approved on February 26, 1912. The words are: "These directions and the 'notices to passengers' below form part of and must appear on each contract ticket." The "directions" in the statutory form of 1849 are (1.) that a ticket in this form must be given to every passenger; (2.) that the blanks must be correctly filled in, &c.; (3.) that the day of sailing must be inserted in words; and (4.) that when once issued the ticket must not be withdrawn from the passenger nor any alteration or erasure made in it. There are further directions, namely, that if mess utensils and bedding are to be provided by the shipowner the stipulations must be inserted, and that if the ticket is signed by a broker or agent it is to be stated on whose behalf. The point to be noted is that none of these are

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contractual terms. They are all notifications either of something for which the Act has provided or of details to which attention is to be given. Upon the construction of the Act of 1849 I think it plain that the word "directions" was confined to notifications such as above described, and had no reference to contractual terms as between the parties. The same is in my judgment true of the word "directions," as used in each subsequent Act, and as used in the present Act of 1894.

The "directions" have been varied from time to time, both in the statutory forms as long as statutory forms were continued, and in the Board of Trade forms after Board of Trade forms approved under the power in the statute came into use. The clause numbered 7 in the contract ticket in the present case was never contained in any statutory form. It appeared for the first time in a Board of Trade form made on August 19, 1888, under the Passengers Act, 1855, in the words "A contract ticket shall not contain either on the face or on the back thereof or have annexed thereto any condition, stipulation, or exception not contained in or required by this form." If those words were intended to provide that the parties should not make any contractual terms other than those contained in or required by the Board of Trade forms it was a clause which, whether it is called a direction or not, was, in my judgment, ultra vires the power given to the Board of Trade by the statute under which they derived authority at that date. However this may be, it is a fact that on February 19, 1889, six months later, another Board of Trade form was substituted in which the words were: "A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form," dropping the words "or on the back thereof or have annexed thereto." From that time to the present this clause has been expressed in these last-mentioned words. We have had much discussion as to what is meant by the words "on the face thereof." The appellants contend that those words mean on the face as distinguished from the back, that the purpose of the words is to provide that the simplicity and plainness of the ticket to the ordinary reader shall not be impaired by putting any additional matter on the face of the document, but that if you want to add anything you must do it

elsewhere either on the back or by a separate document. If anything turns upon the view which the Board of Trade took as to their own powers there would be much in favour of this view in the fact that the modification was made which I have already stated of striking out the words "or on the back thereof or have annexed thereto." But the question to be determined turns, I think, upon much broader considerations. The respondents contend that the words mean that a contract ticket shall not contain in any part thereof any condition, &c. They say condition 7 does not leave it open to the parties to put an additional condition on the back, or to add a condition by a separate document, but forbids them to impose an additional condition in any manner whatsoever. So to read the clause amounts to striking out the words "on the face thereof" altogether. Strike them out and the words will convey exactly the meaning which the parties say is to be attributed to them when the words are inserted. This is not a proper principle of construction. But further and beyond these considerations if the words as such had the effect for which the respondents contend, they would, in my judgment, by reason of the considerations on which I have already dwelt, be ultra vires the Board of Trade and would not be binding.

In O'Brien's case, therefore, the passenger has, in my opinion, become bound by a condition which was not invalid, which is binding upon him, and which relieves the defendants from liability. It follows that in this action the defendants are in my opinion entitled to judgment.

In each of the other three actions the jury have found that the defendants did not do what was reasonably sufficient to give the passenger notice of the conditions having regard to his condition in life. The appellants contend that this verdict was against the weight of evidence and perverse. The appellants agree that upon this issue the onus is upon them to prove the contract which they allege. They put in the contract containing as it does the third condition on the back, and they say that the only other evidence relevant to this issue is evidence which goes to shew that the passenger had reasonably sufficient notice of the conditions. This evidence consisted in Ryan's case of

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certain correspondence between one Moran and the defendants' agents, between March 28 and April 5, 1912, and the fact that on April 5 the steamer ticket for three berths for passengers, of whom Ryan was one, was sent to Moran, and evidence that Moran was agent for Ryan in making the contract. There was no evidence similar to this in the cases of O'Connell and Scanlon. In each of the three cases the passenger received his ticket, and there was affixed to it a red ink slip calling special attention to "the conditions of transportation in the annexed contract." There was also evidence that the passenger would not be allowed to go on board unless he produced his ticket with that red ink slip upon it. The question is whether upon these materials there was evidence upon which the jury could find as they did, first, in Ryan's case, that the defendants did not do what was reasonably sufficient to give Moran notice or to give Ryan notice, and, in O'Connell's and Scanlon's cases, that the defendants did not do what was reasonably necessary to give the passenger in each of those cases notice of the conditions having regard to his condition in life.

The appellants' contention upon this part of the case is that, when they have put in the document containing the written terms, the onus is shifted, and that it lies, not upon the defendants to adduce evidence to shew that the passenger assented to those terms, but upon the passenger to shew that he did not do so. This contention is, I think, contrary to authority. The case is the second case put by Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (1) The agreement has been reduced into writing but the passenger has not signed it. "In that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it." The onus of proof in this respect lies upon those who proffer the document as containing the agreed terms. The three questions proper to be left to the jury were pointed out by the judgment in that case, and are to be found detailed in *Richardson, Spence & Co.* v. *Rowntree.* (2) In the present case the jury may well have thought that the passenger knew there was writing or printing on the ticket, and having regard to the red ink slip knew that it

(1) 2 C. P. D. 416, at p. 421. (2) [1894] A. C. 217, at p. 219.

contained conditions, but there remained the question whether the defendants did what was reasonably sufficient to give the plaintiff notice of the conditions. The onus of establishing that was on the defendants. Upon the evidence in this case the jury might, I think, well find, as they did, that the defendants did not do what was reasonably sufficient. I see no grounds for disturbing the verdict in this respect.

There remains that which is the most difficult and crucial point in this case, namely, the question of negligence. [His Lordship then discussed the evidence upon this question and the summing-up of the learned judge thereon, and said that, in his view, certain passages of the summing-up did not correctly state the effect of the evidence, and proceeded.]

Had this case been for my decision alone I should have thought that it was one which ought to be submitted to another jury. But it is the fact that the learned judge at the commencement of his summing-up told the jury that they and not he were the judges of fact, and that they were not in the least degree bound to follow his opinion in case he pronounced or indicated any opinion, and it is the fact that the jury had heard the whole of the evidence. I am told by those who sit with me that under such circumstances, where no misdirection in point of law can be shewn, it is not according to the course of the Court to direct a new trial.

I bow to their experience in this matter, which is much greater than my own, and under those circumstances, in the case of the three actions other than O'Brien's action, I concur in the order which to them seems right.

KENNEDY L.J. read the following judgment:—The joint trial in these four actions was divided, and, I think, conveniently divided, into three separate parts. The issues in the first and second parts were issues of fact to be decided by the special jury. The question in the third part was a question to be decided, as it was, by the learned judge. I shall deal with the points raised by the appeal in accordance with the order in which these three parts were dealt with at the trial.

The claim of the plaintiff in each of the four actions is a claim

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in damages against the defendants, the owners of the steamship *Titanic*, for negligence in the navigation of that steamship, causing the death by drowning of relatives of the respective plaintiffs when she was lost on April 15, 1912, through collision with an iceberg in the Atlantic Ocean.

The jury were asked, in the first instance, to decide whether the loss of the *Titanic* was or was not caused by the negligence of the defendants' servants engaged in her navigation. This issue was presented to them by Bailhache J. in the following form: (1.) Was the navigation of the *Titanic* negligent in respect of (*a*) look-out, (*b*) speed? There was a second question relating to a particular and subordinate point, whether a certain marconigram from the steamship *Mesaba* was communicated to a responsible officer of the *Titanic*. As to this the jury returned no verdict, and stated that the evidence was not sufficient for them to come to a conclusion. But they answered the first and principal question by finding in regard to (*a*) that there was no negligence in respect of look-out, and in regard to (*b*) that there was negligence in respect of speed.

The defendants, in their notice of appeal, and by their counsel on the hearing of the appeal, have contended that the verdict on (*b*) was against the weight of evidence, and also that on various points the learned judge misdirected the jury, and that the defendants therefore are entitled to a new trial.

In my opinion, there was evidence sufficient to justify the jury in finding that the collision was due to negligence of the defendants in respect of the speed of the *Titanic*, whilst finding, at the same time, that there was no negligence in respect of look-out.

[His Lordship then discussed the evidence, and said that he saw no ground for impeaching the verdict of the jury as one given against the weight of the evidence.]

The further contention of the defendants' counsel was that there ought to be a new trial on the ground that Bailhache J. misdirected the jury in his summing-up. Misdirection on the law applicable to or involved in the case is not alleged. The misdirections which the defendants allege relate to matters of fact. Their case is that the learned judge upon certain points set forth in their notice of appeal stated a wrong view of the

effect of some of the evidence adduced at the trial, or by the expression of his opinion suggested to the jury wrong inferences. I will assume in the defendants' favour, although, as will appear later on, I am far from being satisfied of this, that upon some of the points I should form, reading the notes of the evidence, as the jury, from their understanding of the evidence as it was given orally by the witnesses and commented on by the counsel on either side, were enabled and entitled to form, a different opinion from that which the learned judge expressed, or that I should have been inclined to draw, as the jury were enabled and entitled to draw, a different inference. I am not, on that account, justified in setting aside the verdict on the ground of misdirection in a case in which the judge has made it quite clear to the jurymen that they, and not he, are the judges on all questions of fact, and that, whatever opinion he may express as to this or that piece of evidence, the verdict must express their independent opinion.

So in *Taylor* v. *Ashton* (1), in delivering the considered judgment of the Court of Exchequer upon a case in which it was contended by the counsel who had moved for a new trial upon the ground (inter alia) that the judge at the trial had misdirected the jury as to the effect of a certain clause in a deed of settlement, Parke B., after pointing out that the judge at the trial said to the jury, "After all, it is a question for you to decide, not for me," proceeded, a little further on, to say: "Looking at the mode in which that was left to the jury, and considering that the learned judge was not discussing it as matter of law, but merely shewing that the directors had the power, under certain circumstances, to give credit to certain individuals mentioned, that is not any misrepresentation of the law, or any misconstruction of the instrument in a legal point of view; and we cannot say that any wrong observation on a matter of fact, in which we could not concur, is a ground for granting a new trial, if it was left as a question of fact for the jury." It is upon the condition expressed in these last words that everything turns. If, in regard to a material matter of fact, a judge arrogates to himself the province of the jury, and directs a

(1) (1843) 11 M. & W. 401, at p. 417.

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wrong conclusion, his misinstruction of the jury might, I conceive, subject always to the important provisions of Order xxxix., r. 6, constitute a ground for the grant of a new trial. There is nothing of that kind in the present case. At the outset of his summing-up Bailhache J. emphatically and in the plainest language directed the jurymen to judge for themselves, whatever view he might appear to express: "You are the judges of fact, and not I. If, in the course of my observations to you, I appear to indicate any decided opinions of my own, you are not in the least bound to follow that opinion. On the questions of fact you are the judges, and if the opinion I may indicate or express does not appear right, you will reject it. You will express your opinion upon the facts of this case as we understand it."

The defendants' case as to the alleged misdirections standing thus, it is not, I conceive, strictly necessary for me to consider further the matter of the defendants' complaints in regard to the summing-up of the learned judge. [His Lordship then dealt with the alleged misdirections, and came to the conclusion that the defendants' complaints as to the learned judge's summing-up upon the questions of fact were not well founded.]

The second of the three parts in which this action was tried relates to a defence raised by the defendants upon certain terms exempting them from liability, which are contained upon the back of the contract ticket for the voyage. Those terms were printed in small type, such as is commonly used in bills of lading, upon the back of the contract ticket, with a reference to them on its face in the words "See back" printed in different and in much larger type. Each of the steerage passengers in respect of whose death the four plaintiffs respectively sue had one of these contract tickets. The defendants contended that the terms printed on the back of these tickets bound the steerage passenger, because, as they alleged, the contract ticket, back and front together, contained the contract for his carriage to America. The plaintiffs challenge this allegation upon the ground, first, of fact, namely that the defendants did not do what was reasonably sufficient to give the steerage passengers in respect of whose death the plaintiffs are suing notice of the conditions upon the back of the ticket; secondly, upon the ground of law that the

provisions on the back of the ticket, by reason of certain enactments of the Merchant Shipping Act, 1894, cannot be treated as forming part of the contract of carriage in the case of these passengers. The question of fact was separately submitted to the decision of the jury, after they had given their verdict, as I have said, upon the issue of negligence, and the trial of this question forms that which at the commencement of this judgment I have called the second part of this case.

The jury, after hearing evidence, gave a verdict in favour of the first three plaintiffs, Ryan, O'Connell, and Scanlon, but in favour of the defendants as against the fourth plaintiff, O'Brien. The result of this verdict, if it stands, is that in regard to the first three plaintiffs, whatever be the true view of the law as to the validity of the exemption clause upon the body of the contract ticket, they succeed in the action; and that in regard to the fourth plaintiff, O'Brien, he fails in his action if the exempting clause printed upon the back of the contract ticket is in point of law good and binding. The defendants have contended in this Court that the learned judge ought to have directed the jury that it was their duty to find a verdict in every one of the four cases in favour of the defendants, or, to put the same contention in a slightly different form, that he ought to have told them that there was no evidence upon which they could rightly find a verdict for any of the plaintiffs; and, of course, also that in the first three cases the verdict was against the weight of evidence. It appears to me that in view of the judgments of the House of Lords in *Henderson* v. *Stevenson* (1) and *Richardson, Spence & Co.* v. *Rowntree* (2), in the latter of which the judgment of Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (3) was expressly approved, the learned judge in the present case was right in leaving to the jury the question whether the defendants had given the recipient sufficient notice of the condition upon the back of the ticket, and that there was evidence in the facts before them which justified the conclusion which the verdict of the jury expressed in each of the three cases in which the jury gave a negative answer to that question.

(1) L. R. 2 H. L. (Sc.) 470. (2) [1894] A. C. 217.
(3) 2 C. P. D. 416.

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It is not undeserving of notice that Lord Ashbourne in his judgment in *Richardson, Spence & Co.* v. *Rowntree* (1) made a remark which is on the facts applicable to the present case: "The ticket in question in this case was for a steerage passenger—a class of people of the humblest description, many of whom have little education, and some of them none."

I come now to that which I have called the third part of this case. The result of the verdict of the jury in regard to the plaintiff O'Brien, in whose case they found that the defendants had done what was reasonably sufficient to give the passenger notice of the condition upon the back of the contract ticket, which protected the defendants from any consequence resulting from negligence in the navigation of the *Titanic*, was, as I have already said, that if that condition is valid in law as a part of the passenger's contract of carriage the defendants are by reason of that condition entitled in O'Brien's case to judgment in their favour, notwithstanding the verdict of the jury on the first question submitted to them that the death of the passenger was due to the negligence of the defendants' servants in the navigation of the *Titanic*. Bailhache J. has held that the condition upon the contract ticket which exempted the defendants from liability was not binding upon the passenger, and upon this appeal we have to give our judgment as to the correctness of that decision. The subject is a novel one, and also one, I think, of difficulty. The circumstances are these: The plaintiff O'Brien was received by the defendants as a third-class or steerage passenger to be carried in the *Titanic* from Queenstown to New York. A contract ticket for the voyage was given him. All such contract tickets are regulated by ss. 320 to 323 (inclusive) of the Merchant Shipping Act, 1894. Those sections form a distinct group under the heading "Passengers' Contracts." I shall have to refer to other sections in this group, but in the first instance it is sufficient to quote s. 320, sub-ss. 1, 2, 3, and 4. Sect. 320: "(1.) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any

(1) [1894] A. C. at p. 221.

ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship and printed in plain and legible characters. (2.) The contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section. (3.) If any person fails to comply with any requirement of this section, he shall for each offence be liable to a fine not exceeding fifty pounds. (4.) Contract tickets under this section shall not be liable to stamp duty."

In the present case the steerage passenger's contract ticket, so far as it was in a form approved by the Board of Trade, was in a form which was issued by the Board of Trade on February 15, 1908, and published in the *London Gazette* of February 18, 1908. Besides merely formal parts, such as, e.g., the entries in certain columns of the names and ages of passengers, and the statement of the amount and place (or places) of payment of the fare, this ticket sets forth upon its front (I purposely use this word) the following substantial matters which, for the sake of clearness, I will classify under heads (A), (B), and (C). (A) Seven numbered directions, viz.: "(1.) A contract ticket in this form must be given to every person engaging a passage as a steerage passenger in any ship proceeding from the British Islands to any port out of Europe, and not within the Mediterranean Sea, immediately on the payment or deposit by such steerage passenger of the whole or any part of the passage money, for or in respect of the passage engaged. (2.) The victualling scale for the voyage must be printed in the body of the ticket. (3.) All the blanks must be correctly filed in, and the ticket must be printed in plain and legible characters and legibly signed with the christian names and surname and address in full of the person who issues it. (4.) The day of the month on which the steerage passengers are to embark must be

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inserted in words and not in figures. (5.) When once issued, this ticket must not be withdrawn from the passenger, nor any alteration, addition or erasure made in it. (6.) This ticket is not transferable. (7.) A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." (B) An unqualified and complete contract of carriage from the port of embarkation to the port of arrival in a particular ship. It begins: "I engage that the person named in the margin shall be provided with a steerage passage to, and shall be landed at the port of in the ship," &c., &c. (C) Certain subsidiary provisions, to wit: (1.) A provision of not less than ten cubic feet for luggage. (2.) An acknowledgment of payment of the fare. (3.) A notice that the passenger's luggage, whether in excess of ten cubic feet or not, shall be deemed to be of a value not exceeding 10*l.*, unless the value in excess of that sum be declared and paid for. (4.) The statutory dietary scale, with an instruction that if mess utensils and bedding are to be provided by the ship it must be so stated. There is a note in italics that the whole is to be signed in full, presumably by the shipowner or charterer, or if it is signed by a broker or agent it must be stated on whose behalf such broker or agent signs. Then follows a "Notice to Steerage Passengers": "(1.) If steerage passengers, through no default of their own, are not received on board on the day named in their contract tickets, or fail to obtain a passage in the ship, they should apply to the emigration officer at the port, who will assist in obtaining redress under the Merchant Shipping Acts. (2.) Steerage passengers should carefully keep this part of their contract ticket till after the end of the voyage. This contract ticket is exempt from stamp duty."

The contract ticket given by the defendants to the plaintiff O'Brien contained all that there is prescribed in the "approved form," but it also contained in print the following additions, which have never been approved by the Board of Trade. Just below the place designated by the approved form for the signature by the defendants' representative the defendants printed upon the ticket "See back," and on the back they inserted in print, under the heading "Notice to Passengers," ten conditions in favour of

the defendants, upon one of which, namely, the clause exempting the defendants from liability for loss or damage although occasioned by the negligence of the defendants' servants, the defendants rely in this action. I need not, I think, set out these conditions at length. It will be sufficient for the purpose of this judgment to refer to the main portion of the third of them: "(3.) Neither the shipowner, agent or passage broker shall be liable to any passenger carried under this contract, for loss, damage or delay to the passenger or his baggage, arising from the act of God, public enemies, arrests or restraints of princes, rulers or people, fire, collision, stranding, perils of the seas, rivers, or of navigation of any kind, accidents to or from machinery, boilers, steam, latent defects, even though existing at the beginning of the voyage, or from causes of any kind, beyond the carrier's control even though the loss, damage or delay may have been caused or contributed to by the neglect or default of the shipowner's servants or of other persons for whose acts he would otherwise be responsible, and whether occurring on board this or any other vessel on which the passenger may be forwarded under this contract."

It is obvious, first, that the contract ticket as approved by the Board of Trade contains in itself that which is sufficient in point of law to constitute a complete contract of carriage; secondly, that this condition which was added by the defendants upon the back of the ticket, and which exempts the defendants from liability alike in regard to the death or injury of the steerage passenger himself or in respect of the loss of or damage to his baggage, although such loss or damage has been occasioned by the negligence of the defendants' servants, most materially alters to his prejudice the contract between the steerage passenger and the defendants as it stands in the approved form. In regard to the passenger, the contract of carriage in the approved form, which I have already quoted, is in its express terms an absolute engagement on the part of the defendants to carry the passenger to his destination, and would be modified only by the implication imported into it by the common law relating to such carriage, whereunder the duty of the carrier is to use reasonable care in the performance of the contract. The

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same third condition also—although this is a minor point—renders practically worthless the stipulation as to the 10*l.* valuation of the steerage passenger's luggage, for it exempts the defendants from all liability, although the luggage is lost by the negligence of the defendants' servants. The result—assuming the validity of the provisions which the defendants have added to the approved form—is, in the present case, that the plaintiff O'Brien, and every person who sues in respect of the loss of life or loss of property caused to a steerage passenger by the sinking of the *Titanic*, and is in the same position as that in which he has been placed by the verdict of the jury on the second part of this case, is deprived of any legal remedy. The question to be considered is whether the defendants are entitled to treat this third condition, or any other of the conditions in their favour, which they have indorsed upon the "approved contract ticket," so far at any rate as those conditions alter the contract contained in that ticket as it was approved by the Board of Trade, as forming part of the contract of carriage. Bailhache J. has decided that the defendants are not entitled to do so, and has accordingly given judgment for the plaintiff. I have come to the conclusion that the learned judge's decision was right.

The defendants' contentions are that when s. 320 of the Merchant Shipping Act enacted that "the contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette" it is to be understood as referring to merely formal matters, such as the shape of the ticket, the arrangement of contents, the insertion of the statutory requirements as to dietary, and such like matters; and that, when it sanctioned the insertion of "directions," which, if not inconsistent with the Act, are to be obeyed as if they were set forth in the section, it did not thereby empower the Board of Trade to insert any provision affecting the contractual position of the passenger in regard to the carrier. Therefore, say the defendants, we were entitled to make and insert in the ticket qualifying or inconsistent terms provided always that the passenger was given a ticket which also set forth the terms of approved "form"; and if the approved form, either in the "directions" or elsewhere, contains any

denial of this right, it is so far ultra vires and may be disregarded, and effect must be given to any contractual provisions we may have chosen to insert in the ticket as it is accepted by the passenger. I use the word "accepted," because a person in the position of the plaintiff O'Brien is held by the law to have accepted when he receives without objection. In fact I do not suppose that one such steerage passenger in a thousand reads such provisions, and few if they did would appreciate their legal import.

Further, say the defendants, the seventh of the "directions" in the form approved by the Board of Trade in the present case contemplates, and indeed impliedly reserves to us, a right to annex exceptions and conditions, as we have annexed them in the present case, upon the back of the ticket, for it states: "A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The conditions and exceptions upon which we rely are not on the face but on the back of the ticket; ergo, they are good and valid. In support of this last contention, which lays stress upon the word "face," the defendants refer to the fact that in the direction contained in the form of contract ticket issued in 1888 under the Passengers Act, 1855, there was a direction that "A contract ticket shall not contain either on the face or on the back thereof or have annexed thereto any condition, stipulation, or exception not contained in or required by this form," and that in the form issued in 1889 under the same Act, as well as in the form of 1908, the corresponding direction is: "A contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The purpose, argue the defendants, of the direction as it first was published in 1889, and as it now stands in the form approved by the Board of Trade in 1908, is simply to keep the face of the ticket, containing the form approved by the Board of Trade, as distinguished from the back of the ticket, free from the risk of confusing the steerage passengers, many of whom are illiterate, by mixing up contractual conditions imposed by the shipowner with the formal requirements as to dietary, fares, and other like minutiæ, with which alone, as the defendants contend, the statute of 1894 authorized the Board

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of Trade to deal. After very careful consideration I find myself unable to accept the defendants' view.

Leaving out of sight for the moment the argument founded on the seventh of the directions contained in the form of 1908—the form with which we have to deal—let us see first what is the true import of s. 320 of the Act of Parliament. Is it true that, as the defendants assert, when that section enacts in sub-s. 1 that there shall be given to the steerage passenger "a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters," and in sub-s. 2 that "the contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section," it does not mean that the approved contract ticket shall contain the terms of the contract, but it means only that it shall contain, and in its directions prescribe, purely formal matters, or, at most, in addition to such formal matters, rules as to diet and other matters of comfort and accommodation, leaving the contract in its essentials to be regulated by the parties? I do not think that this is sound. In the first place, is it reasonable to suppose that Parliament would take the trouble to make these enactments for the protection of the steerage passenger for the purpose merely of securing that he has a contract ticket which conforms to a prescribed model in formal matters, and sets forth statutory provisions, such as the provisions as to diet, which would be binding whether expressed or not upon the contract ticket? Does not the very expression "contract ticket" naturally import a ticket which contains the contract between the parties? What is the protection to the steerage passenger in the approval of the Board of Trade if the ship-owner may make a contract with the steerage passenger on the same piece of paper which vitally affects, to the prejudice of the steerage passenger, the value of the engagement to carry which the Board of Trade has approved? Stress is laid by the defendants upon the words "form approved by the Board of Trade" as indicating that only matters of "form," as contrasted with substance, are to be dealt with by the Board of Trade in framing

the document. I agree with Bailhache J. that this is a non-natural interpretation. He says in the course of his judgment: "Next, I ask, what is meant by the form of the contract ticket, and does the word 'form' mean the shape and size and appearance of the ticket only, or does it cover the contents of the ticket, the matters for which it makes provision, and the manner in which it deals with those matters? I think it clearly means the latter. This is certainly the ordinary acceptation of the term, and I see no reason, and, indeed, have, I think, no right to reject it in this case." In regard to the effect to be given to the word "form" an apposite reference was made by the plaintiffs' counsel to the language of s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as interpreted by the House of Lords in *Thomas* v. *Kelly*. (1) The "form" in the schedule of that Act deals with matters of essence; and it is, I think, noteworthy that Lord Halsbury L.C. in regard to the words "in accordance with the form in the schedule to this Act annexed" held (p. 511) that the effect of these words, which are somewhat less stringent than "in a form," was "to enact not only what a bill of sale must contain, but also what it must not contain." It appears to me that when we look at other portions of this part of the statute of 1894 dealing with "passengers' contracts" there is in them some indication that what the Act means is not a "form" to which the shipowner may annex most important terms which the Board of Trade has no opportunity of approving, but a contract which is to be in itself complete in regulating the relations of carrier and passenger. What otherwise is the use of authorizing the Board of Trade in the approved form to give "directions," which are to have statutory force with the limitation only that they are not inconsistent with the Act itself? What is the "stipulation" in any such contract ticket for the breach of which the passenger may under s. 321, sub-s. 1, obtain a summary remedy? And if we pass on to s. 323 we find the contract of carriage spoken of as "the contract of which that ticket is evidence." The view of the Board of Trade is clear enough. They have not deemed this statutory duty to be limited, as the defendants would limit it, to matters of form and the statement of a dietary already prescribed

(1) 13 App. Cas. 506.

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by the law. The approved form of contract ticket speaks for itself on this point. We find there a complete contract, an unqualified engagement to be signed by the defendants' representative to carry the passenger to his destination, and an agreement that his luggage shall be deemed to be of a value not exceeding 10*l.*, unless the value in excess of that sum be declared and paid for. It cannot be open to the shipowner to qualify these terms by added terms, such as the defendants have sought to annex by the exceptions on the back of this ticket, which take away from the passenger all right of remedy for damage caused by the negligence of the defendants' servants, alike in respect of life and property, unless, indeed, that which the Board of Trade have included in the approved form is ultra vires. For the reasons I have already stated I see no ground for holding that any of the provisions in the approved contract ticket are, in view of s. 320, ultra vires; and, if they are not, the ticket, as the defendants have given it to the steerage passenger, is, in regard to the added part upon which they rely, not a contract ticket approved by the Board of Trade, and that part cannot be held to afford the defendants an answer to the claim of the plaintiff O'Brien in this action.

I turn now to the seventh direction, which, argue the defendants, must be interpreted as contemplating the propriety of conditions, stipulations, or exceptions not contained in the approved contract ticket, provided that they are not contained "on the face thereof." I share the doubt expressed by my brother Bailhache whether, if the shipowner chooses, as the defendants have chosen in this case, to write "See back" on the "face" of the paper, he does not thereby incorporate with that which is written on the face that which is written on the back, and so in effect abolish any distinction between "face" and "back." But, putting aside this consideration, I feel so strongly the unreasonableness, to use no stronger term, of holding that the Board of Trade, when they approved the form of contract ticket, which contains in itself, as approved, a complete contract, intended by this seventh "direction" inferentially to give the shipowner carte blanche to add, provided only that he prints them on the other side of the paper, conditions which essentially alter this contract,

that I prefer to give to the direction a construction which seems to me to be a perfectly possible construction, and one which would be in harmony with s. 320. We may, I think, construe the words "on the face thereof" in a wider sense than is given to them if "face" is read as contrasted with "back," and treat them as being used here in the sense in which, I think, they are properly used when you say that such and such a thing does or does not appear on the face of a written or printed instrument, meaning thereby anywhere in the instrument, without regard to one side or the other of the sheet or sheets of paper on which the instrument is written or printed; so that the meaning of the seventh direction, in exact accordance with the interpretation which I place upon s. 320 of the Merchant Shipping Act, is a notification by the Board of Trade that there must not by any express addition to the document be imported into this contract ticket which the Board of Trade have approved any new condition, stipulation, or exception. The implications of the common law relating to carriers of passengers remain.

I will only add that such an indirect and inferential authority to alter the approved form and the legal effect of that approved form, as the defendants assert the seventh direction to be, would be a curious method for the Board of Trade to adopt in so important a matter. If the Board of Trade intended the contract in the approved form not to be complete as it stands, but to be subject to essential alterations, the natural and obvious course would have been after the first words of contract in the form to be signed by the shipowner, "I engage," to have proceeded either to add "subject to the conditions and exceptions indorsed herein" or to have inserted in the same place a direction "[Here insert conditions and exceptions if any]" with a blank space for the insertion of such conditions and exceptions. If the shipowners can persuade the Board of Trade that it is right in some such way to change the approved form, well and good. Until they have done so the contract ticket, with the addition of the terms in their own favour and to the prejudice of the steerage passenger upon which the defendants rely in this action, is, in my judgment, not a contract in a form approved by the Board

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of Trade, and such added terms are not in law binding upon such passenger.

In my opinion the appeal fails in the case of all the four actions, and should be dismissed with costs.

Appeals dismissed.

Solicitor for plaintiffs: *H. Z. Deane.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. F. B.

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[IN THE COURT OF APPEAL.]

CHARING CROSS ELECTRICITY SUPPLY COMPANY *v.* HYDRAULIC POWER COMPANY.

Nuisance—Various Companies laying Mains under Streets—Application of Doctrine of Rylands *v.* Fletcher*—Statute—Construction—Two Acts to be construed together as one Act.*

The plaintiffs were the owners of electric cables which had been laid under certain public streets. The defendants were the owners of hydraulic mains which had been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging the plaintiffs' cables. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read and construed together as one Act":—

Held, (1.) that the doctrine of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330 applies not only to cases in which the dangerous thing has escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursting of their mains notwithstanding that they had been guilty of no negligence.

Midwood v. *Manchester Corporation* [1905] 2 K. B. 597 followed.

(2.) That the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act,

the defendants had enjoyed, in respect of the two first mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

Decision of Scrutton J. [1913] 3 K. B. 442 affirmed.

APPEAL from a decision of Scrutton J.; reported [1913] 3 K. B. 442.

The plaintiffs were a company supplying electricity in the city of London under a provisional order under the authority of which they had placed their cables under certain of the public streets. The defendants were the owners of hydraulic mains containing water at a high pressure used to supply hydraulic power, which mains had been laid under the same streets also under statutory authority. The action was brought to recover damages for injury to the plaintiffs' cables in four different streets, Water Lane, Upper Thames Street, Cannon Street, and St. Swithin's Lane, caused by the bursting of the defendants' mains. Two of the mains which so burst, those in Upper Thames Street and Cannon Street, were laid under a private Act passed in 1871—34 & 35 Vict. c. cxxi.—which did not contain the usual clause, now found in Gasworks Acts and other similar Acts, providing that nothing in the Act should exempt the company from liability for a nuisance. The other two mains were laid under the London Hydraulic Power Act, 1884 (47 & 48 Vict. c. lxxii.), which in s. 17 provided that "Nothing in this Act shall exempt the company from any indictment suit action or other proceeding at law or in equity in respect of any nuisance caused by them." And by s. 1 of that Act, "This Act may be cited for all purposes as the London Hydraulic Power Act, 1884, and this Act and the Act of 1871 as amended and extended by this Act shall be read and construed together as one Act." The plaintiffs alleged that the water had escaped from the mains by reason of the defendants' negligence, or alternatively that the defendants were liable as for a nuisance. The defendants denied the negligence, and contended that in the absence of negligence they were not liable, especially as they contended that the fractures of their mains were caused by subsidence due to the laying of the plaintiffs' cables. The judge found the following facts:—

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A. On February 4, 1912, the defendants' main in Water Lane burst and did damage to the plaintiffs' cable, thereby necessitating repairs which cost 583*l.* 10*s.* 10*d.* The defendants' main was laid in 1895, the plaintiffs' cable in 1901-2. The soil in Water Lane was not very sound, and when the plaintiffs laid their cable in 1902, and the excavations were filled up, the settling down of the soil did damage to the defendants' mains for which the plaintiffs paid. This was put right in a manner satisfactory to all parties at the time, and nothing happened from June, 1902, till February, 1912, when the defendants' main was fractured in a way which was due to subsidence or shifting of the soil, leaving the main unsupported in places, when the weight and pressure of the pipes and the water within, probably assisted by the vibration of the heavy traffic and a sharp frost at the time, caused the fracture. The effective cause was the subsidence. This was due to the nature of the soil and the traffic over it. The judge was not satisfied that the plaintiffs' work in 1902 or anything that had happened to it since had anything to do with the subsidence in 1912. The defendants suggested in this and the other cases that the subsidence was caused by the perishing of the wood surrounding the plaintiffs' cables which were laid in bitumen in a wooden mould, which perishing let the soil down. The judge was not satisfied that this was so.

B. On February 5, 1912, during the same sharp frost, the defendants' main burst in Upper Thames Street and did damage amounting to 41*l.* 0*s.* 10*d.* to the plaintiffs' cables. The defendants' main was laid in 1883, the plaintiffs' cables in 1901. There was a large inspection chamber of the plaintiffs built near the point where the burst occurred. Nothing happened from 1901 to 1912, when the defendants' flange broke transversely near the inspection chamber. The fracture was due to subsidence of the soil leaving the pipe unsupported, and to vibration by heavy traffic in a hard frost. The judge was not satisfied that the plaintiffs' works in 1901, or anything that had happened to them since, had anything to do with the burst in 1912.

C. On February 10, 1912, a burst in the defendants' main in Cannon Street caused damage to the plaintiffs' cables amounting to 3*l.* 8*s.* 7*d.* This amount was so small that very little was said

about it. The burst was due to subsidence of soil and vibration caused by the underground railway and traffic above, and the cables of the plaintiffs had nothing to do with it.

D. On August 27, 1912, a burst of the defendants' main in St. Swithin's Lane caused damage to the plaintiffs' cables amounting to 89*l.* 3*s.* 10*d.* The defendants main was laid in 1892, the plaintiffs' cables in 1901. The fracture was due to subsidence of the soil leaving the main unsupported and subject to the vibrations of heavy traffic. The judge was not satisfied that any work of the plaintiffs in 1901 or any changes in its condition since had anything to do with the burst in 1912. He found that the defendants were not guilty of any negligence either in the manner of laying their mains or in respect of the materials of which the mains were constructed, and that they could not by any reasonable care have detected the subsidences before the bursts occurred.

Scrutton J. held (1.) that the doctrine of *Rylands* v. *Fletcher* (1) applied not only to cases in which the dangerous thing had escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursts in their mains, notwithstanding that they had been guilty of no negligence; and (2.) that the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first-mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

The defendants appealed.

Sankey, K.C., and *F. Gover*, for the defendants. The judge found that the defendants were not guilty of any negligence, and that the fractures in the defendants' pipes were in each case

(1) L. R. 3 H. L. 330.

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due to the subsidence of the soil leaving the mains unsupported. The plaintiffs contended that, as the defendants were not protected by the fact of their mains being laid under statutory powers, the doctrine of *Rylands* v. *Fletcher* (1) applied, and that the defendants were bound to keep their water in their pipes at their peril; in other words, that the defendants had created a nuisance, for the damage caused by which they were responsible. But *Rylands* v. *Fletcher* (1) has no application to the present case; it is confined to the case of owners or occupiers of neighbouring closes of land, each of whom is liable to an action for nuisance if, by a non-natural use of his land, e.g., for the storage of water, he allows the water to escape from his close to the close of his neighbour. The foundation of the liability in that case was the exclusive dominion and control which a man has over his own close. The whole basis of the action for nuisance is that the defendant has been guilty of an invasion of proprietary rights. Here the plaintiffs and the defendants are simply co-licensees; they have no proprietary rights in the highway at all. Where a water company's main, the laying of which was authorized by Act of Parliament, burst and did damage to the plaintiff's premises, it was held that the defendants, having been guilty of no negligence, were not liable: *Green* v. *Chelsea Waterworks.* (2) *Rickards* v. *Lothian* (3) is an authority for the proposition that a man who has on his premises a proper and reasonable supply of water is not responsible for damage not due to his own default, whether caused by inevitable accident or by the wrongful act of third persons; in that case *Rylands* v. *Fletcher* (1) is distinguished in these words (4): "But the present case is distinguished from that of *Rylands* v. *Fletcher* (1) in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the intervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster." In the present case it is the supervening subsidence of the earth caused by the

(1) L. R. 3 H. L. 330.
(2) (1894) 70 L. T. 547.
(3) [1913] A. C. 263.
(4) [1913] A. C. at p. 277.

traffic above which, superadded to the water in the pipes (which of itself would have been innocuous), caused the disaster. *Midwood* v. *Manchester Corporation* (1), upon the authority of which Scrutton J. decided this case, is distinguishable upon the facts. It was a case of damage to an adjoining owner, and moreover clause 67 of the Order in that case was much larger and more comprehensive than s. 17 of the statute in the present case.

Assuming that in the absence of statutory protection for liability for nuisance the doctrine of *Rylands* v. *Fletcher* (2) applies, the defendants have statutory protection in the case of Upper Thames Street and Cannon Street. The Act of 1871, under which the mains were laid in those streets, contained no section corresponding to s. 17 of the Act of 1884, and impliedly authorized the nuisance. The provision in s. 1 of the Act of 1884 that the two Acts should be read and construed together was intended to apply the provisions of the earlier Act to mains laid under the later Act, and not to apply the provisions of the later Act to mains laid under the earlier Act and thereby to cut down rights which were already vested in the defendants. [They also cited *Ross* v. *Fedden* (3); *Blake* v. *Woolf* (4); *Lambert* v. *Lowestoft Corporation* (5); *Dumphy* v. *Montreal Light, Heat and Power Co.* (6); *Fisher* v. *Prowse* (7); *Carstairs* v. *Taylor*. (8)]

McCall, K.C., and *C. B. Marriott*, for the plaintiffs, were not called upon.

LORD SUMNER. This is an appeal from the judgment of Scrutton J. in favour of the plaintiffs' claim for damage done to their underground electric cables by the escape of water from the defendants' underground mains. Both parties carry on undertakings for profit, and have certain statutory permissions and powers under private Acts of Parliament. The damage was actually done in four places in the City, where the mains of the defendants and the cables of the plaintiffs were underneath the surface of the street. In two of them, the mains were put in

(1) [1905] 2 K. B. 597.
(2) L. R. 3 H. L. 330.
(3) (1872) L. R. 7 Q. B. 661.
(4) [1898] 2 Q. B. 426.
(5) [1901] 1 K. B. 590.
(6) [1907] A. C. 454.
(7) (1862) 31 L. J. (Q.B.) 212.
(8) (1871) L. R. 6 Ex. 217.

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under the defendants' earlier Act, the other two after they obtained their later Act. In 1912 there were subsidences of the surrounding soil, and the mains were left unsupported in consequence, whereupon the weight and pressure of the pipes and the water within, probably assisted by the vibration of the heavy traffic and a sharp frost at the time, caused the fracture. The effective cause was the subsidence. This was due to the nature of the soil and the traffic over it. The learned judge finds substantially the same events in all the cases.

The defendants by their Acts of Parliament are incorporated for the purpose of supplying power by hydraulic pressure for cranes and similar uses, and are not allowed to supply water for any purposes which would come into competition with the ordinary water supply. Accordingly they keep their mains charged at very high pressure, and, as soon as the breaks occurred, the water escaped under a very high head. No doubt there would be a complete wash-out of the earth, and injury to the cables and penetration of the insulation would follow comparatively soon with serious results. Negligence was alleged, but was negatived by the learned judge.

The first question is whether, under those circumstances, the plaintiffs sustained particular injury by a nuisance or an invasion of their rights in the nature of a nuisance caused by the defendants; and without wishing to treat the argument with any disrespect, I can answer that briefly, if curtly, by quoting Collins M.R. in *Midwood* v. *Manchester Corporation* (1): "If that was not a nuisance, I do not know what would be one." Indeed I might dispose of this case by saying that, as *Midwood* v. *Manchester Corporation* (2) is a decision of this Court, unless it can be effectively distinguished, nothing more need be said. In that case the plaintiffs had premises and stock in trade adjoining a street in Manchester. The Manchester Corporation—the undertakers of the electricity supply—had their mains in the streets. Negligence was not relied upon. Somehow the insulation of the conductors failed; a short circuit took place, and the heat so generated volatilized the bitumen in which the main was laid, which gave off an inflammable gas. The gas accumu-

(1) [1905] 2 K. B. at p. 605. (2) [1905] 2 K. B. 597.

lated and presently found its way into the house adjoining the plaintiff's, where it exploded and caused the fire by which the plaintiff's property was damaged, and for this the defendants were held liable.

I think that this present case is also indistinguishable from *Rylands* v. *Fletcher*. (1) Two grounds of distinction have been suggested. It is said that the doctrine of *Rylands* v. *Fletcher* (1) is applicable between the owners of adjacent closes, which are adjacent whether there be any intermediate property or not; and that it is a doctrine depending upon the ownership of land and the rights attaching to the ownership of land, under which violations of that species of right can be prevented or punished. In the present case, instead of having two adjacent owners of real property, you have only two neighbouring owners, not strictly adjacent, of chattels, whose chattels are there under a permission which might have been obtained by the private licence of the owners of the soil, though in fact obtained under parliamentary powers; hence the two companies are in the position of co-users of a highway, or at any rate of co-users of different rooms in one house, and *Rylands* v. *Fletcher* (1) does not apply. The case depends on doctrines applicable to the highways, or to houses let out in tenements. I am unable to agree with any of these distinctions, though they have been pressed upon us by both learned counsel with great resource and command of the authorities. *Midwood* v. *Manchester Corporation* (2) is not decided as a case of a dispute arising between the owners of two adjacent closes. The case is treated as one between a corporation, whose business under the roadway is exactly similar to that of the defendant corporation here, and injured occupiers of the premises. If the distinction drawn between the present case and that of adjacent landowners in *Rylands* v. *Fletcher* (1) be a good one, it either was not taken in *Midwood* v. *Manchester Corporation* (2), or was taken and treated as of no importance. Further I am satisfied that *Rylands* v. *Fletcher* (1) is not limited to the case of adjacent freeholders. I shall not attempt to shew how far it extends. It extends as far as this case, and that is enough for the present

(1) L. R. 3 H. L. 330. (2) [1905] 2 K. B. 597.

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purpose. It is quite true that the parties were adjacent freeholders, of whom one made a reservoir on his land, and the other excavated old mining workings. Hence in the judgments both of the Exchequer Chamber and of the House of Lords attention is drawn to the use of the close and the natural user of the land, and the rule of law is laid down that one who for his own purposes brings on his land and keeps there anything likely to do damage if it escapes must keep it at his peril. Both Courts, however, shew that they have no intention of confining the principle to the case of adjacent freeholders. It is enough if I refer to the report of *Fletcher* v. *Rylands* in the Exchequer Chamber (1), in which Blackburn J. delivered the judgment of the Court. He illustrated by cases upon the liability in trespass of the owner of an animal. Again, Lord Cranworth in the House of Lords (2) speaks of the principle not as confined to the case of landlords, but in very broad terms: "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." That is not a precise proposition of law, but it is inconsistent with there being any idea in his Lordship's mind that *Rylands* v. *Fletcher* (3) was confined to the invasion of a right of property in soil.

Counsel then argued that *Rylands* v. *Fletcher* (3) is at most a case of adjacent owners, or occupiers, or licensees, of separate premises. This is a case of joint and successive user by two parties of one highway common to them both. I think the same idea is involved in the other class of cases cited, namely, cases of joint occupiers of one house.

Upon this part of his judgment, and upon this only, I differ from Scrutton J., because he clearly (4) was disposed to think that this was a case of joint user of highways. These cables and mains were laid under the highway, but the laying and using of them are no part of the use of the highway. How thick a highway is, I do not know. I suppose practically it has a certain thickness, but I should think it quite clear that where you find cables and mains laid, there the highway ceases. At

(1) (1865) L. R. 1 Ex. 265.
(2) L. R. 3 H. L. at p. 341.
(3) L. R. 3 H. L. 330.
(4) [1913] 3 K. B. at pp. 449, 450.

that depth they are not in the highway but underneath it, and it seems to me, therefore, that this is a simple case of two independent persons licensed to pass their apparatus through soil—the ownership of which is not material here—with additional rights of breaking up the superincumbent surface of the highway, but the enjoyment of their licences is no joint user of the highway at all. If that is so, the analogy of cases on nuisance and on co-occupation of a house fails. It was said by the defendants, "We got there first and the plaintiffs came with their cables afterwards, and they must therefore take the place as they find it; one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover." Of course there are cases of nuisance where a person is held not to be entitled to complain of what is only the accustomed way of dealing with property on the ground that he has gone to the nuisance instead of the nuisance coming to him. No doubt similar cases can be put in connection with licensees who go upon premises that are in a more or less hazardous condition, but no analogy is made out here. If it had been the normal condition of these mains to squirt out water under high pressure from time to time, there might be some substance in the argument, but, assuming that the mains were sound and contained the water instead of releasing it, as they have done for years, the argument founded upon the sequence of dates is illusory.

Another argument is based upon the language of the defendants' Acts of Parliament. The Act of 1871 incorporated the undertakers and recited that they proposed to carry on an undertaking that was beneficial to the public. They are not incorporated as waterworks supply companies with an obligation to supply water to the public, but they are given powers of taking water and of laying mains without being under obligation to keep their mains charged with water at high pressure, or at all. This serves at once to distinguish the class of cases of which *Green* v. *Chelsea Waterworks* (1) was an illustration, where the principle is that if the Legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon

(1) 70 L. T. 547.

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negligence in his way of doing it, and not upon the act itself. In the Act of 1871 there was no clause in pari materia with clause 17 of the Act of 1884, which is: "Nothing in this Act shall exempt the company from any indictment, suit, action, or other proceeding at law or in equity in respect of any nuisance caused by them." It is said that, in so far as that section applies, the plaintiffs have to prove that if there was a nuisance the nuisance was caused by the defendants, and it is suggested that it was not caused by the defendants, but by unknown passers-by on the surface of the highway or what not. I do not agree that "nuisance caused by them" is to be read in any restricted sense which would save the defendants, even although there were other jointly operating causes as well as their own acts which led to the breakdown, but on the facts as found by the learned judge it is plain that this nuisance was caused by the defendants. It is not having water in the pipes that is the legal wrong; it is not even subjecting water in the pipes to the very high pressure necessary for the defendants' undertaking that is the legal wrong; it is letting the water escape: *Nichols* v. *Marsland.* (1) The question is: What caused the nuisance which consisted in streams of water suddenly issuing from a fracture in the pipe under a very high head? The fracture was only conduced to by the traffic and the vibrations caused by the traffic. The immediate cause of the fracture of the pipe was its own weight, when charged with water and suspended between two points instead of being continuously supported by the subjacent soil which had subsided; but the thing which actually caused the water to squirt out was the working of the defendants' engines, and if at the time of the fracture the engines had not been working, or it had been possible to cut off the pressure instantly, the damage would have been done in a very different way and to a very different extent, and much of the damage would have been of a very different kind. On any reading of the words "nuisance caused by them," this escape of water constituting a nuisance was caused by the defendants.

There is another point. By s. 1 of the Act of 1884 it is provided: "This Act may be cited for all purposes as the London

(1) (1875) L. R. 10 Ex. 255; (1876) 2 Ex. D. 1.

Hydraulic Power Act, 1884, and this Act and the Act of 1871, as amended and extended by this Act, shall be read and construed together as one Act and may be cited as the London Hydraulic Power Acts, 1871 and 1884." The suggestion is that in the two cases where the mains were laid before 1884, these provisions, including s. 17, do not apply, and that they are governed only by the Act of 1871, which, as it does not keep alive liability for nuisances caused by them, must be deemed to authorize nuisances caused by them. That is an assumption that I should not be prepared to make, but it does not arise because, on the construction of the two Acts, as regards all occurrences after 1884, although happening to a main laid before 1884, the two Acts must be read and construed together as one Act, and therefore, in the language of Lord Coleridge C.J.—in *Read* v. *Joannon* (1), s. 17 of the later Act should be read thus: "Nothing in this Act"—meaning thereby nothing in this combined Act of 1871 and 1884—"shall exempt the company from any suit . . . . in respect of any nuisance caused by them." If that is so, there is nothing in that defence.

I think the appeal should be dismissed with costs.

KENNEDY L.J. I am of the same opinion, and I have very little which I must add, because I entirely agree with the reasoning which has been expressed in the judgment just delivered. I will only, in fact, add this, that in my view this case would be sufficiently decided by saying that it is indistinguishable in any material point from *Midwood* v. *Manchester Corporation* (2), and the judgment in that case is a judgment which places the right of the plaintiffs to succeed, so far as this Court is concerned, beyond all doubt. It was attempted, as a suggestion merely, to say that in *Midwood* v. *Manchester Corporation* (2), in addition to clause 70, which corresponds with s. 17 of the later of the two Acts in the present case, there was another clause, cl. 67, but on looking through the judgment it is quite clear that the fact that there was also a clause 67 in that case had no effect as materially governing the decision. It was clause 70 of the Order in that case which was relied upon, and the only

(1) (1890) 25 Q. B. D. 300. (2) [1905] 2 K. B. 597.

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reference, I think, in all the three judgments to the existence of clause 67 is in the judgment of Mathew L.J., in which he says, not that clause 70 is to be read by the light of clause 67, but that "clause 70 of the Order seems to me to be decisive. I think the provisions of clause 67 of the Order in this case must be read by the light of clause 70." Clause 70 is substantially identical as it seems to me, with s. 17 in the 1884 Act, and, as my Lord has said, that Act by its terms is applicable and governs the case, although some portion of the present defendants' mains were brought into being under earlier legislation, which, by the Act of 1884, is incorporated with the Act of 1884, and therefore, in my view, according to the true construction, s. 17 of the later Act applies to all the mains in question. It has been said in the course of the argument, the substance of which has been dealt with by my Lord, that the plaintiffs in the present case came upon the ground, if I may use that expression, after the defendants' mains had been placed there and, so to speak, were obliged to take the position for their works subject to risks which might arise from the earlier works. I think that is fallacious. They did in fact go there, it is true, at later dates. I think the earliest of the works that they put in was somewhere about 1901. They went there, if you look at it, as it appears to me, according to the true light to be got from the facts, with the knowledge that they were persons whose works would be protected from injury arising from the existing works. They went there, in fact, after the Act of 1884 had come into force, and, therefore, apart from any implication from the general law which would give them protection from nuisance; they went there entitled to assume that whatever was there already was there under the condition of its owners having to pay damages if nuisance arose from it. Did nuisance arise? In my opinion it clearly did in this case. As I have said, I am not going to repeat the reasoning which has been already expressed by Lord Sumner. I concur in his opinion that *Midwood* v. *Manchester Corporation* (1) is a case which governs us, and that the principle applicable in *Midwood* v. *Manchester Corporation* (1) and in the present case is the principle of *Rylands* v. *Fletcher* (2); and that this cannot be

(1) [1905] 2 K. B. 597.

(2) L. R. 3 H. L. 330.

distinguished on any of the grounds that have been suggested by the argument for the defendants. I agree that this judgment should be as my Lord has stated.

BRAY J. I am of the same opinion. Treating this case, first of all, without regard to the statutory authority which the defendants have, it seems to me quite clear that it comes within the principles of *Rylands* v. *Fletcher*. (1) It was said that it was not within those principles because *Rylands* v. *Fletcher* (1) is the case of the owners of adjoining closes of land, but, in my opinion, that is not so. The headnote of *Rylands* v. *Fletcher* (1), as reported in the House of Lords, is this, and I may say that I have looked through the speeches of the Lord Chancellor and the other learned Lords and it is abundantly justified by what is said there: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned." "For any mischief thereby occasioned," that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any mischief thereby occasioned. Now in the earlier part of that, it deals with the case where he brings it upon his land. It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy this land for a certain purpose, namely, for these pipes, it is equally his for the purpose of testing this principle. Therefore I think that *Rylands* v. *Fletcher* (1) applies, and, if it applies, then the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is in itself dangerous and probably mischievous if not kept under proper control.

Now, if it is within *Rylands* v. *Fletcher* (1), the next point

(1) L. R. 3 H. L. 330.

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is to see whether the statutory power which is given them gives them any protection, and undoubtedly the cases shew that, if statutory power is given without any limitation, that does not protect them, except it be shewn that they have acted negligently. Then comes s. 17, which has been read and which I will not read again. What is the effect of that section? In my opinion the effect of it is, paraphrasing the language somewhat: You may put your pipes on this land, but you are not to be entitled by reason thereof to any protection against claims by other persons who have sustained injuries arising from any actionable nuisance which you may commit, and, therefore, if it be shewn that the plaintiffs have sustained an injury by an actionable nuisance committed by the defendants, then they have no protection.

Then the next point which is taken is that the defendants have not committed any nuisance; the injuries have not been caused by them. In my opinion the findings of the learned judge shew that the injuries were caused by them. Lord Sumner has explained this, and I need not refer to it further.

The next point is that s. 17 does not apply to injuries caused by the water in the pipes which have been laid before the passing of the Act of 1884. Now the Act of 1884 is to be read with the preceding Act, and it imposes, in my opinion, a limitation upon the exercise of their powers. Now they were exercising their powers at the time they caused this nuisance, which was after the passing of the Act of 1884, and therefore it seems to me that s. 17 imposed that limitation on the exercise of the defendants' powers.

The last point taken was this: We got there first. Now, in order to make that good, it seems to me that it must be shewn that, by virtue of the powers given to the defendants, they were given some right to interfere with the beneficial use of the land by the adjoining owner. In my opinion they were given no such right at all. If this Act did not deprive the owner of the surrounding land of any beneficial use of his land and if he might use his land in this way, he would be entitled to exactly the same remedies as he could otherwise have got; so that there is no protection, in my opinion, to be given because of the

defendants coming there first. It does not matter to whom the surrounding land belongs. When the Legislature gave them these authorities, they did not take away from the right of the owner of that surrounding land any of the rights which he otherwise had, and therefore, in my opinion, the judgment must be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Fladgate & Co.*

Solicitors for defendants: *Beale & Co.*

W. J. B.

METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

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London—Water—Metropolitan Water Board—Compulsory Powers—Laying Main Pipes—Protection of Railway Company—Acquisition of Easement—Metropolitan Water Board (Various Powers) Act, 1907 (7 *Edw.* 7, *c. clxxiv.*), *ss.* 61, 96.

By s. 61, sub-s. 1, of the Metropolitan Water Board (Various Powers) Act, 1907, the Board are empowered to exercise at any place within their limits of supply the like powers with respect to the laying of mains and pipes as are exercisable by local authorities under the provisions of the Public Health Act, 1875, with respect to the laying of mains and pipes within their respective districts for the purpose of water supply. By sub-s. 3 the limits of supply are to be deemed the district of the Board.

By s. 96, sub-s. 6, of the Act of 1907 the Board shall not, without the consent in writing of certain named railway companies under their common seal, acquire any of the lands or property of the railway companies, but the Board may acquire and the railway companies shall if required grant to the Board an easement or right of constructing and maintaining works on, through, in, under, over or along such lands and property; and the sum to be paid for the acquisition of such easement or right shall be settled as therein provided.

The Board having laid a main pipe under land of one of the named railway companies within the limits of supply of the Board:—

Held, that the Board were not bound to acquire or pay for any easement or right of constructing or maintaining the main pipe.

Swanston v. *Twickenham Local Board* (1879) 11 Ch. D. 838 followed and applied.

AWARD in the form of a special case.

The Metropolitan Water Board, hereinafter called the Board, were minded under certain enabling sections of the Public Health

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Act, 1875, and the Metropolitan Water Board (Various Powers) Act, 1907 (1), to lay a main pipe under certain lands at Battersea belonging to the London, Brighton and South Coast Railway Company, hereinafter called the company. The Board duly gave notice of their intention to the company. The company gave notice to the Board that under s. 96, sub-s. 6, of the Metropolitan Water Board (Various Powers) Act, 1907, the Board were bound to acquire an easement in the company's lands. The Board claimed that under s. 61 of the same Act of 1907 and the powers conferred upon them by the Public Health Act, 1875, they were entitled to carry out the works without purchasing or acquiring any easement or right of constructing the works, and they refused to admit the validity of the company's notice.

Sect. 96 of the Metropolitan Water Board (Various Powers) Act, 1907, was passed for the protection of several railway companies of which the company is one. By sub-s. 15 of that section it is provided that any dispute or difference which may arise between the railway companies and the Board as to any works to be carried out by the Board shall be settled by arbitration as therein provided.

The proposed works were carried out with the consent of the company subject to a reference to arbitration under the above enactment.

By an agreement under seal dated October 16, 1913, and made between the Board of the one part and the company of the other part, it was agreed that the following matter should be referred to arbitration, namely, whether the Board were entitled under the powers conferred upon them by the Metropolitan Water Board (Various Powers) Act, 1907, to lay the main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing or maintaining works on, through, in, under or along such lands and property. It was further agreed that the arbitrator should state his award in the form of a special case for the opinion of the Court and that in all other respects the reference should be subject to the Arbitration Act, 1889, as a submission made by consent out of Court.

(1) See note on p. 794, post.

The parties appeared by counsel, and there were produced before the arbitrator the Metropolitan Water Board (Various Powers) Act, 1907, the book of reference of the said Act, and the plan of the proposed works, all of which, together with the submission to arbitration, were annexed to and to be deemed part of the special case.

The company contended that the provisions of s. 96, sub-s. 6, of the Metropolitan Water Board (Various Powers) Act, 1907, extend and apply to the laying by the Board of the main and the execution by the Board of the works shewn upon the plans, specifications, sections, and detailed drawings delivered with and referred to in their notice and purporting to be so laid and executed by the Board under s. 61 of that Act.

The Board contended (1.) that s. 96, sub-s. 6, of the Act had reference only to lands delineated on the deposited plans and described in the deposited book of reference which the Board are empowered to enter upon, take, and use under s. 19 of the Act for the purposes of Part II. of the Act, and which included certain lands of the company other than the lands at Battersea now in question and shewn on the plan annexed to the submission; (2.) that s. 61 of the Act of 1907 confers on the Board authority to exercise the powers of local authorities under the Public Health Act, 1875, ss. 54 and 16, with respect to the laying of mains and pipes within their limits of supply, and that the exercise of such powers does not involve the purchasing or acquiring by the Board of any of the lands affected (see *Swanston* v. *Twickenham Local Board* (1)) or any easement therein, but only the payments by way of indemnity and compensation specified in s. 96, sub-s. 5, of the Act of 1907 in lieu of the payment of the compensation specified in s. 308 of the Public Health Act, 1875; (3.) that the Board were therefore entitled under the powers conferred on them by the Act of 1907 to lay the main in question through and under the said lands of the company at Battersea without purchasing or acquiring from the company any easement or right of constructing and maintaining works on, through, in, under or along such lands and property inasmuch as (*a*) the lands of the company in or through which the main

(1) 11 Ch. D. 838, at p. 851, per Cotton L.J.

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was laid are not and have not any connection with the lands of the company which the Board were empowered to acquire by s. 19 of the Act of 1907, nor were such lands at Battersea required or used for the purposes of the works authorized by Part II. of the Act in s. 19 thereof referred to, and (*b*) the Board had no power to compulsorily purchase or acquire the company's lands at Battersea.

The award proceeded to recite as follows:—It was admitted by the parties that all the requirements of the Act other than the alleged requirement as to the giving of a notice to acquire an easement had been carried out, and it was not suggested that the proposed works were more or other than were reasonably necessary for the laying of a main properly and safely in the position indicated and that the place where the main was to be laid was within the limits of supply of the Board. The acquisition of lands is dealt with by various sections of the Act. In particular power is given to the Board by s. 19 to take and use lands described in the book of reference. In s. 21 power is given to the Board in lieu of acquiring any lands to acquire an easement. By s. 24 compulsory purchase or taking of lands or easements is limited to a period of three years from the passing of the Act. Some of the lands delineated in the book of reference both within and without the district of the Board belonged to the railway companies for whose protection s. 96 was passed. The powers given by s. 61 of the Act only apply within the limits of the supply of the Board and are not limited in time.

The arbitrator took the view that the powers given by s. 61 of the Act do not involve any change in the title of the land in which the pipes are laid, but merely give the right to lay such pipes, and that if and when such pipes were removed the land on which they had been placed would belong to the original owner and not to the Board. For these and other reasons he was of opinion that the mere laying of a pipe or main within the district of the Board under the powers of s. 61 was not a purchase or acquisition of the land within the meaning of s. 96, sub-s. 6. He therefore awarded and declared as follows:—

"That the Board were entitled under the powers conferred on them by the Metropolitan Water Board (Various Powers) Act,

1907, to lay the aforesaid main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing and maintaining works on, through, in, under or along such lands and property; but this award is subject to the opinion of the Court on the following point of law:—

"Whether the laying of mains or pipes under the powers of s. 61 of the said Act through or under the property of a railway company necessarily involves the purchase or acquisition of any of the lands or property of such railway company within the meaning of s. 96, sub-s. 6, of the said Act.

"If the answer of the Court to the said question is in the negative then this my award shall stand; but if the answer is in the affirmative then this my award shall be as follows:—

"That the Board were not entitled under the powers conferred on them by the Metropolitan Water Board (Various Powers) Act, 1907, to lay the aforesaid main through and under the said lands of the company without purchasing or acquiring from the company any easement or right of constructing or maintaining works on, through, in, under or along such lands and property . . . ."

Hartree (*Clode*, *K.C.*, with him), for the London, Brighton and South Coast Railway Company. Sect. 54 of the Public Health Act, 1875, by reference to s. 16 of the same Act empowers a local authority to carry their main pipes into, through, or under any lands whatsoever in their district. When this has been done the local authority acquires a property in the soil immediately surrounding the pipe; the soil vests in the authority for the purposes of the undertaking: *Taylor* v. *Corporation of Oldham.* (1) By s. 61 of the Metropolitan Water Board (Various Powers) Act, 1907, a similar result would follow when the Water Board lay a main. The main vests in them and they acquire a property in the soil surrounding the main. But when the main runs through lands of one of the named railway companies, then by s. 96, sub-s. 6, of the Act of 1907 the Board shall not without the consent in writing of the company purchase or acquire any of the lands or property of the company, but the Board may acquire

(1) (1876) 4 Ch. D. 395.

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and the company shall if required grant an easement or right of constructing and maintaining the works. It follows that the Board must acquire and pay for an easement.

Clavell Salter, K.C. (*Courthope-Munroe* with him), for the Metropolitan Water Board. The question in this case is whether s. 96, sub-s. 6, of the Act of 1907 derogates from the powers conferred upon the Board by s. 61 of the Act. That is not the scope or intention of s. 96. By Part II. of the Act, i.e., ss. 5 to 34 inclusive, large powers of compulsory purchase were conferred upon the Board for the purpose of constructing twenty-three conduits specified and described in s. 5. By s. 19, "Subject to the provisions of this Act the Board may enter upon take and use such of the lands delineated on the deposited plans and described in the deposited book of reference as they may require for the purposes of the works authorized by this part of the Act." It is found by the arbitrator that some of the lands delineated on the plans and described in the book of reference belonged to railway companies. For their protection it was enacted by s. 96, sub-s. 6, that notwithstanding anything contained in this Act"—i.e., in s. 19—"the Board shall not . . . . purchase or acquire any of the lands or property of the railway companies." That means purchase or acquire compulsorily under s. 19. The provisions of s. 61 remain unaffected, and under that section they may lay a main pipe under any land within their limits of supply without acquiring any easement: *Swanston* v. *Twickenham Local Board.* (1)

Hartree in reply.

SHEARMAN J. Having come to a clear decision upon this point I see no reason for reserving judgment. The question turns upon the construction of ss. 61 and 96 of the Metropolitan Water Board (Various Powers) Act, 1907. By s. 61 the Water Board took powers enabling them to run pipes over lands within their district without giving notice to treat and so incurring the burden of purchasing lands compulsorily under the Lands Clauses Consolidation Act, 1845. It is probable that the railway companies named in the Act, being affected by the proposed legislation,

(1) 11 Ch. D. 838.

opposed the Bill and succeeded in obtaining for their protection the enactment of s. 96. The question arises thus: The Board had decided to run a main pipe under the London, Brighton and South Coast Railway Company's line at Battersea. The company object that under the protection afforded them by s. 96 the Board cannot do this without acquiring an easement. The Board deny that it is necessary for them to acquire an easement. That is the question I have to decide.

Sect. 61 gives the Board the powers of a local authority of laying water mains in their district. Those powers are contained in ss. 16 and 54 of the Public Health Act, 1875. A local authority may carry a water main into, through, or under any lands whatsoever within their district. The case of *Swanston* v. *Twickenham Local Board* (1) decided that a local authority may carry a main over land without acquiring any easement. Therefore if the case fell to be decided on s. 61 alone it would follow that the Water Board could lay this main without the necessity of acquiring an easement. I have to decide whether s. 96 qualifies their right to do this or takes it away as regards the railway company. In my view the railway companies made a good bargain if, as I assume, they procured the insertion of s. 96 in the Act; the value to be placed on an easement, if acquired, would not be very great; on the other hand the companies got a very valuable protection under sub-ss. 1—5 in the power to do themselves what otherwise they would have to acquiesce in. Be this as it may, it is plain that s. 96 enacts at the end of sub-s. 5 that in the case of the exercise of any of the powers of the Board under s. 61 the ordinary compensation clauses of the Public Health Act, 1875, are not to apply, but the specific provisions of this Act are to apply; and there is nothing in the first five sub-sections which in any way compels the Board to purchase any easement before they run their main under the premises of a railway company.

I come now to sub-s. 6. It was argued with much force that it is impossible for the Water Board to run a pipe which thereupon vests in them without acquiring a certain property; and that this is an acquisition of property which is prohibited by the

(1) 11 Ch. D. 838, 851.

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earlier words of sub-s. 6: "The Board shall not without the consent in writing of the railway companies under their common seal purchase or acquire any lands or property of the railway companies." It is contended that those words prohibit the Water Board from doing what they have done. That is an ingenious argument, but I cannot assent to it. In my opinion the words "purchase or acquire" allude to the compulsory acquisition of lands, easements, and so forth. There is nothing in those words prohibiting the Board from doing what they are doing now under the powers conferred upon them by s. 61. Neither can I find anything in the latter words of s. 96, sub-s. 6, prohibiting them. The words "but the Board may acquire and the railway companies shall if required grant to the Board an easement" do not in my view confer upon the companies the right to force upon the Board the acquisition of an easement whether necessary for their purposes or not. I have therefore come to the conclusion that there is nothing in s. 96 which in the present case prevents the Board from laying this main without acquiring an easement. The award therefore stands.

Award confirmed.

Solicitor for the Water Board: *Walter Moon.*

Solicitor for the London, Brighton and South Coast Railway Company: *P. Vivian Rose.*

NOTE.—By s. 13 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), all sewers within the district of a local authority, together with all buildings works materials and things belonging thereto, except as therein mentioned, shall vest in and be under the control of such local authority. By s. 14, any local authority may purchase or otherwise acquire from any person any sewer or any right of making or of user or other right in or respecting a sewer (with or without any buildings works materials or things belonging thereto) within their district, and any person may sell or grant to such authority any such sewer right or property belonging to him. By s. 15, every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Act.

By s. 16, "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement

or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district . . . . "

By s. 54, "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

By s. 308, "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act . . . ."

By the Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), s. 61, sub-s. 1, "It shall be lawful for the Board to exercise at any place or places within their limits of supply the like powers with respect to the laying of mains and pipes as are exerciseable by local authorities under the provisions of the Public Health Act, 1875, with respect to the laying of mains and pipes within their respective districts for the purpose of water supply (including section 308 of the said Act) . . . . "

Sub-s. 3: "For the purposes of this section the limits of supply shall be deemed to be the district of the Board . . . . "

Sub-s. 4: "The powers by this section conferred shall be in addition to and shall not be construed so as to limit derogate from or otherwise affect any other powers vested in the Board under this Act."

By s. 96, sub-s. 1, "In constructing laying down . . . . maintaining repairing renewing . . . . any mains . . . . in exercise of any of the powers conferred by this Act or by any of the Acts incorporated wholly or partly therewith upon along across under or over the railways works lands or property of" certain named railway companies including the London, Brighton and South Coast Railway Company . . . . "the same shall be done under the superintendence and to the reasonable satisfaction of the chief engineer of the railway company whose railways . . . . works lands or other property . . . . may be affected . . . . (in this section called 'the engineer') and in accordance with plans specifications sections and detailed drawings (in this section referred to as 'the plans') previously submitted to and approved in writing by the engineer or in case of difference settled by arbitration . . . . "

Sub-s. 4: "In the execution of any such works . . . . the Board shall not at any time or in any manner cause any injury or danger or (so far as can be avoided) any interruption impediment or delay to the safe passage and conduct of traffic . . . . "

Sub-s. 5: "If any such injury danger interruption impediment or delay shall be caused by . . . . any of such works . . . . the Board shall indemnify and save harmless the railway companies from all and any claims and demands . . . . and shall also make compensation to the railway companies in respect of any loss or injury which they may

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sustain or any expense to which they may be put . . . . and the amount of such compensation shall in case of difference be settled by arbitration in the manner hereinafter provided Provided that in the case of the exercise by the Board of the powers of" s. 61 " of this Act this sub-section shall apply instead of section 308 of the Public Health Act, 1875."

Sub-s. 6: "Notwithstanding anything contained in this Act or any Act incorporated wholly or partly therewith the Board shall not without the consent in writing of the railway companies under their common seal purchase or acquire any of the lands or property of the railway companies but the Board may acquire and the railway companies shall if required grant to the Board an easement or right of constructing and maintaining works on through in under over or along such lands and property and the sum to be paid for the acquisition of such easement or right shall be settled in the manner provided by the Lands Clauses Consolidation Act, 1845, with respect to the purchase of lands otherwise than by agreement Provided always that where the Board shall have acquired any such easement or right as aforesaid nothing in this Act shall prevent the railway companies from using their lands and property as they may think fit subject to such reasonable protection for the works of the Board as may be agreed or settled by arbitration in manner hereinafter provided."

W. H. G.

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June 10.

TARRANT *v.* WOKING URBAN DISTRICT COUNCIL.

Local Government—New Street—Construction of, in conformity with By-laws—Alteration of Street after Construction completed—Public Health Act, 1875, *s.* 157.

A by-law provided that "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building" shall comply with certain requirements as to the width of the carriageway and footways:—

Held, that when once the construction of a new street has been completed no offence is committed against such a by-law by a subsequent diminution of the width of the carriageway or footways below the required minimum.

Semble, that s. 157 of the Public Health Act, 1875, which authorizes the making by urban authorities of by-laws "with respect to the level, width, and construction of new streets," does not authorize the making of a by-law which would render such a reduction of the original width of the street an offence.

CASE stated by Surrey justices.

The appellant W. G. Tarrant was summoned upon informations charging that he between June 16 and July 31, 1913, unlawfully constructed for use as a carriage road a new street

called Hockering Road intended to form the principal approach and means of access to certain buildings so that the width of the carriageway was less than two thirds and the width of the footways on each side was less than one sixth of the entire width of such street contrary to by-law 7 of the respondent council's by-laws. (1)

At the hearing of the information the following facts were proved or admitted :—

In the year 1904 certain persons known as the Smallpiece trustees, the predecessors in title of the appellant, submitted to the respondents plans for the laying out and construction of a road called Hockering Road in the respondents' district. The plans, which were duly approved by the respondents, shewed a road 40 ft. in width with a carriageway of the width of 26 ft. 8 in. and a footway on each side of 6 ft. 8 in. The whole of the road comprised in the said plans was constructed by the Smallpiece trustees in accordance with the plans not later than June, 1905. The road commenced at its western end in a public highway and terminated at its eastern end in an arable field.

By an agreement dated October 1, 1909, the appellant agreed to purchase from the Smallpiece trustees the Hockering estate, including the above-mentioned road. In 1910 the appellant laid out and constructed in accordance with plans submitted to and approved by the respondents an extension of Hockering Road to the eastern boundary of the Hockering estate. In the same year he agreed to purchase the adjoining property called the Roundhill estate, and in 1911 in accordance with further plans approved by the respondents he constructed a further

(1) By the by-laws of the Woking Urban District Council :—

By-law 5 (1.) : "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be forty feet at the least."

By-law 7 : "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building shall comply with the following requirements :—

"(*a*) He shall construct the carriageway of such street so that the width thereof shall be two thirds of the entire width of such street.

. . . . .

"(*c*) He shall construct on each side of such street a footway of a width not less than one sixth of the entire width of such street."

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extension of Hockering Road terminating in a highway on the eastern boundary of the Roundhill estate. No portion of Hockering Road was dedicated to the public, and the expense of the upkeep of the road was entirely defrayed by the appellant. The neighbourhood was of a residential character, and the appellant had erected several houses in the said road, to which houses it formed the principal approach and means of access. It appeared that through traffic, including heavy motor lorries, had made use of Hockering Road as a short cut between the highways surrounding the Hockering and Roundhill estates, and the appellant at the request of the residents on the said estates erected in June and July, 1913, certain piers and gates at the extreme western end of Hockering Road on the portion constructed in 1905. The piers were four in number, and their total size was such that the carriageway was occupied by them to the extent of 8 ft. 8 in. and each of the footways to the extent of 8 in., leaving the width of the road available for use as a carriageway when the gates were open 18 ft. and as a footway 6 ft. only on each side.

The justices were of opinion that the appellant by erecting the said piers and gates had constructed a new street within the meaning of the by-law, and they accordingly convicted him.

Macmorran, K.C., and *Latter*, for the appellant. As this road is not a public highway the appellant would at common law be entitled to stop it up altogether provided he obtained the consent of the owners of the houses. The only question is whether the erection of the piers is a breach of the by-law. What the appellant did was not a construction of a new street but an obstruction of an old one. There is nothing in the by-law when once the construction is complete to prevent the owner from so altering the construction of the street as to make it out of conformity with the by-law. It only says that "he shall construct" it in the manner specified. It does not say that he shall maintain it in that condition. And, as was said by Neville J. in *Kirby* v. *Paignton Urban Council* (1) in answer to the question whether, where plans have been deposited for the making of a new street and have been approved by the local authority, the owner can

(1) [1913] 1 Ch. 337, at p. 348.

under any circumstances do anything inconsistent with the construction of the road in accordance with the plans which he has deposited after it has been constructed in accordance with them, "The rights of the owner must remain in his land unless there is something to take those rights away." There is nothing in the by-law here to do so.

Moresby, for the respondent council. The justices were right in holding that the appellant by erecting the piers brought himself within the by-law as a person constructing a new street. Every erection forming part of a street is a part of the construction of the street. In *Hendon Local Board* v. *Pounce* (1) it was held that the "construction" of a new street included the building of houses abutting on it. A fortiori must it include the building of something on the street itself. Hockering Road is still a new street, for it has never been dedicated to the public; and a street continues to be new until it is taken over by the highway authority. The original portion of Hockering Road and its extensions are all one street, the construction of which has been extended over a period of years, and the erection of a structure for the purpose of limiting the width of the entrance to it was part of the construction of that street.

Macmorran, K.C., in reply. The building of the piers was no part of the construction of the street, for if it were, the blocking up of the street altogether by building a wall across it would be an act of construction of the street. The different sections of the road laid out and constructed at different dates do not together constitute one street merely because they are called by the same name. Each section is a different street, for which separate plans have to be submitted to and approved by the council. The portion of the road on which the piers were erected ceased to be a new street in 1905. It is a mistake to suppose that a new street continues to be new until taken over by the highway authority. That no doubt was so in the metropolis, for the definition of "new street" in the Metropolis Management Act, 1862, provided that that term should include any street however old which at the time of the passing of that Act had not been taken over. But it is otherwise in the country. For the

(1) (1889) 42 Ch. D. 602.

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purposes of the Public Health Act, 1875, a street ceases to be new as soon as the construction of it is completed. This is recognized by these by-laws, for by by-law 115 "Every person who shall lay out or construct a street shall within a reasonable time after the completion of the laying out or construction of such street deliver or send . . . . to the surveyor of the council . . . . notice in writing of the completion of the laying out or construction of such street and shall at all reasonable times within a period of seven days after such notice shall have been so delivered or sent afford such surveyor . . . . free access to such street for the purpose of inspection." The present case is not only casus omissus in the by-law, but also in the statute. The Act of 1875 by s. 157 only empowers urban authorities to make by-laws "with respect to the level, width, and construction of *new* streets." It does not enable them to make by-laws with respect to the width or construction of streets that have ceased to be new.

LORD COLERIDGE J. The question is whether upon the facts of this case the magistrates were right in convicting the appellant of an offence under by-law 7. In 1905 a portion of Hockering Road was laid out and constructed as a new street. The plans were approved by the district council and the street was constructed in accordance with those plans. In 1910 there was a slight extension of the road, and in 1911 there was a further extension, on each occasion plans and drawings being submitted to and approved by the council, and the work being executed in accordance therewith. Therefore by 1911 three separate sections of Hockering Road had been constructed and joined together into one road, and at that time no breach of the by-laws had been committed. In 1913, two years after the last portion of the road had been constructed, the appellant placed certain gates and piers across one end of Hockering Road, the road not having been dedicated to the public but still remaining a private road. The question before the magistrates was whether the erection of those gates and piers, which undoubtedly limited the passage way of the road to an extent which would have been an infringement of the by-law if it had been made at the time when the road was originally laid out, amounted to an infringement of the

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by-law at the time when it was in fact made. That depended upon whether in 1913 Hockering Road was still in course of construction as a new street and whether the erection of the gates and piers was an act of construction of the street. We are clearly of opinion that there was no evidence on which the magistrates could find that the portion of the road where the gates were erected was a new street in 1913. By-law 115 distinctly contemplates a time when a new street shall be completed, for it provides that upon completion of the construction of the street notice shall be sent to the surveyor in order that he may come and inspect it. From that it seems clear that the by-laws had in view the construction of the street at the time when it was laid out, and did not contemplate any infringement of the requirement as to width taking place subsequently to the completion of the construction. Here the particular portion of the road on which the gates were placed was completed in 1905, and even the two additional portions were completely constructed by 1911, and under those circumstances it is impossible to hold that the erection in 1913 of gates across a road which was completely laid out and constructed in 1905 was a construction of a new street so as to make the reduction of the width of the passage way a violation of by-law 7. If the street had not been originally constructed in accordance with the by-law it would have been a different matter, for then an act tending to keep the width of the road below the required minimum might possibly have been treated as a continuing offence. But that is not the case here. I am of opinion that the conviction cannot stand.

AVORY J. I am of the same opinion. It was not competent for the justices to find that the appellant had by the act complained of constructed a new street. The act in question consisted of the erection of piers and gates, and it appears to me almost a contradiction in terms to say that a person who obstructs an existing street is thereby constructing a new street. But even if it is not, the portion of Hockering Road where the gates are now erected was as a matter of fact constructed in 1905. Though it may be well that the attention of the Legislature should be directed to the advisability of authorizing the making of a

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by-law providing that when once a street has been constructed in accordance with the by-laws it should not be altered without the consent of the local authority, no such by-law has yet been made nor has the Legislature authorized the making of it, and we have no right to put a forced construction on the existing by-laws in order to make up for the want of such a provision. I agree that the appeal ought to be allowed.

ATKIN J. I agree. The justices have found facts which shew that the erection of these gates would have been a breach of the by-law if it had been made at the time when the street was being constructed as a new street. But the street was constructed and its construction was completed long before the erection was begun, and it is only a person who is engaged in constructing a new street who can commit a breach of this by-law. The alteration of an existing street cannot amount to the construction of a new one. There is nothing in the by-law to prohibit a land-owner, who owns the soil of a street not dedicated to the public, from making alterations in it which would not have been permitted at the time when the street was originally constructed. Whether there ought to be a by-law to prevent such alterations is a question of expediency for the Legislature.

Appeal allowed.

Solicitor for appellant: *C. W. M. Price.*

Solicitor for respondents: *R. Mossop, Woking.*

J. F. C.

GODMAN, Appellant *v.* CROFTON, Respondent. 1914

June 9.

Justices—Case stated — Notice of Appeal—Service on Solicitor for Respondent—Acceptance of Service by Solicitor—"Giving notice in writing of such appeal to the other party"—Summary Jurisdiction Act, 1857 (20 *& 21 Vict. c.* 43), *s.* 2.

By s. 2 of the Summary Jurisdiction Act, 1857, a party dissatisfied with the determination of justices as being erroneous in point of law may apply to the justices to state and sign a case for the opinion of the High Court, and such party, called "the appellant," shall within three days after receiving such case transmit the same to the Court, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party," called "the respondent":—

Held, that, where the solicitors to the respondent had authority to accept service of notice of appeal on the respondent's behalf, notice in writing of the appeal was properly given to the respondent when it was given to and accepted by the solicitors on behalf of the respondent.

Syred v. *Carruthers* (1858) E. B. & E. 469 and *Pennell* v. *Churchwardens of Uxbridge* (1862) 31 L. J. (M.C.) 92 approved.

Hill v. *Wright* (1896) 60 J. P. 312 not followed.

Application for an order directing the officer of the Crown Office to draw up an order of the Court made on the hearing of an appeal by way of special case stated by justices of the county of Dorset as hereinafter appearing.

On June 13, 1913, an information was laid before the justices by the appellant, an inspector appointed under the National Insurance Act, 1911, against the respondent for failing to pay a contribution for the week commencing January 20, 1913, in respect of an employed contributor contrary to Part I. of the Act and the regulations made thereunder. Two other informations were also laid for similar defaults in relation to the weeks commencing January 27 and February 3, 1913, respectively.

The justices dismissed the informations but stated a case at the request of the appellant.

The case was heard in the King's Bench Division before Channell, Rowlatt, and Atkin JJ. on December 12, 1913. The respondent was not represented.

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The appeal was allowed and the case was remitted to the justices with a direction to convict. Application was subsequently made to the Crown Office Master to issue the order of the Court. In accordance with the usual practice when the respondent has not appeared or been represented, the Master required an affidavit of due service of the case and notice of appeal.

An affidavit of Maurice Linford Gwyer, solicitor for the National Health Insurance Commission, was presented to the Master, which, after mentioning the dismissal of the informations by the justices, proceeded as follows:—

"3. The appellant being dissatisfied with the said determination and desiring to question the same, applied in writing within three days after the dismissal of the said information to the said justices to state and sign a case setting forth the facts and grounds of such determination for the opinion of this Honourable Court, and I on behalf of the appellant, within three days after receiving the case stated and signed by the said justices, transmitted the same to this Honourable Court, first having given notice in writing of such appeal with a copy of the case so stated and signed to Messrs. Luff and Raymond, the solicitors then acting on behalf of the said respondent in the above mentioned proceedings. I append to this my affidavit a bundle of correspondence (marked M. L. G. 1) containing copies of letters and telegrams which passed between me and Messrs. Luff and Raymond with reference to the acceptance by them of notice in writing of the above mentioned appeal. As shewn by the telegram dated October 17, 1913, I received the special case from the justices on that day and on the same day I duly gave notice in writing of the appeal to the said solicitors a copy of which is attached hereto marked M. L. G. 2 together with a copy of the case stated and signed by the said justices as aforesaid. I further did all such things as are required to be done upon an application to state a case in accordance with the provisions of the Summary Jurisdiction Acts, 1857 and 1879, and the rules thereunder . . . ."

The bundle of correspondence mentioned in the affidavit contained the following letters and telegrams:—

A letter dated October 4, 1913, from Messrs. Luff & Raymond to M. L. Gwyer: "We are in receipt of your letter of the 3rd inst. with reference to an appeal in respect of the proceedings against Mrs. Crofton under the National Insurance Act. Assuming that you have complied with all the necessary requirements regarding special cases we shall be pleased to accept service of the necessary proceedings . . . ."

A letter dated October 6, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "I am obliged by your letter of the 4th inst., and I note that you will be prepared to accept service on Mrs. Crofton's behalf in the event of the justices stating a case . . . ."

A letter dated October 16, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "Referring to your letter of the 4th inst. I am daily expecting to receive the special case signed by the adjudicating justices from Mr. Wyld. As you are aware the rules of Court oblige the appellant within three days after the receipt of the case from the justices to transmit it to the Crown Office first giving notice in writing of the appeal with a copy of the case to the respondent. In this case as you are willing to accept service on behalf of Mrs. Crofton I propose directly the case is received from the justices to forward to you by post a notice of appeal in duplicate, a copy of the case, and a prepaid telegraph form, and I shall be glad if you will on receipt of these papers telegraph to me immediately that you have received the notice of appeal and copy case and write to me in due course enclosing the duplicate notice of appeal endorsed with an acceptance of service . . . ."

A telegram dated October 17, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "Re Godman and Crofton. Special case arrived from justices this morning. Please telegraph at once in reply to my letter of yesterday. Reply paid."

A telegram of the same date from Messrs. Luff & Raymond to M. L. Gwyer: "Re Godman and Crofton. Concur in arrangements for service by post per your letter of 16th. Luff."

A letter dated October 17, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "I am much obliged by your telegram received this morning. I now enclose the notice of appeal herein with a copy of the special case annexed and a duplicate

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copy of the notice of appeal for you to endorse with a note that you accept service on behalf of Mrs. Crofton. I also enclose a prepaid telegram form and shall be glad if you will kindly telegraph to me immediately on receipt of this letter . . . ."

A telegram dated October 18, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "Re Godman and Crofton. Are you forwarding me the duplicate notice of appeal endorsed with an acceptance of service by to-day's post? Please telegraph. Reply paid."

A telegram of the same date from Messrs. Luff & Raymond to M. L. Gwyer: "Re Godman Crofton. Yes, forward you duplicate notice endorsed with acceptance to-day. Luff."

A letter dated October 18, 1913, from Messrs. Luff & Raymond to M. L. Gwyer: " . . . . We have now received copy of the case and notice of appeal and we return one copy of the notice with a memo. endorsed of our acceptance of service on behalf of Mrs. Crofton . . . ."

A letter dated October 21, 1913, from M. L. Gwyer to Messrs. Luff & Raymond: "*Godman* v. *Crofton*. I am much obliged to you for your letter of the 18th instant enclosing the duplicate notice of appeal herein endorsed with your acceptance of service. The case was set down for hearing at the Crown Office yesterday . . . ."

The notice referred to as M. L. G. 2 in the above-mentioned affidavit was in these terms:—"To Jane Crofton of" &c. "Take notice that John Frederick Edward Godman being the informant in three informations preferred by him and heard before and determined by three of His Majesty's justices of the peace in and for the county of Dorset being a Court of summary jurisdiction sitting at Sturminster Newton in the said county on July 17, 1913, being dissatisfied with the determination of the said Court upon the hearing of the said informations as being erroneous in point of law applied to the said justices pursuant to s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, and the rules made under the last named statute to state and sign a case setting forth the facts and the grounds of such their determination in order that he the informant may take the opinion thereon of the King's Bench

Division of the High Court of Justice. And further take notice that in pursuance thereof and of the statutes aforesaid the said justices stated and signed a case a copy of which is annexed hereto. Dated October 17, 1913" &c. On the back of this notice were written the words " We accept service of this notice and the annexed case on behalf of the respondent (Signed) Luff & Raymond, October 18, 1913, solicitors for the respondent Jane Crofton."

Upon reading this affidavit it appeared to the Master of the Crown Office that the notice and the case had been sent to the respondent's solicitor and not to the respondent. Being in doubt whether this was a compliance with the provisions of s. 2 of the Summary Jurisdiction Act, 1857, and in view of the cases of *Hill* v. *Wright* (1) and *Wills & Sons* v. *McSherry* (2) and other cases on the question, he refused to issue the order of the Court except by the direction of the Court.

An ex parte application having been made on behalf of the appellant that the Master might be directed to draw up the order, the Court ordered that notice should be given to the respondent and, if she should decline to move in the matter, to the Treasury Solicitor, and that the matter should then come on for argument.

Mr. M. L. Gwyer on March 5 wrote to Messrs. Luff & Raymond informing them of these facts and asking what course their client would pursue. On April 4 Messrs. Luff & Raymond wrote to say that the respondent left the matter in their hands and that they would advise her not to appear upon the application.

The matter coming on for hearing,

Inskip, for the appellant. The Master of the Crown Office ought to draw up the order of the Court allowing the appeal. Sect. 2 of the Summary Jurisdiction Act, 1857, provides that a party dissatisfied with the determination of justices as being erroneous in point of law may apply in writing within three days after the same to the justices to state and sign a case for the opinion of one of the superior Courts of

(1) 60 J. P. 312. (2) [1913] 1 K. B. 20.

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law to be named by the party applying, "and such party, hereinafter called 'the appellant,' shall within three days after receiving such case, transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given hereinafter called 'the respondent.'" The question here arises upon the words "first giving notice in writing of such appeal . . . . to the other party." Has such a notice been given? There can be no doubt that service of a notice on the solicitor for the party to be notified is good service upon the party: *Syred* v. *Carruthers* (1); *Pennell* v. *Churchwardens of Uxbridge* (2); *Holloway* v. *Coster* (3); *Wills & Sons* v. *McSherry*. (4) No doubt the conditions prescribed by the Act must be performed before an appeal can be brought: *Woodhouse* v. *Woods* (5); but what are the conditions? Personal service is not one of them. Notice on the other party is all that is required. "The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required": *Hope* v. *Hope*. (6) It is a question of fact whether the notice reached the respondent. The uncontradicted evidence is that the notice was served upon the respondent's solicitors who had authority to accept service on her behalf. There can be only one inference, that she received notice. No attempt is made to dispute the inference.

Branson, for the respondent. This case is covered by *Hill* v. *Wright* (7), where the exact point was raised and it was held that notice to the respondent's solicitors is not notice to the respondent within this enactment. The cases of *Edwards* v. *Roberts* (8) and *Foss* v. *Best* (9) are to the same effect. Where it is impossible to serve the respondent within the prescribed time

(1) E. B. & E. 469.
(2) 31 L. J. (M.C.) 92.
(3) [1897] 1 Q. B. 346.
(4) [1913] 1 K. B. 20.
(5) (1859) 29 L. J. (M.C.) 149.
(6) (1854) 4 D. M. & G. 328, at p. 342.
(7) 60 J. P. 312.
(8) [1891] 1 Q. B. 302.
(9) [1906] 2 K. B. 105.

the rule may be relaxed, as it was in *Syred* v. *Carruthers* (1) and *Wills & Sons* v. *McSherry*. (2) There is no evidence in the present case that it has been found impossible, or that any effort was made, to serve the respondent. The question is not whether the notice has come to the mind of the respondent, but whether it has been given as directed by the statute: *Vaux* v. *Vollans*. (3)

LORD COLERIDGE J. In this case a technical point has arisen as to the interpretation to be given to s. 2 of the Summary Jurisdiction Act, 1857. By that section a party dissatisfied with the determination of justices as being erroneous in point of law may apply in writing within three days to the justices to state and sign a case for the opinion of a superior Court. It proceeds to enact that such party, thereinafter called the appellant, shall within three days after receiving such case transmit the same to the Court named in his application, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given." The question we have to decide is what is the meaning of the language in that enactment. It is urged that as a condition precedent to the appeal there must be personal service of the notice in writing upon the respondent. But for the case of *Hill* v. *Wright* (4) we should have little difficulty in disposing of that contention, but that case seems to have placed a very technical construction on the statute. It is not reported at any length; the statement of facts is brief, and the Court, Lord Russell C.J. and Wright J., give no reasons for their decision. It seems that in that case a copy of the special case was sent to the solicitors of each of the respondents but not to the respondents themselves, and that the preliminary point was taken on behalf of the respondents that s. 2 of the Act of 1857 had not been complied with. The decision of the Court was in favour of the respondents. If it is necessary to say that the Court came to a wrong decision in that case, we are prepared to say so; but it is to be observed that there was no evidence that the solicitors at the

(1) E. B. & E. 469.
(2) [1913] 1 K. B. 20.
(3) (1833) 4 B. & Ad. 525.
(4) 60 J. P. 312.

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time when they were served were in fact acting for the respective respondents. In the present case we have uncontradicted evidence that at the time when they received the notice in writing the solicitors were acting on behalf of the respondent and we may take it that they were so acting. The question therefore is whether under the words strictly interpreted service on the solicitors of the respondent acting for the respondent is good service of the notice in writing within the meaning of the enactment. Cases have been cited on both sides; but this is clear, that the interpretation put upon the enactment in *Hill* v. *Wright* (1) is inconsistent with the principle of the earlier case of *Pennell* v. *Churchwardens of Uxbridge* (2) as well as with later cases such as *Wills & Sons* v. *McSherry* (3), in which it was held that, where every effort to effect personal service had failed, the respondents having gone abroad, service at the last known place of abode was a sufficient compliance with the prescribed conditions. In *Syred* v. *Carruthers* (4) also the Court held that, after an unsuccessful attempt to effect personal service, notice to the respondent's attorney was good notice. It is true that the decision is based upon three considerations; the attempt to effect personal service, the notice to the attorney, and the discovery of the respondent and service upon him without objection after the expiration of the three days prescribed by the statute. In our opinion the last consideration has no bearing on the discussion, and the real decision is that where an attempt to effect personal service has failed and notice has been given to the attorney that is a valid service of notice. I do not see any necessity for holding that as a condition precedent to the appeal it must be proved that personal service has been attempted and has failed. Personal service is not necessary. The case of *Syred* v. *Carruthers* (4) shews that if notice is served on the attorney retained in the matter that is prima facie good service on the respondent. In *Edwards* v. *Roberts* (5) this question did not arise, because there the appellant had given the notice before transmitting the special case to the Court. The case of *Foss* v.

(1) 60 J. P. 312.
(2) 31 L. J. (M.C.) 92.
(3) [1913] 1 K. B. 20.
(4) E. B. & E. 469.
(5) [1891] 1 Q. B. 302.

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Best (1) is distinguishable; in that case there was no evidence of service upon any one. The case of *Reg.* v. *Justices of Oxfordshire* (2) turned on the terms of s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, which are in substance the same as those in the Act we are considering. But there had been no service upon the solicitor in that case, because the facts shew that at the time of service he had ceased to represent the respondent. In *Holloway* v. *Coster* (3) the ground of the decision is that it is sufficient if the notice reaches the person to whom it is to be given although it is not personally served upon him. The case, however, upon which I rest my judgment is that of *Pennell* v. *Churchwardens of Uxbridge* (4), where Blackburn J., delivering the opinion of the Court, held that a solicitor acting for an appellant had presumably authority to receive a case on behalf of the appellant. Inasmuch as the case was not transmitted to the Court within three days after the appellant had received it, the Court could not allow the appeal to be entered, but Blackburn J. clearly expresses the view that where a solicitor acting for one party does an act which is fairly within the scope of the authority conferred upon him the other side may assume that he still retains his position and has authority to accept notice. In the present case the solicitors had acted for the respondent; there was evidence to shew that they were still so acting when this notice was received; they were agents of the respondent to receive the notice; the reasonable inference is that they received it on behalf of their client, and there being no evidence to the contrary we think that the terms of the statute have been complied with. The officer of the Court must therefore draw up the order.

AVORY J. I am of the same opinion. The question is as to the jurisdiction of the Court to hear this appeal, and the Court ought to be satisfied that it had jurisdiction. If it had been shewn that this notice never was in fact brought to the attention of the respondent the Court might refuse to draw up this order. But so far from shewing that, the evidence is sufficient to

(1) [1906] 2 K. B. 105.
(2) [1893] 2 Q. B. 149.
(3) [1897] 1 Q. B. 346.
(4) 31 L. J. (M.C.) 92.

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establish that the notice was brought to her attention. Nothing which we say in this case is to be taken as throwing any doubt upon the law that the conditions prescribed by s. 2 of the Act must be complied with before an appeal can be brought; they are conditions precedent to an appeal. The question is what are the conditions. The Act does not prescribe personal service; it merely prescribes notice in writing of the appeal to the other party. Then, as was decided in *Holloway* v. *Coster* (1), it is a question of fact whether the notice reached the person to be notified. In *Wills & Sons* v. *McSherry* (2) I entertained a doubt whether *Hill* v. *Wright* (3) was rightly decided. Now, after further considering the matter with my Lord and my brother Atkin, I say that if *Hill* v. *Wright* (3) cannot be distinguished from the present case it ought not to be followed.

ATKIN J. I agree. It is a condition of appealing that the appellant shall within three days after receiving the special case transmit the same to the Court, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party. The appellant gave notice in writing to the solicitors of the other party, who accepted service on her behalf, and there is evidence that they were authorized to accept service of the notice on her behalf as her solicitors. To my mind it is a question of fact whether or not notice in writing has been given to the other party or not. The words of the Act are not that personal service of the notice is to be effected, and so *Holloway* v. *Coster* (1) is precisely in point. It is not necessary for us to say in this case whether the retainer of a solicitor in proceedings before justices necessarily continues so as to include the acceptance of notice of appeal from a party dissatisfied with the decision. In the present case it is clear that the solicitors had in fact authority to accept this notice. That being so, it is unnecessary to go further and shew that the notice actually came to the mind of the client. The case of *Pennell* v. *Churchwardens of Uxbridge* (4) seems to confirm this view. An appellant must within three days after receiving the case from

(1) [1897] 1 Q. B. 346.
(2) [1913] 1 K. B. 20.
(3) 60 J. P. 312.
(4) 31 L. J. (M.C.) 92.

the justices transmit it to the Court. It was held in that case that the appellant had received the special case when it was sent by the magistrates to his solicitor. So here the respondent received the notice in writing when her solicitors received it. I concur in the view that if *Hill* v. *Wright* (1) cannot be distinguished it must be wrong. The officer of the Court must therefore draw up the order made on the appeal.

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Order accordingly.

Solicitor for appellant: *The Solicitor to the Insurance Commissioners.*

Solicitor for respondent: *The Treasury Solicitor.*

W. H. G.

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June 10.

Child—Illegitimate—Wilful Neglect of—Liability of Father—Person having "custody, charge, or care" of Child—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1; *s.* 38, *sub-s.* 2.

The enumeration in s. 39, sub-s. 2, of the Children Act, 1908, of the persons who are presumed to have the custody, charge, or care of a child is not intended to be an exhaustive enumeration of the persons referred to in s. 12, sub-s. 1, as having the custody, charge, or care. The latter section applies to those who have in fact the custody, charge, or care as well as those who are presumed to have it.

Where an illegitimate child is living with its father and mother, the fact that the mother, who is the child's sole parent and legal guardian, is resident in the house does not prevent the father from having jointly with her the custody, charge, or care of the child within the meaning of s. 38, sub-s. 2, of the Children Act, 1908, so as to render him liable to a penalty under s. 12 if he wilfully neglects it.

CASE stated by the stipendiary magistrate for Liverpool.

The respondent Alfred Jones and one Gladys Owens were summoned on an information charging that they on February 28, 1914, and other days being each over the age of sixteen years and having the custody, charge, or care of four children did wilfully

(1) 60 J. P. 312.

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neglect them in a manner likely to cause them unnecessary suffering contrary to s. 12 of the Children Act, 1908. (1)

On the hearing of the information the following facts were proved or admitted:—

On seven occasions, once in each of the months of October, November, and December, 1913, and January, 1914, and three times in February, 1914, an inspector in the service of the appellants visited the house occupied by the respondent and Gladys Owens and found four of the latter's illegitimate children, whose ages ranged from ten to two years, in a very dirty, ragged, verminous, and neglected condition. Of the four rooms in the house three were empty and the other contained scarcely any furniture. On most of the visits the inspector found the woman Owens in the house drunk or drinking with other women. On four of the visits he saw the respondent in the house and on two of those occasions he was drunk. During the period of the offences charged and for a considerable time previously thereto the respondent had been cohabiting with the woman Owens. The respondent was the father of some if not all of the said children. No affiliation order had ever been made against him in respect of any of the children.

Having regard to the last mentioned fact and in view of the decision in *Butler* v. *Gregory* (2) the magistrate was of opinion that the respondent did not come within the first paragraph of s. 38, sub-s. 2, of the Children Act, 1908, as being the parent or legal guardian or legally liable to maintain any of the said children. It was contended on behalf of the appellants that

(1) By s. 12 of the Children Act, 1908, "If any person over the age of sixteen years, who has the custody, charge, or care of any child . . . . wilfully . . . . neglects . . . . such child . . . . in a manner likely to cause such child . . . . unnecessary suffering or injury to his health" he shall be guilty of an offence.

By s. 38, sub-s. 2, "For the purposes of this part of this Act—Any person who is the parent or legal guardian of a child . . . . or who is legally liable to maintain a child . . . . shall be presumed to have the custody of the child."

"Any person to whose charge a child . . . . is committed by any person who has the custody of the child . . . . shall be presumed to have charge of the child."

"Any other person having actual possession or control of a child . . . . shall be presumed to have the care of the child."

(2) (1902) 18 Times L. R. 370.

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s. 23, sub-s. 1, of the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15) (1), entitled the magistrate to convict the respondent on the ground that he was cohabiting with the parent of the children. But the magistrate decided that that sub-section had no application to the Children Act, 1908, under which the respondent was charged. He was further of opinion that the mere fact of the respondent living with a woman and her illegitimate children did not constitute him "a person having actual possession or control" of such children, she being at law their sole legal custodian or guardian. He accordingly dismissed the information as against the respondent, but convicted the woman Owens.

The society appealed.

J. H. Layton, for the appellants. The respondent was liable to be convicted of the offence charged, for by virtue of s. 23, sub-s. 1, of the Act of 1904 he was to be treated as being the "parent" of the children. By that sub-section the provisions of that Act relating to the parent of a child were to apply to a person cohabiting with the parent. Then by sub-s. 3 "any person who is the parent of a child shall be presumed to have the custody of the child." And by s. 1 any person who has the custody of a child is to be guilty of an offence if he wilfully neglects it. Therefore under the Act of 1904 it is clear that the respondent would have been liable. A great part of the Act of 1904 is now repealed by the Children Act, 1908, s. 1 of the earlier Act being replaced by s. 12 of the later. But sub-s. 1 of s. 23 is left unrepealed, and it is difficult to see to what it can apply unless the words "The provisions of this Act" are read as meaning "the provisions of this Act or of any subsequent Act which are substituted for any of the provisions of this Act," that is to say, as including the provisions of s. 12 of the later Act. Further the respondent was liable as having the actual possession or control of the children. The magistrate made the mistake of construing "actual possession" as meaning legal possession.

No counsel appeared for the respondent.

(1) By s. 23, sub-s. 1, of the Prevention of Cruelty to Children Act, 1904, "The provisions of this Act relating to the parent of a child shall apply . . . to any person cohabiting with the parent of the child."

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LORD COLERIDGE J. The question which we have to decide in this case is whether the father of an illegitimate child, which is living with him and its mother in the same house, is liable to be convicted under s. 12, sub-s. 1, of the Children Act, 1908, if he wilfully neglects it. It was contended that the effect of s. 23, sub-s. 1, of the Prevention of Cruelty to Children Act, 1904, was to attach to "any person cohabiting with the parent of a child" all the responsibilities of a parent and that as the respondent here cohabited with the child's mother he was to be regarded as the parent, and therefore, under s. 38, sub-s. 2, of the Act of 1908, as having the custody of the child. But s. 23, sub-s. 1, of the Act of 1904 is expressly limited in its application to "the provisions of this Act," and I think the magistrate was right in holding that its application could not be extended to the provisions of the Act of 1908 which were substituted for those of the Act of 1904. Then the question arose as to the true construction of s. 12, sub-s. 1, and s. 38, sub-s. 2, of the Act of 1908, and I gather that the magistrate was of opinion that the persons who had the custody, charge, or care of a child within the meaning of the former section were limited to those who were presumed to have the custody, charge, or care of the child under the latter, and that being of that opinion he came to the conclusion that he could not convict the respondent, upon the ground that he was not the parent of the child or legally liable to maintain it, and further that in view of the fact that the mother, who was the legal guardian of the child, was resident in the house the respondent could not be said to have the actual possession or control of it. We think that the magistrate in so holding was in error in two respects. In the first place we think that s. 38 does not in any way limit the meaning of the words in s. 12; it is intended to amplify them, not to cut them down. Quite apart from s. 38 if any person who has the custody, charge, or care of a child wilfully neglects it he is guilty of an offence under s. 12. Whether he has such custody, charge, or care is a question of fact for the magistrate to determine. And secondly we think that he is not to be precluded from determining that question in the affirmative merely because, in the case of an illegitimate child, the mother who has the legal custody, charge,

and care of the child is living in the same house with the child and the accused. The case must go back to the magistrate.

AVORY J. I am of the same opinion. The magistrate here has held that he could not as matter of law find the respondent guilty of the offence charged, and he was led so to hold by the supposition that s. 38, sub-s. 2, of the Children Act, 1908, was an exhaustive definition of the persons who were liable to be proceeded against under s. 12, sub-s. 1. He began by saying that in his opinion the respondent was neither the parent nor legal guardian of the child nor legally liable to maintain the child. In that I agree with him ; I think consequently the respondent was not a person who was "presumed to have the custody of the child." He then went on to hold that the respondent was not a person who could be presumed to have the care of the child by reason of his having the "actual possession or control," because the mother who was the child's sole legal custodian and guardian was living with it. In that I think that the magistrate was wrong. The very object of the last paragraph in s. 38, sub-s. 2, is to provide that persons who are neither parents nor legal guardians nor legally liable to maintain the child may be subject to the obligations imposed by s. 12; and the fact of the mother of an illegitimate child residing with it does not prevent some other person from having in fact the actual possession and control. But it appears to me that s. 38, sub-s. 2, is not, and was never intended to be, an exclusive definition of the persons liable to be proceeded against under s. 12. To give one illustration, a gaoler undoubtedly would have the custody of a child who was in the prison. If so he would clearly come within the language of s. 12 although he was not a parent or guardian or person legally liable to maintain the child. I am of opinion that the respondent may be a person having the custody, charge, or care of these children. Whether he is so or not is a question of fact for the magistrate. The case must go back to him with the expression of our opinion.

ATKIN J. In my opinion a person may have the custody, charge, or care of a child notwithstanding that there exist at the

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same time all the persons named in s. 38, sub-s. 2, who are presumed to have such custody, charge, or care. It is a question of fact whether the person charged has the actual custody, charge, or care of the child. To my mind the effect of s. 38, sub-s. 2, is that the persons who are there named and who are respectively presumed to have the custody, charge, or care of the child may, if they wilfully neglect it, be convicted under s. 12 even though they have not in fact either the custody, charge, or care.

Appeal allowed.

Solicitors for appellants: *Collins, Robinson & Co.*

J. F. C.

1914

June 11.

WATERS, APPELLANT *v.* EDDISON STEAM ROLLING COMPANY, LIMITED, RESPONDENTS.

Highway—Locomotive—Steam Roller—Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 12.

By s. 12 of the Locomotive Act, 1861, the weight of every locomotive, and the name of the owner or owners thereof, shall be conspicuously and legibly affixed thereon; and any owner not having affixed such weight and such name shall, upon conviction thereof before two justices, forfeit a penalty:—

Held, that a steam roller is a locomotive within the meaning of the above enactment.

CASE stated by justices of the county of Southampton.

An information was laid by the appellant against the respondents charging that they were the owners of a locomotive used on a highway called Romsey Road in the county of Southampton, which had not its weight conspicuously and legibly affixed thereon, contrary to s. 12 of the Locomotive Act, 1861. (1)

(1) By the Locomotive Act, 1861, s. 12, "All the clauses and provisions of any general or local Acts relating to turnpike roads or highways shall, so far as the same are not expressly altered or repealed by or are not inconsistent with the provisions of this Act, apply to all locomotives propelled by other than animal power, and to all wagons, wains, carts, and carriages of any other description drawn by such locomotive, and to the owners, drivers, and attendants thereof, in like manner as if drawn by animal power: Provided always, that the weight of every locomotive, and the name of the owner or owners thereof, shall be conspicuously and legibly affixed thereon; and any

The justices dismissed the information, but stated a case for the opinion of the Court. The following facts appeared:—

The respondents were the owners of a certain steam road roller which was on November 4, 1913, being used on a highway, called Romsey Road in the parish of Ampfield. It had not conspicuously and legibly affixed thereon the weight thereof.

The respondents contended—

(1.) That steam rollers were invented after and were not contemplated by the Locomotive Act, 1861.

(2.) That the Locomotive Act, 1861, was passed to deal with heavy traction engines drawing wagons and the like which caused damage to the public highways.

(3.) That steam rollers are designed and specially constructed for repairing public highways, and are not used for any other purpose than for drawing a water cart and living van when travelling from place to place. They are not used in any way for haulage purposes.

(4.) That steam rollers, together with certain other locomotives, are exempt from being licensed in accordance with the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 9, sub-s. 1. Under s. 10 of the same Act such excepted locomotives are compelled to be registered and pay a fee of 2*s.* 6*d.* Under the same section a penalty is provided for locomotives which require to be but are not registered or which fail to affix the required registration plate in accordance with the said section.

(5.) That all locomotives used for haulage or traction purposes, other than agricultural locomotives, steam rollers, and locomotives used by highway authorities within their district, not only have to pay a large yearly licence, but also on passing from one county to another pay a fee for each county they enter, whereas steam rollers pay a fee of 2*s.* 6*d.* for registration only, which registration covers them for all time. The question of weight does not therefore apply to that class of locomotive, and, that being so, they are not obliged to carry a weight plate affixed thereon shewing the tare weight of the same.

owner not having affixed such weight and such name shall, upon conviction thereof before two justices forfeit any sum not exceeding five pounds . . . ."

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(6.) That hundreds of steam rollers are employed on the public highways of the country, and also in parks and dockyards, none of which bear a weight plate.

The appellant contended—

That a steam roller, whether or not engaged in drawing wagons or other vehicles, is a locomotive propelled by other than animal power within the meaning of the Locomotive Act, 1861, and is equally with traction engines subject to the restrictions in that Act with regard to crossing bridges and making good damage thereto, consuming their own smoke, and indicating their weight. In support of his contention he called attention to the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), which exempts certain classes of locomotives not invented in 1861 from the provisions of the Locomotive Act, 1861, and also to the Locomotives Act, 1898, which exempts steam rollers from certain restrictions to which locomotives in general are subjected.

The justices adopted the contention of the respondents and dismissed the information as aforesaid, being of opinion that s. 12 of the Locomotive Act, 1861, has never been held to apply and does not apply to steam rollers.

The question for the Court was whether upon the above statement of evidence the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

Randolph, K.C., and *Ricketts*, for the appellant.

Holman Gregory, K.C., and *S. H. Emanuel*, for the respondents.

BRAY J. In this case the respondents were charged with an offence under s. 12 of the Locomotive Act, 1861, in using upon a certain highway a steam roller, of which they were the owners, which had not the weight thereof conspicuously and legibly affixed thereon. The justices refused to convict on the ground that a steam roller was not a locomotive within the meaning of that enactment. This raises a pure question of law. It may be that the Legislature when enacting s. 12 had not in their minds the use or the invention of steam rollers for repairing roads. That, however, is no answer to this information. In the case of *Parkyns* v. *Preist* (1) Lord Coleridge C.J. said: "It is probable that the

(1) (1881) 7 Q. B. D. 313, at p. 317.

statutes in question were not pointed against the specific form of locomotive which is described in this case. Indeed, such a locomotive was not known when they were passed, and possibly not contemplated. As, however, it comes within the very words of the statutes, it seems to us that we cannot upon any true ground of construction exclude it from their operation." All that applies to this case. This steam roller is a locomotive. It is propelled by other than animal power. At the time of the passing of the Act of 1861 locomotives were coming into common use, and the object of the Act was to make regulations concerning them. It therefore enacted that all the provisions of any general or local Acts relating to turnpike roads or highways should apply to all locomotives. There are other sections of this Act which certainly ought to apply to steam rollers as well as to other locomotives, for example ss. 6 and 7, relating to the restricted use of locomotives over bridges and the reparation for damage caused by them. The Locomotives Act, 1865 (28 & 29 Vict. c. 83), also contains provisions in s. 3 regulating the manner of working locomotives on highways. Those regulations ought to apply to a steam roller as to any other locomotive. I am clearly of opinion that this steam roller is a locomotive within s. 12 of the Act of 1861; it is not disputed that it had not got its weight affixed. The justices therefore ought to have convicted the respondents.

AVORY J. I am of the same opinion. The point raised in the present case might have been argued in the case of *London County Council* v. *Wood*.(1) It was not raised in that case probably because it was not thought worth arguing.

ATKIN J. I agree.

Appeal allowed. Case remitted to justices.

Solicitors for appellant: *Robbins, Olivey & Lake, for H. Barber, Winchester.*

Solicitors for respondents: *Oppenheimer, Blandford & Co., for H. A. Huxtable, Dorchester.*

(1) [1897] 2 Q. B. 482.

W. H. G.

1914
June 17.

COBB *v.* SAXBY.

[1913 C. 3377.]

Highway—Premises abutting thereon—Right of Access—Advertisement on Wall of Premises—Obstruction—Interference with Private Right—Damage—Injunction.

In an action, in which the claim was admitted, the defendant counterclaimed an injunction in the following circumstances. The plaintiff and the defendant were the respective owners and occupiers of two adjoining houses abutting on a street which was a public highway. The side wall of the defendant's house projected into the street a short distance beyond the front of the plaintiff's house. There was no door or other opening in the side wall. The plaintiff affixed boards at right angles to the front of his house and close to the defendant's side wall covering the wall to a height of twenty-two feet from the pavement. The boards did not constitute an obstruction to the street, but they prevented the defendant from having access to the wall from the street for the purpose of repairing it, and from exhibiting advertisements upon it:—

Held, that the right of access to a highway enjoyed as a private right by the owner of premises adjoining the highway is not limited to the right to pass from the premises to the highway and vice versa, but includes the right of access to a wall of the premises in which there is no door or other opening, and the right to have advertisements on the wall displayed to the uninterrupted view of the members of the public using the highway: that the act of the plaintiff was a wrongful interference with the private right of the defendant; and that the defendant was entitled to an injunction restraining the plaintiff from maintaining the boards in the position above described.

Action tried by Rowlatt J. without a jury.

The plaintiff was the owner in fee simple and occupier of certain premises, No. 33, King Street, Margate, consisting of a dwelling-house with a shop on the ground floor. The defendant was the leaseholder and occupier of a house and shop, No. 35, King Street, next to the plaintiff's house, the side walls of the two buildings being in contact with each other. Both houses opened directly into the street, but the front of the defendant's house projected into the street for a distance of eighteen inches beyond the front of the plaintiff's house.

In 1910 the plaintiff caused to be affixed to the front of his house and at right angles thereto two boards sixteen inches wide,

one above the other, which reached from a point eight inches above the pavement to a height of twenty-two feet at a distance varying from two to nine inches from that part of the defendant's side wall which projected beyond the front of the plaintiff's house. There were no windows or doors or other openings in the defendant's side wall.

The action was brought by the plaintiff for an injunction to restrain the defendant from placing his advertisements on the boards. The defendant by his defence admitted he had acted wrongfully in so doing, and gave an undertaking not to repeat the trespasses, and paid 40*s.* into Court, which was accepted by the plaintiff in satisfaction of his claim; and the only question at the trial was that raised by the defendant's counter-claim.

The defendant by his counter-claim alleged (inter alia) that the plaintiff's act in placing the boards where they were was wrongful, and that the defendant had thereby suffered damage in that the boards obstructed the access to and diminished the enjoyment of the defendant's premises, and prevented him from examining and repairing his wall and from advertising on it and from making a door in it.

The defendant claimed damages and an injunction.

The plaintiff by his defence to the counter-claim, in addition to denying the allegations therein contained, alleged that he had always been ready and willing to afford the defendant facilities, by removing the boards or otherwise, to enable the defendant to have at all times access to the wall for all purposes for which he might be legally entitled to such access.

Disturnal, K.C., and *P. B. Morle*, for the defendant. It is not contended that the boards are an obstruction to the highway, but in their present position they constitute an interference with the private right of access to the wall from the highway which the defendant, as the owner and occupier of premises abutting on the highway, is entitled to. Any interference with a private right even without causing damage is actionable. The expression "right of access" in this connection is not confined to the right of passing from the premises to the highway; it includes all the amenities which the premises derive from the presence of the

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highway,—*Beckett* v. *Midland Ry. Co.* (1)—as, for example, the right to have advertisements on the wall of the house exposed to the uninterrupted view of members of the public using the highway. The plaintiff has no right to say that the defendant shall only be allowed to have access to the wall for the purpose of repairing it at such times as the plaintiff considers reasonable. The defendant is entitled to make a door or window in the wall if he wishes, but he cannot do so while the boards remain in their present position. If the boards are not taken down, the plaintiff may acquire an easement over the defendant's property: *Moody* v. *Steggles.* (2) [*Ramuz* v. *Southend Local Board* (3) and *Rowley* v. *Tottenham Urban District Council* (4) were also referred to.]

W. Mackenzie, for the plaintiff. The boards are not an obstruction of the highway and are not a public nuisance, and their presence is therefore not wrongful on that account. The private rights of the owner of property abutting on a highway are limited to a right to pass to and from the highway and a right to uninterrupted light and air from the highway. If the defendant were really intending to open a door or window in this wall, the boards would have to be removed, but there is no evidence that the defendant does intend to do so, and at the present time the defendant has not suffered that particular direct and substantial damage which is necessary to entitle the defendant to maintain his counter-claim: *Benjamin* v. *Storr.* (5) The right of access to the highway which the defendant is entitled to enjoy by virtue of the ownership of his premises is strictly limited to passing from his property on to the highway and vice versa: *Lyon* v. *Fishmongers' Company* (6); *Chaplin & Co.* v. *Westminster Corporation.* (7) Both *Beckett* v. *Midland Ry. Co.* (1) and *Ramuz* v. *Southend Local Board* (3) were cases of interference with the right of access in the strict sense. The ownership of premises adjoining a highway does not confer upon the owner a private right that people using the highway shall at all times have an uninterrupted

(1) (1867) L. R. 3 C. P. 82.
(2) (1879) 12 Ch. D. 261.
(3) (1892) 67 L. T. 169.
(4) [1914] A. C. 95.
(5) (1874) L. R. 9 C. P. 400.
(6) (1876) 1 App. Cas. 662.
(7) [1901] 2 Ch. 329.

view of the premises. The defendant has no right to use the road when repairing the wall, for the ownership of the soil of the road at this spot is in the plaintiff. The plaintiff cannot by means of these boards acquire an easement over the defendant's property. If the defendant put back his house the boards would become an obstruction to the highway.

Disturnal, K.C., replied.

ROWLATT J. This case raises an interesting point, but having heard the arguments on both sides, I no longer feel any doubt as to what my decision ought to be. [The learned judge stated the facts and continued:] For the purposes of my judgment I will assume, though it has not been strictly proved, that the title to the subsoil of that part of the roadway which is in the corner formed by the projection of the defendant's wall is in the plaintiff as the owner of No. 33. The position taken up by the plaintiff is, as I understand it, that if the defendant were at any time to make a doorway in the projecting part of his wall, he (the plaintiff) would not insist on maintaining the boards in such a position that they would interfere with the defendant's right of egress from his premises, and, therefore, I do not propose to deal with the case on the footing that the plaintiff is threatening to obstruct the egress from any door on the defendant's premises. But the plaintiff does claim the right to maintain the boards in their present position with the result that the defendant is prevented from using the wall for the purpose of placing advertisements on it, and the plaintiff says that he will only take the boards down at such reasonable times as the defendant may require for the purpose of repairing the wall and after reasonable notice.

In my opinion the contentions raised by the defendant's counter-claim are well founded. It is said on his behalf that the existence of these boards in their present position constitutes an invasion of the private rights which the defendant possesses by reason of the contiguity of his premises to the public highway. It is well settled law that the owner of land adjoining a highway has the private right of passing from his premises on to the highway, and if that right is obstructed and he brings an

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action against the person causing the obstruction, he is not in the position of a member of the public who complains of an obstruction to the highway which specially affects him, but he is a person who has a cause of action by reason of the interference with or obstruction to his private right. Although no authority precisely in point has been cited, I am of opinion that the owner of a house adjoining a public highway has precisely the same rights, as regards the highway, with respect to the wall of his house as he has in the case of a door or other entrance leading from his house on to the highway. He has the right to do anything he likes to the wall, for example to display advertisements upon it, and if these rights are invaded or obstructed, he has, in my opinion, a good cause of action against the person causing the interference with his rights. Take the case of a wall of a house adjoining a highway which has a window in it which the owner of the house uses for the display of his goods, or suppose the owner of the house places on the wall pictures or advertisements of goods which he has for sale, it is to his interest that the members of the public using the highway should be able to look in at the window or to gaze at the advertisements on the wall, and if any one prevents the public from so doing the rights of the owner of the wall are invaded. It is to my mind unthinkable that, if a man were to hold a screen in front of a shop window and thus prevent the public from looking in, he should be allowed to justify his so doing on the ground that, because he was not preventing egress from the shop to the highway, he was not interfering with any right of the owner of the shop. In my opinion, the law does not in those circumstances leave the owner of the premises without a remedy.

For these reasons I am of opinion that on the facts of this case the defendant is entitled to judgment on his counter-claim.

Judgment on counter-claim for defendant.

Solicitors for plaintiff: *Patersons, Snow & Co., for O. K. & W. Daniel, Margate.*

Solicitor for defendant: *F. Daphne, for Leonard Hill, Margate.*

F. O. R.

WILLIAM FRANCE FENWICK & CO., LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED. 1914 *June* 24, 25.

[1913 W. 1756.]

Insurance (Marine)—Running down Clause—Damage in Consequence of Collision—Construction of Clause.

By a clause attached to a time policy of marine insurance upon the hull and machinery of a steamship the underwriters agreed that "if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums . . . . this company will pay the assured" a certain proportion of such sums.

The insured ship by reason of her negligent navigation came into collision with another ship she was overtaking. The impact was very slight and had practically no effect. After the collision the other ship (by reason of attractive forces brought into play between the two vessels from their proximity coupled with the wash of the propeller of the insured ship against the starboard bow of the other after the insured ship got ahead of her) came into collision with a third ship, to which a large amount of damage was done. The owners of the insured ship having been held alone to blame for both collisions became liable to pay, and paid, sums in respect of damages arising out of both collisions. In an action brought by the owners of the insured ship to recover from the insurers the proportion underwritten by them of the sums so paid for damages:—

Held, that the collision with the third ship was a consequence of the collision between the insured ship and the other ship within the meaning of the clause, and that therefore the insurers were liable to pay to the owners of the insured ship the proportion they had underwritten of the damages arising out of both collisions.

ACTION tried in the Commercial Court before Bailhache J. without a jury.

The plaintiffs, Messrs. William France Fenwick & Co., Limited, of Fenchurch Street, E.C., were owners of the steamship *Cornwood*, and they brought the action against the defendants, who carried on business at Cornhill, E.C., and had underwritten a policy of marine insurance, dated September 1, 1911, to recover in respect of a loss under the policy.

The policy was for one year, from September 1, 1911, upon the hull and machinery of the *Cornwood*, valued at 19,000*l.*, in

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the sum of 1300*l.* Among the Institute Time Clauses on a slip attached to the policy was the following:—

"It is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; . . . ."

The question was whether certain damages which the plaintiffs had become liable to pay were damages in consequence of collision within the meaning of the clause.

The points of claim delivered by the plaintiffs contained the following paragraphs:—

"3. On October 4, 1911, the *Cornwood* came into collision with the steamship *Rouen* and the plaintiffs have become entitled under the said collision clause to the defendants' proportion of the damages amounting to 17,125*l.* 14*s.* 4*d.* which the plaintiffs became liable to pay and have paid as in the next paragraph set out.

"4. The *Rouen* was damaged in the said collision and as a result thereof the *Rouen* came into collision with another steamship the *Galatée* doing and receiving further damage and the plaintiffs in consequence thereof became liable to pay sums by way of damages exceeding the statutory limit of their liability. With the consent in writing of the defendants given without prejudice to their liability under the said policy the liability of the owners of the *Cornwood* was contested, but by decree of the Admiralty Court dated January 25, 1912, in an action Folio 399 [1911 R. No. 1502] the *Cornwood* was held alone to blame for both of the said collisions. The said decree was affirmed on appeal to the Court of Appeal and to the House of Lords.

"Thereupon with the like consent proceedings were taken to limit the liability of the owners of the *Cornwood* and the sum of 17,125*l.* 14*s.* 4*d.* was paid into Court in such proceedings in respect of damages and interest and has been paid out of Court to answer the claims arising out of the said collision.

"The plaintiffs claim

"(1). Under paragraph 4 39/760ths of 17,125*l.* 14*s.* 4*d.*"

The points of defence contained the following paragraphs:—

"2. The defendants admit that on October 4, 1911, the *Cornwood* came into collision with the *Rouen*. They admit that in consequence of this impact the plaintiffs became liable to pay a certain sum by way of damages within the provision of the running down clause in the policy viz.: the claim of the owners of the *Rouen* in respect of the damage done to that steamer by the said collision.

"3. Subject to production of the pleadings and a copy of the evidence in the admiralty action mentioned in paragraph 4 of the claim the defendants admit that the plaintiffs became liable to pay and have paid 17,125*l.* 14*s.* 4*d.* as damages for the negligence of their servants in navigating the *Cornwood* including damage done by the *Rouen* to the *Galatée* and by the *Galatée* to the *Rouen* but the defendants deny that the said sum (other than such part of it as represents the amount mentioned in paragraph 2 hereof) was paid as damages in consequence of the collision of the *Cornwood* with the *Rouen* within the provision of the running down clause."

The following statement of the facts is taken from the judgment of the learned judge:—

"On October 4, 1911, the *Rouen* and the *Cornwood* were proceeding up the river Seine. The *Rouen* was ahead of the *Cornwood*. The *Rouen* was the slower vessel of the two, and at a particular part of the river the *Cornwood* desired to pass her. She gave the necessary signals for that purpose, and received answering signals from the *Rouen*. The *Cornwood* then proceeded to draw up to and to pass the *Rouen*. It so happened that while she was in process of executing this passing manœuvre the lights of another steamer, the *Galatée*, came into view coming down the river in the opposite direction. The presence of the *Galatée*

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was at this particular juncture somewhat embarrassing. The result was that the *Cornwood*—no doubt desiring to avoid the *Galatée* and of course desiring to avoid the *Rouen* too—by some negligent manœuvre drew too near to the *Rouen* as she passed, with the result that the stem of the *Rouen* was drawn to the starboard side of the *Cornwood* and the *Rouen* and the *Cornwood* were in collision; there was a glancing blow about thirty feet or so from the *Cornwood's* stern, the side of the *Cornwood* coming into collision with the bows of the *Rouen*. The blow was a slight one. Very little damage was done to either vessel, and if matters had ended there there would have been no importance in the case. But unfortunately after the collision between these two vessels the *Rouen* got across the river and ran into the *Galatée*, which was coming down on the other side of the river. That collision caused very serious damage, and a large sum of money has had to be paid in consequence of that collision. After the *Rouen* and the *Cornwood* got clear of each other the *Cornwood* by some means took a cant, or sheer to starboard, and ran into the starboard bank. The result of her doing so was that the back wash from her propeller operated strongly upon the starboard bow of the *Rouen*, and it was that more than anything else that pushed the *Rouen* across the river into the *Galatée*. The sums which had to be paid by the owners of the *Cornwood* have been large; they limited their liability, but even so the sum so limited was 17,125*l*. 14*s*. 4*d*.

"Under those circumstances the owners of the *Cornwood* contend that the collision between the *Rouen* and the *Galatée* was, within the meaning of the running down clause, a consequence of the collision between the *Rouen* and the *Cornwood*. They contend that the *Rouen* and the *Cornwood* came into collision and that as the result of that collision the *Rouen* came into collision with the *Galatée* and they became liable to pay these heavy damages both to the *Galatée* and the *Rouen*. There has been a good deal of interesting scientific evidence in this case as to how these two vessels, the *Rouen* and the *Cornwood*, came actually into contact, but I do not think I need critically examine that scientific evidence because I think that the way in which these two vessels came into contact is described with quite sufficient accuracy in

the judgment of Bargrave Deane J. in the Admiralty Court in the action between the owners of the *Cornwood* and the owners of the *Rouen*. The way in which these two vessels came into collision is thus described by the learned judge: 'As the *Cornwood* got ahead of the *Rouen* there undoubtedly was some sort of attraction between the vessels and it is extremely likely, as the *Cornwood* went ahead, that there was, not suction, but an attraction by means of the displacement of the *Cornwood*, which may have deflected the head of the *Rouen*. I believe it did. I believe that her head was drawn towards the *Cornwood* as the *Cornwood* went by. . . . . The collision was a slight one, the starboard quarter of the *Cornwood* coming into contact with the port anchor of the *Rouen*. It was a very slight collision indeed, a very slight contact, but directly the *Cornwood* got ahead across on to the starboard bow, as she undoubtedly did, of the *Rouen*, the full wash of her propeller came against the starboard bow of the *Rouen*, and with her already having an impetus to port, owing to this displacement, the wash further emphasized that movement to port with the result that she proceeded out into the middle of the river, where unfortunately another vessel, the *Galatée*, was coming down.'"

A. Adair Roche, K.C., and *Balloch*, for the plaintiffs. The plaintiffs became liable to pay the whole of the damages in consequence of the collision. If the collision in the sense of the actual contact between the *Cornwood* and the *Rouen* was one of the proximate causes of the collision between the *Rouen* and the *Galatée* the damage to the *Galatée* was a consequence of the collision between the *Cornwood* and the *Rouen* within the meaning of the clause. The whole of the circumstances must be looked at.

Leslie Scott, K.C., and *F. D. Mackinnon*, for the defendants. Under the clause the defendants are only liable for damages caused by collision, i.e., by actual impact. They are not liable for damage caused by the negligent navigation of the *Cornwood*. The collision between the *Galatée* and *Rouen* was caused by certain forces brought into play by the navigation of the *Cornwood*. Those forces would have caused the collision

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with the *Galatée* with or without the fact of the impact between the *Rouen* and *Cornwood*. That impact had nothing to do with the collision between the *Rouen* and *Galatée*. [*M'Cowan* v. *Baine* (1) and *Owners of the S.S. Devonshire* v. *Owners of the Barge Leslie* (2) were referred to.]

Roche, *K.C.*, in reply, referred to *Reischer* v. *Borwick*. (3)

BAILHACHE J. In this case the plaintiffs are the owners of the steamer *Cornwood*, and they sue their underwriters under a policy of insurance dated September 1, 1911. That policy was an insurance upon the hull and machinery of the *Cornwood*, together valued at 19,000*l*. The defendants underwrote her in the sum of 1300*l*. The question turns not upon anything on the face of the policy itself, but upon the construction of the running down clause in the Institute Time Clauses which were attached by a slip to the policy. The particular part of the running down clause which requires to be construed is this: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured" certain sums of money. The circumstances under which the claim arises are these. [Having stated the facts above set out, the learned judge continued:] I think for my purpose that that is a sufficient description of how this particular collision between the *Rouen* and the *Cornwood* happened and how the *Rouen* came to be driven across the river into the *Galatée*.

The contention on the part of the defendants is in substance that although a person describing with care and precision the incidents that happened in the Seine on this particular occasion would among other incidents no doubt refer to the collision between the *Rouen* and the *Cornwood*, yet the collision between the *Rouen* and the *Cornwood*—although it was historically a part of the events which led to the collision between the *Rouen* and

(1) [1891] A. C. 401. (2) [1912] A. C. 634.
(3) [1894] 2 Q. B. 548.

the *Galatée*—was in no way a cause of the collision between the *Rouen* and the *Galatée;* and they contend that that being so, although the collision between the *Rouen* and the *Galatée* was subsequent to the collision between the *Rouen* and the *Cornwood* and followed immediately afterwards, and was part of the same series of events, yet the collision between the *Rouen* and the *Galatée* was not a consequence of the collision between the *Rouen* and the *Cornwood*. That depends upon the way in which the collision between the *Rouen* and the *Cornwood* happened. The evidence has satisfied me that when two vessels are passing each other in narrow waters and close together a very considerable influence is exerted by the passing vessel upon the slower one. I am quite satisfied that that influence is very much greater as the two vessels come nearer and nearer together. In this case as the *Cornwood* was passing the *Rouen* she had to get as near to the *Rouen* as she could because the *Galatée* was on the other side, and she got too close. The result of that was that the bows of the *Rouen* were drawn towards the side of the *Cornwood* to such an extent that they actually came into contact with the side of the *Cornwood*. Of course contact is essential in order to bring this clause into operation. Mere proximity without collision is not sufficient. The result of this drawing of the bows of the *Rouen* towards the *Cornwood* was that the *Cornwood* was causing the *Rouen* to swing to port. The effect of the blow was, so far as altering or affecting that swing was concerned, almost negligible. If it had any effect at all it checked it, but I think it had practically no effect at all. As the *Cornwood* got clear of the bows of the *Rouen*, the *Rouen* continued to swing to port, and the *Cornwood* took a sharp sheer to starboard with the result that the wash from her propeller impinged upon the bows of the *Rouen* almost at right angles and the sheer to port which the *Rouen* already had was very much increased by this wash from the propeller. In one sense it is quite true to say that the collision between the *Rouen* and the *Galatée* was not due to the collision between the *Rouen* and the *Cornwood*, that is to say, it was not due to the actual impact between the two vessels. I do not think it was. The impact so far as it had any effect at all was to drive the *Rouen* away from the *Galatée*. But I do not think that is at all

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conclusive of the case. The force of water coming from the bows of a passing vessel, which has an attraction which draws the other vessel towards her, operates very much more heavily as the vessels get nearer to each other. I am not at all satisfied that if the *Cornwood* had kept a little further from the *Rouen* than she did there would have been any collision at all between the *Rouen* and the *Galatée*. I think the collision between the *Rouen* and the *Galatée* was due to the fact that the *Cornwood* got so near to the *Rouen* that the force of the water operating from her bows together with the suction operating from her stern drew the *Rouen* into the *Cornwood* and gave her such a swinging impetus as sent her, after the *Cornwood* got free, with the addition of the wash from the *Cornwood's* propeller, into the *Galatée;* and I am not at all satisfied that those forces would have operated to anything like that extent if, instead of being in collision, the two vessels had only been in close proximity. It does not seem to me to be necessary at all, granted that there is a collision, to find that the actual impact of the two vessels drove the *Rouen* into the *Galatée*. I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but, having done that, afterwards sent the *Rouen* into the *Galatée*. Of course there must be collision between the insured vessel and another vessel, but in this case there was a collision, and in my judgment the collision between the *Rouen* and the *Galatée* was such a consequence of the collision between the *Rouen* and the *Cornwood* as brings this running down clause into play and makes the underwriters liable.

In the course of his argument Mr. Leslie Scott cited *M'Cowan* v. *Baine*. (1) At the commencement of his judgment in the House of Lords the Earl of Selborne said: "My Lords, I cannot help thinking that in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude." I do not desire to fall into either of those extremes. It seems to me that in a case such as the present one, it would be construing this mercantile contract with "extreme

(1) [1891] A. C. 401.

literalism" if I were to hold that the collision between the *Rouen* and the *Galatée* was not a consequence of the collision between the *Rouen* and the *Cornwood*. In my judgment it was a consequence within the meaning of the clause and the defendants are liable.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Waltons & Co.*

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[1913 B. 3930.]

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June 29, 30; *July* 6.

Insurance (Marine)—Re-insurance—Compromise between Original Assured and Original Insurers—Whether Re-insurers entitled to Benefit of Compromise.

The plaintiffs, who had insured the *Katina* against total and/or constructive total loss only, re-insured the risk with the defendants. The re-insurance policy did not contain the usual clause "to pay as may be paid thereon." During the currency of the policies, the *Katina* stranded and her owner gave notice of abandonment, alleging that she was a constructive total loss. The plaintiffs declined to accept the notice of abandonment, whereupon the owner sued them, but that action was compromised by the plaintiffs paying to the owner a sum less than 100 per cent. of the loss. The defendants were asked to agree to this compromise, but they declined to do so, alleging that there was no constructive total loss in fact. In an action by the plaintiffs against the defendants on the re-insurance policy, it was found as a fact that the *Katina* was a constructive total loss:—

Held, that the defendants were not entitled to the benefit of the compromise made with the owner and were liable to the plaintiffs for the full amount of the re-insurance, but that they were entitled to the benefit of any rights in respect of the abandonment of the *Katina* which they would have had if no compromise had been effected.

ACTION tried by Bailhache J. without a jury.

The action was brought upon two time policies of re-insurance dated January 23, 1913, on the hull and machinery of the steamer *Katina*, valued at 20,500*l*. The policies were in the same form; one was for 850*l*., the other for 650*l*. The policies were against total and/or constructive total loss only, and were warranted free from all average and salvage charges.

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The plaintiffs were original insurers to the extent of 1500*l.* under a time policy dated December 31, 1912, on the hull and machinery of the *Katina*, valued as in the re-insurance policy. This policy was a f.p.a. policy, but covered collision damage. By clauses attached to the policy the insured value was to be taken as the repaired value, and nothing in respect of the damage or break-up value of the vessel was to be taken into account. The re-insurance policies contained the same clause; they did not contain the clause "to pay as may be paid thereon."

The *Katina* stranded a few miles below Hartland Point, on a dangerous shore, on May 23, 1913. Notice of abandonment was given three days afterwards. It was not accepted, but the underwriters agreed to treat the matter as though a writ had been issued. In stranding, the *Katina* sustained serious damage, and it was doubtful whether she would be got off and towed into a place of safety. An arrangement was made, however, by the Salvage Association with a firm of salvors to make the attempt, they being guaranteed 250*l.* towards their expenses, and leaving their remuneration, if successful, to be determined afterwards. They were successful. The salvage charges amounted to between 2000*l.* and 3000*l.* The *Katina* came off on June 5, and after being beached in Clovelly Bay was ultimately taken to Swansea, where she was put on the hard on June 14, and dry-docked two days later. She would have gone straight into dry dock but for the fact that she was drawing too much water forward. While on the hard she became filled with mud. She was cleaned, and a specification of repairs was prepared, and on July 10 tenders were invited. They were received and opened on July 17. The Ocean Dry Dock Company, in whose dry dock she was, tendered at 15,000*l.*, and the Mount Stuart Dry Dock, Cardiff, at 12,290*l.* She had lost all her stores and in effect all her furniture and fittings, and a tender was obtained to replace them for 700*l.* It became evident that the cost of repair, plus salvage charges, would closely approximate to her insured value. The owner held to his notice, and the underwriters, other than the plaintiffs, compromised the claim for 11,150*l.* and payment of salvage and other expenses, those whose policies rendered them liable paying 16 per cent. in respect of salvage charges and 50 per cent. in

respect of the loss. The underwriters took the proceeds of sale of the steamer, which had been sold on August 18 for 5000*l.*, without prejudice to the respective rights of owners and underwriters. The plaintiffs did not at first fall in with this arrangement. The owner then sued the plaintiffs, and after some time the plaintiffs settled with the owner on the same terms as the other underwriters and paid the owner's costs. The defendants were asked to agree to this compromise and to pay accordingly, but they declined to do so, alleging that there was no constructive total loss in fact. In those circumstances the plaintiffs now sued the defendants, their re-insurers, and claimed from them payment in full under the re-insurance policies, alleging (1.) that the *Katina* was a constructive total loss by reason that on May 23 or 26, 1913, her actual total loss appeared to be unavoidable, or, alternatively, that the shipowner had been deprived of her possession by the said perils, and it was unlikely that he could recover her ; or (2.) that the *Katina* was a constructive total loss because upon and by reason of the stranding she could not have been preserved from actual total loss without an expenditure which would have exceeded her value when the expenditure had been incurred, or, alternatively, because the shipowner had been deprived of her possession by the said perils, and the cost of recovering the ship would have exceeded her value when recovered ; or (3.) that the *Katina* was a constructive total loss by reason of the fact that the cost of salving and repairing her would have exceeded 20,500*l.*, her insured value.

The defendants denied that the *Katina* was a constructive total loss, and they said that the plaintiffs had not paid as for a total or constructive total loss. They contended that as their insurance excluded salvage charges and general average they could only be held liable, if at all, on the same basis as the original insurers who had issued policies in the same form.

Roche, K.C., and *R. A. Wright*, for the plaintiffs. (1) Notwithstanding the arrangement made between the plaintiffs and

(1) The argument is confined to the one point, namely, the extent of the defendants' liability under the policies on the footing that the *Katina* was in fact a constructive total loss.

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the original assured the plaintiffs are entitled to recover from the defendants the full amount of the re-insurance and not merely 50 per cent. of that amount. The loss was a total loss, and it cannot affect the question that the original assured, in order to obtain speedy payment and to avoid litigation, agreed to compromise his claim. The extent of the liability of a re-insurer is not always measured by what the re-assured has paid to the original assured. Supposing the original insurer to have become bankrupt and the assured to have been paid a small dividend, the re-insurer is still liable to pay the whole amount of the re-insurance to the trustee of the original insurer, and not merely the dividend: see Arnould's Marine Insurance, s. 324; *In re Eddystone Marine Insurance Co.* (1); *Uzielli* v. *Boston Marine Insurance Co.* (2); *Western Assurance Co. of Toronto* v. *Poole* (3); and *In re Law Guarantee, Trust, and Accident Society.* (4)

Maurice Hill, K.C., and *F. D. Mackinnon*, for the defendants. A contract of re-insurance is a contract of indemnity, and the plaintiffs are therefore only entitled to recover what they have in fact paid. They have not paid 100 per cent. of the loss and cannot therefore require the defendants to pay 100 per cent. Even if it could be said that the defendants were liable for 100 per cent., they are entitled by way of subrogation to the benefit of the reduction in amount resulting from the compromise.

Roche, K.C., replied.

Cur. adv. vult.

July 6. BAILHACHE J. read his judgment, in which, after stating the facts set out above and holding that the plaintiffs had failed to establish that the *Katina* was a constructive total loss on either the first or second head, but that they had established that she was a constructive total loss on the third head, namely, that the cost of salving and repairing her would have exceeded her insured value, he continued as follows: One last point remains. The owner gave notice of abandonment and insisted that the *Katina* was a constructive total loss. The underwriters declined to accept the notice and maintained the contrary.

(1) [1892] 2 Ch. 423.
(2) (1884) 15 Q. B. D. 11.
(3) [1903] 1 K. B. 376.
(4) (1914) 30 Times L. R. 616.

Neither party was sure of his ground, and a compromise was effected whereby the *Katina* was sold for 5000*l.* and the underwriters took the proceeds, paying salvage and certain other expenses amounting to just over 5000*l.* They also paid to the owner 50 per cent. of his claim. The defendants were asked to agree to this compromise and to pay accordingly. This they declined, upon the ground that there was no constructive total loss in fact. The result was that for a time the plaintiffs stood out and declined to fall in line with the other underwriters, and the owner sued. That action was settled upon the terms of the compromise, and the plaintiffs paid the owner's costs. The defendants now say that they ought to have the benefit of the compromise and ought only to pay 50 per cent. on their policies. They say that their contract is one of indemnity, and that all that they can be asked to pay is the sum which the plaintiffs have actually paid to the original assured. The re-insurance policies do not contain the usual clause "to pay as may be paid thereon." I think the defendants' contention fails. I have no doubt that original underwriters may make a bargain with their assured of which the re-insurers may be entitled to the benefit as in this very case if the re-insurers had agreed with the original underwriters that they should make the best terms they could with the owner and that they, the re-insurers, would, without questioning liability, accept those terms. This, however, is exactly what these defendants refused to do. The original underwriters bought the compromise by giving up their right to put the owner to proof of a constructive total loss. The re-insurers declined to pay this price, and, having declined, cannot, I think, claim the benefit of the compromise so bought. I am doubtful whether, unless the compromise was made for their benefit as well as that of the original underwriters, the re-insurers could in any case take advantage of it. True, a re-insurance policy is a contract of indemnity, but against what? I incline to think against liability, and I see no more reason why a re-insurer should pay less by reason of a compromise made with the assured for the benefit of the original underwriter and not of the re-insurer than in the case where the original underwriter becomes bankrupt and pays a small dividend or none. Where a

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loss occurs and the original underwriter is covered by re-insurance to the full extent, the contract of the re-insurer is, I think, to pay the original insurer forthwith the full amount for which the original insurer is liable to the original assured. The indemnity afforded by re-insurance is against liability and not against discharge of the liability. Of course in such a case the re-insurer is entitled to have all the rights of the original insurer exercised for his benefit, whether those rights are of abandonment or of subrogation, and when those rights have been exercised he is entitled to be recouped to the extent to which they have materialized. Applying these principles, although I decline to give the defendants the benefit of the compromise, I must, of course, see that they are not prejudiced by it. I must disregard it. So doing, the original underwriters must give the re-insurers the benefit of any rights they would have had if no compromise had been made, which would legally reduce their liability to the original assured. The plaintiffs must therefore give the defendants the benefit of the right to have the *Katina* abandoned to the plaintiffs less the cost of salvage. I estimate her value after payment of salvage at 2000*l.*, and I make in round figures the proportion of that value attributable to the plaintiffs' policy to be 300*l.* To this extent the liability of the defendants must be diminished and for this sum they must have credit. I therefore give judgment against the defendants for the full amount of their respective subscriptions, less their proportionate shares of 300*l.*, and with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
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June 29, 30.

In re HILDESHEIM.

Solicitor—Bill of Costs—Solicitor and Client—Disbursements—Unpaid Items—No Statement in Bill that unpaid—"Set out a separate heading in the bill"—Statement in accompanying Letter—Payment "before commencement of taxation"—Disallowance on Taxation—Order LXV., *r.* 27 (29a).

A solicitor delivered to his client a bill of costs containing among the other items generally many items of disbursements which had not then been paid, and he sent with it a letter stating that, of the payments therein, 27*l.* for counsel's fees and 36*l.* for printer's charges had not been paid.

The client obtained an order for taxation and a day was appointed to proceed with the taxation; on that day the taxing Master, before dealing with any item in the bill by way of taxation, granted an adjournment to enable the solicitor to pay the unpaid items; they were all paid before the adjourned appointment, and the Master allowed them on taxation:—

Held, that the payment of the items in question had been made by the solicitor "before the commencement of the taxation," within the meaning of r. 27 (29a) of Order LXV., but that the bill, even if read with the letter, did not "set out such unpaid items of disbursements under a separate heading in the bill" as required by the rule, and that therefore those items could not be allowed on taxation.

APPEAL from an order of Lord Coleridge J. at chambers.

The respondent had acted as solicitor for the appellant, and on February 24, 1913, he sent his bill of costs to him, with a letter of the same date in which he said: "The payments in the bill herewith amount to 308*l.*, but of these 63*l.* have not yet been paid, namely, counsel's fees 27*l.* and printer's charges 36*l.*" The bill of costs contained many items of disbursements, for counsel's fees and printer's charges, which had not then been paid. These items were not set out under a separate heading in the bill, but were inserted in order of date among all the other items in the bill; and there was no statement in the bill itself that the items in question had not been paid.

On the application of the client an order was made, on February 11, 1914, for taxation of the bill, and the bill and the letter which accompanied it were duly lodged in the office of the

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taxing Master. On March 18 a notice was sent by the Master appointing March 24 to proceed on the taxation. On March 24 the respondent and the solicitor for the client appeared before the Master, when the latter stated that he would ask the Master to disallow the items of disbursements for counsel's fees and printer's charges because they had not been paid before the delivery of the bill. The respondent then applied for an adjournment to enable him to pay those items, and the Master adjourned the appointment until the next day without having dealt with any item in the bill by way of taxation. The respondent paid all those items before the adjourned appointment on March 25, and the Master proceeded with the taxation and allowed them all.

Objections were carried in by the client, in respect of the allowance of those items, in the following terms:—

"This fee should be wholly disallowed as Order LXV., r. 27, regulation 29a, has not been complied with. (*a*) The respondent's bill of costs does not expressly state that this fee has not been made (paid). (*b*) This unpaid item of disbursement is not set out under a separate heading in the respondent's bill of costs. (*c*) Payment of such fee was not made by the respondent before the commencement of the taxation."

The objections to the items for the printer's charges were upon the same grounds.

The answer of the Master was as follows:

"This is one of the several disbursements which were not actually made before the delivery of the bill of costs, and the question is whether they can be brought within the rule referred to (Order LXV., r. 27, sub-r. 29a) (1) so as to give me a discretion

(1) Order LXV., r. 27: "(29a) In taxations under or pursuant to the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing Master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client. For the purposes of computation of one sixth thereof, such bill shall be deemed to include such unpaid items as part of the bill.

to allow them. With regard to reasons (*a*) and (*b*), the bill of costs delivered on the 24th February, 1913, was accompanied by a letter of that date from Mr. Hildesheim, the solicitor, to the client, and it seems to me that the two (the bill of costs and the letter) must be taken together and that the letter must be read with the bill, and then I hold that the requirements of the rule have been substantially complied with on the points raised. As to the third reason (*c*) it is necessary for me to state what has taken place in my office. The order for taxation was dated the 11th February, 1914, and a copy of this order and the bill of costs and the aforesaid letter were duly lodged in my office. The documents referred to in the bill were subsequently lodged in my office. On the 18th March a notice was sent out from my office appointing the 24th of March to 'proceed' on the taxation before me. On the 24th of March I was attended by Mr. Hildesheim, the solicitor, and by Mr. Cridland, solicitor for the client, when a preliminary discussion took place as to whether a formal cash account was necessary. Mr. Hildesheim contended that the letter referred to and the statement in the bill of costs afforded sufficient information as to cash. Mr. Cridland also called my attention to the items of disbursements above referred to, which he said he should ask me to disallow as they had not been made before the delivery of the bill of costs. Mr. Hildesheim then applied to me to adjourn the appointment to enable him to pay the items of disbursements before I proceeded to tax the bill. Mr. Cridland objected to any adjournment. I had not, up to that time, dealt with any item in the bill by way of taxation and I considered that it would only be fair and reasonable, and quite within my power, to grant a short adjournment to enable the solicitor to make the

"Provided also that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed by the taxing Master if actually made before the commencement of the taxation, if it appears to him that such payments have been properly made, and that no injustice is done thereby.

"The provisions as to the review of taxations shall apply to anything done by the taxing Master pursuant to this rule."

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payments. Accordingly the appointment was adjourned until the next day. In the meantime the payments were made, and on the next day (the 25th March) I proceeded with the taxation. I hold that the payments were in time. It appears to me that the payments have been properly made and that no injustice has been done thereby (to use the words of the rule) and that the solicitor ought to have the relief contemplated by the rule. On its merits I consider the disbursement referred to in the objection proper and necessary. Under these circumstances I overrule this objection."

An appeal by the client was dismissed by Lord Coleridge J., and he appealed to the Court of Appeal.

Harry Dobb, for the appellant. According to the decision in *Sadd* v. *Griffin* (1) the items of disbursements which had not been made when the bill was delivered could not under any circumstances have been allowed on taxation. The effect of that decision has been modified by the new rule, Order LXV., r. 27 (29a), which enables the taxing Master to allow such items if certain conditions have been observed. Such items must have been paid by the solicitor either "before the commencement of the proceedings in which the taxation takes place," or, when the client has commenced the proceedings, " before the commencement of the taxation." The payments in this case were not made before the commencement either of the " proceedings " or the " taxation." The proceedings are commenced as soon as the client applies for an order to tax or at any rate as soon as the order is made. The taxation commences at the time which the taxing Master has fixed to proceed with the taxation, that is, in this case, March 24. The taxation commenced as soon as the parties appeared before the Master on the appointed day.

The rule requires that " the bill shall expressly state " that such items of disbursements have not then been made. Here there is no such statement in the bill, and the statement in the accompanying letter is not a sufficient compliance with the rule.

The rule further requires that such items shall be " set out

(1) [1908] 2 K. B. 510.

. . . . under a separate heading in the bill." Here they are not in any way separated from the other items in the bill, and even if the letter is read together with the bill it cannot possibly be said that these items are set out under a separate heading.

This rule makes certain exceptions to the rule established in *Sadd* v. *Griffin* (1) and lays down certain conditions. Those conditions must be strictly complied with, and in this case, even if the letter is read into the bill, not one of the three conditions has been observed.

A. E. Hughes, for the respondent. These items of disbursements were made before the commencement of the taxation within the meaning of the rule. The "commencement of the taxation" means the point of time when the actual process of taxation commences, that is, when the taxing Master begins to deal with the items of the bill; and here the Master has stated that he had not, on March 24, dealt with any item in the bill by way of taxation.

The other requirements of the rule have been complied with. The letter must be read as part of the bill: *Taylor* v. *Hodgson* (2); *Champ* v. *Stokes* (3); and the letter states expressly what items of disbursements had not then been made. The terms of the letter also identify and set out all such items sufficiently to comply with the rule. This case comes within the proviso to the rule, and there the words "so set out" mean only sufficiently described as made in discharge of an antecedent liability. All the requirements of the rule have been substantially complied with, and that is sufficient.

BUCKLEY L.J. It is with great regret that I have to hold that this appeal must be allowed. On February 24, 1913, the solicitor delivered his bill of costs accompanied by a letter of the same date. The bill of costs contains charges for disbursements purporting to have been made for counsel's fees and printer's charges. In fact at the date of the delivery of the bill of costs those fees and charges had not been paid. The letter which accompanied the bill stated that that was so. That being so, if

(1) [1908] 2 K. B. 510. (2) (1845) 3 D. & L. 115.
(3) (1861) 6 H. & N. 683.

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matters now stood as they did in 1908, disbursements which had not been so made must have been disallowed on taxation. That was decided in *Sadd* v. *Griffin*. (1)

The operation of the law there laid down has been modified by the provisions of Order LXV., r. 27 (29a). The effect of that rule is that non-payment before the delivery of the bill of costs of items of disbursements is not now necessarily fatal to their allowance upon taxation. By that rule the taxing Master has power to allow disbursements if actually made "before the commencement of the proceedings in which the taxation takes place," or, in cases within the proviso to the rule, "before the commencement of the taxation." This case comes within the proviso. I propose to deal with that part of the rule first. What happened was this. The order for taxation was made on February 11 last, on the application of the client. On March 18 a notice was sent by the taxing Master appointing March 24 for proceeding with the taxation. The taxing Master, in his answer to the objection, states what then happened. [The Lord Justice read the answer.] I hold that then, on March 24, the commencement of the taxation had not taken place. The taxation commences when the taxing Master takes the bill of costs and deals with items by way of taxation. He had not done so in this case on March 24, and I hold that he had not then commenced the taxation of the bill of costs. So far, then, the solicitor succeeds.

I come then to the next point. The bill of costs contains these items of disbursements for counsel's fees and printer's charges scattered through the bill. This letter was sent to the client with the bill. [The Lord Justice read the letter.] It is admitted that the aggregate figures stated in the letter are correct when the items in the bill are added up. Turning to the words of the rule, it provides that disbursements not actually made before the delivery of the bill may be allowed on taxation if certain conditions are observed. First, the bill must "expressly state that they have not then been made"; and, secondly, the bill must "set out such unpaid items of disbursements under a separate heading in the bill." Have those conditions been satisfied? The bill does not expressly state that these disburse-

(1) [1908] 2 K. B. 510.

ments had not then been made, unless it is sufficient that the letter so states. Possibly we might be able to get over that difficulty. But the rule goes further and says that such items must be set out under a separate heading in the bill. The provisions of that rule are binding upon us, and this provision has not been complied with. The present case comes within the proviso to the rule. Does the proviso repeat those words of the main part of the rule? The proviso refers to payments made by the solicitor pending the proceedings for taxation "in discharge of any such antecedent liability so set out in the bill." What do the words "so set out" there mean? It appears to me that they must mean set out as provided in the main part of the rule, that is, under a separate heading in the bill. That has not been complied with, and we are bound by the terms of the rule. It is purely a question of technicality and the client has no merits, but the appeal must be allowed and the matter must go back to the taxing Master with a direction to disallow the items in question.

KENNEDY and PHILLIMORE L.JJ. concurred.

Appeal allowed.

Solicitor for appellant: *Spencer Cridland.*
Solicitor for respondent: *Paul Hildesheim.*

J. H. W.

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July 7, 8.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* NOEL.

Criminal Law—Fraudulent Conversion of Property—First Disclosure of Acts by Accused as Voluntary Witness in Cross-examination in Civil Action—Protection from Prosecution—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 85.

When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him "in consequence of any compulsory process" of a Court of law, within the meaning of s. 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence under the Larceny Act, 1901, in respect of the act so disclosed.

Appeal from a conviction at the Central Criminal Court upon an indictment under s. 1 of the Larceny Act, 1901.

The appellant was charged, upon several counts, with fraudulently converting to his own use a cheque for 1000*l.* and the proceeds thereof received for or on account of another person or entrusted to him for a certain purpose or entrusted to him for safe custody.

The cheque for 1000*l.* had been handed to the appellant by his employer and paid by the appellant into a banking account upon which he alone could draw, and he drew upon that account for the full amount of the cheque.

An action was brought in the High Court against the appellant and his employer in respect of that sum of 1000*l.* In that action the appellant voluntarily gave evidence and in cross-examination he was asked to produce the pass-book relating to the said banking account. The book was not in Court, and the appellant was told by the Lord Chief Justice, before whom the action was being tried, to fetch the book; the appellant fetched the book and produced it without making any objection; the entries in that book were the first disclosure of the payment of the cheque for 1000*l.* into the said banking account and of the drawing against it by the appellant.

Subsequently this prosecution was instituted against the appellant, and at the trial the defence (among others) was set up that he was not liable to be convicted, by reason of the provisions

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of s. 85 (1) of the Larceny Act, 1861, because the acts upon which the charge against him was founded were first disclosed by him as above stated. This defence was overruled; the appellant was convicted; and he appealed upon the above ground (among others). The other points argued upon the appeal do not call for a report.

A. Powell, K.C., and *Arthur Lawton*, for the appellant. It is admitted that the dealings of the appellant with the cheque in question were first disclosed by him in the evidence which he gave in the civil action. He was, therefore, protected from conviction by s. 85 of the Larceny Act, 1861. The Larceny Act, 1901, repeals ss. 75 and 76 of the Act of 1861, but provides (s. 2, sub-s. 1) that "this Act shall have effect as part of the Larceny Act, 1861, and section 1 of this Act shall be substituted for sections 75 and 76 of that Act, and references in any enactment to those sections shall be construed as references to section 1 of this Act." This prosecution was under s. 1 of the Act of 1901, and, therefore, s. 85 of the Act of 1861 applies. It is true that the appellant was a voluntary witness in the civil action, but he did not disclose any of the facts upon which this prosecution was founded until he was cross-examined and told to produce the pass-book. That was a disclosure by him in consequence of "a compulsory process" of the Court within the meaning of s. 85. The term "process" is a very wide one and will include the cross-examination of a witness in a civil action. Giving evidence in a civil suit upon cross-examination is being compelled to give evidence and to answer questions, for it is against the desire and the will of the witness. That is clearly a compulsory process. In such a case

(1) The Larceny Act, 1361 (24 & 25 Vict. c. 96), s. 85 (so far as it is unrepealed): "Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any Court of Law or Equity, in any action, suit, or proceeding which shall have been bona fide instituted by any party aggrieved."

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as this the witness could not object to answer upon the ground that his answer might tend to criminate him, because of the provisions of s. 85, and therefore he must be entitled to the protection against subsequent conviction which is given by that section: *Garbett's Case* (1); *Skeen's Case* (2); *Reg.* v. *Gunnell* (3); *Rex* v. *Oliver*. (4) The case of *Rex* v. *Pike* (5) was decided upon the provisions of the Bankruptcy Act, 1890, and has no bearing upon the present case. If such a case as this does not come within the protection given by s. 85, then a person like the appellant is in a worse position than a person who, for instance, has committed a forgery; the latter, if giving evidence as a witness in a civil action, could refuse to answer any question which might shew that he had committed forgery, but the provisions of s. 85 would prevent the former from refusing to answer any question which might shew that he had fraudulently converted property. That would be a most unreasonable construction of the section.

Travers Humphreys, for the Crown. The obligation imposed by the first part of s. 85 to answer questions ought to be limited so as to coincide with the protection given by the latter part of the section, that is, it should be limited to persons giving evidence in consequence of "compulsory process" and should not be extended to a voluntary witness. The section applies only to a person who has been forced by the machinery of the law to give evidence against his will. Disclosure made by a witness who voluntarily gives evidence in an action is not made under any "compulsory process" of the Court, and it cannot make any difference that the disclosure is made during cross-examination. A witness who gives evidence in consequence of a subpœna may be doing so in consequence of "a compulsory process" of a Court, but not a voluntary witness. Even if a voluntary witness claims to be entitled to refuse to answer upon the ground that his answer may criminate him and is ordered by the Court to answer, that is not "a compulsory process" within s. 85. In this case, however, there was no suggestion of any refusal to answer questions or produce the pass-book and

(1) (1847) 1 Den. C. C. 236.
(2) (1859) Bell, C. C. 97.
(3) (1886) 16 Cox, C. C. 154.
(4) (1909) 3 Cr. App. Rep. 246.
(5) [1902] 1 K. B. 552.

the disclosure was purely voluntary. Not one of the cases cited has any bearing upon the present case.

A. Powell, K.C., replied.

The judgment of the COURT (Ridley, Lord Coleridge, and Scrutton JJ.) was delivered by

RIDLEY J. A point has been raised that the appellant was not liable to conviction because the acts done by him upon which the charges against him were founded had, previously to his being charged, been first disclosed by him on oath, in consequence of a "compulsory process" of a Court of law, within the meaning of s. 85 of the Larceny Act, 1861. It has been contended that, if a witness is cross-examined, his answers are given in consequence of a compulsory process of the Court, and that, therefore, the acts disclosed by such answers cannot subsequently be made the foundation of criminal proceedings against him. It seems to us that the expression "compulsory process," in s. 85, signifies something more than the mere putting of a question to a witness which he may not wish to answer. If there were a compulsory examination, as in bankruptcy, or by interrogatories, or by a bill in equity, that would be a compulsory process of a Court of Law or Equity. Also, possibly, if a witness claims the privilege of refusing to answer a question because his answer may tend to criminate him, and the Court orders him to answer the question, that may be a "compulsory process" of the Court within the meaning of s. 85. We do not, however, desire to decide that point, as it is not necessary to do so in the present case. In this case no such privilege was claimed, and it is not necessary for us to go further than to say that, where evidence is given voluntarily by a witness in proceedings in a Court of Law or Equity, it is not given "in consequence of any compulsory process of a Court of Law or Equity," within the meaning of s. 85.

This appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Adrian de Fleury & Co.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. H. W.

K. B. D. 1913 *Jan.* 16, 17; *Feb.* 1.
C. A. 1914 *Feb.* 17, 18, 19; *April* 8.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

CLODE AND OTHERS *v.* THE LONDON COUNTY COUNCIL.

Metropolis—General Line of Buildings in Street—Buildings erected beyond the General Line—Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings.

The Euston-road was laid out in 1756 under 29 Geo. 2, c. 88, which enacted that no buildings should be erected on new foundations in the road within fifty feet of the highway, and that, if so erected, they should be deemed to be common nuisances. The Metropolis Management Act, 1862, s. 75, enacted that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings if the distance of that line from the highway did not exceed fifty feet. Before 1862 a row of buildings had been erected about fifty feet back from the highway, and a second row of buildings had been erected on the forecourts of those buildings; the fronts of this second row adjoined the inner edge of the pavement, being about eleven feet from the kerb of the roadway. With the view of shewing that they were erected on new foundations and were consequently illegal buildings and common nuisances, maps of the years 1793 and 1819 were put in evidence and received by the tribunal of appeal as evidence of such fact; the maps were not made on the authority of any public body or for any public purpose. In 1867 the Metropolitan Board of Works, with the object of establishing a new and regular building line eleven feet from the road coinciding with the then existing projecting buildings on the forecourts, passed a resolution enabling all persons interested to build up to that line of frontage without restrictions, but no certificate was ever given by the superintending architect defining the eleven feet line as the general line of buildings. In August, 1909, the lessee of the appellants was proceeding to re-erect the building leased to him on the eleven feet line, when it was objected that that line was in advance of the general building line in that part of the road. The superintending architect, being called upon to define the general building line, gave a certificate that it was the old building line lying fifty feet from the road. The tribunal of appeal confirmed his certificate:—

Held, in the Divisional Court, by Ridley J., that, upon the authority of *Scott* v. *Carritt* (1900) 82 L. T. 67, and *Metropolitan Railway* v. *London County Council* [1911] A. C. 1, the superintending architect was bound to disregard the buildings on the forecourts and to hold that they were unlawfully there, and therefore that the certificate of the superintending architect as to the building line was right. By Lush J., that the

buildings on the forecourts, which had been sanctioned by the Metropolitan Board of Works, could not be held to be unlawful erections, and that the superintending architect was bound to have regard to them in defining the general building line.

Held, in the Court of Appeal, first, that the maps were not admissible evidence for the purpose for which the respondents sought to make use of them, and, secondly, that the London County Council could not disregard what had been authorized or approved in 1867 by the Metropolitan Board of Works, followed, as it was, by the erection of new buildings up to the inner edge of the pavement and the heightening of existing buildings.

Scott v. *Carritt* (1900) 82 L. T. 67 and *Metropolitan Railway* v. *London County Council* [1911] A. C. 1 distinguished.

APPEAL from the decision of a Divisional Court (Ridley and Lush JJ.) upon a case stated by the tribunal of appeal under the London Building Act, 1894.

The following statement of facts is taken from the written judgment of Lush J.

The Euston Road was laid out in the year 1756 under an Act of Parliament, 29 Geo. 2, c. 88. It was enacted by that Act that no buildings should be erected on new foundations in the road within fifty feet of the highway; if so erected, they were to be deemed common nuisances. The Act was a temporary Act only, but its provisions were renewed from time to time ultimately by an Act of 7 Geo. 4, c. cxlii. In each of these statutes is to be found the same prohibition against erecting buildings in the Euston Road on new foundations within fifty feet of the highway. The last-mentioned Act was repealed by the Metropolis Management Act, 1862. That Act, by s. 75, provided that no new building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings if the distance of that line from the highway did not exceed fifty feet. Although the earlier Act of 1855 contained a similar power in the local authority to sanction the extension of buildings beyond the general building line, that Act would not repeal 7 Geo. 4, c. cxlii., which was a special Act relating to the Euston Road.

As a matter of fact, as the tribunal of appeal have found, an almost continuous row of buildings had many years ago, long before 1862, been erected about fifty feet from the roadway, and

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another row of buildings, also of "considerable age," had been erected in front of them on what used to be the forecourts of the houses. These later buildings, which were regular in frontage and irregular in height,—one, two, three, and sometimes four storeys—abutted on the pavement. They were, as the tribunal of appeal have found, substantially all erected on new foundations, and consequently were unlawful buildings and common nuisances. (This finding was obviously right, and was not really questioned, although the admissibility of a map which was relied upon in arriving at this conclusion was questioned.) These projections must apparently have been (and the superintending architect, Mr. Vulliamy, said in 1867 in his report, to which I will shortly refer, that they were) allowed to remain through a misapprehension as to the meaning or effect of the prohibiting statutes on the part of the magistrates.

The tribunal of appeal also find that there was a general line of buildings in 1855 and afterwards in this part of the street, and that all the projections on the forecourts were in front of them.

In 1867 the Metropolitan Board of Works, with the object of establishing a new and regular line of buildings eleven feet from the road roughly coinciding with the frontage of the then existing projections on the forecourts, passed a resolution enabling all persons interested to build up to that frontage without restrictions as to height. The effect of that resolution, or rather of the fact that it was extensively acted on, is, I think, the material question in this case. I will consider it more in detail later on.

In August, 1909, the appellants' lessee of one of their three buildings was proceeding to re-erect it within eleven feet of the roadway when he was met with the objection that that was in front of the general line of buildings in that part of the Euston Road. The superintending architect was accordingly required by the respondents, in pursuance of s. 22 of the London Building Act, 1894, to define the general line of buildings in that part of the Euston Road. Having heard the appellants (among others), he certified in writing, on September 28, 1909, that the general line of buildings in that part of the Euston Road was the line shewn by a strong red line on the plan annexed to his

certificate. That line shewed the general line of buildings to be what I may call the old line approximately fifty feet back from the road. The appellants, whose lessee, of course, would, if that certificate stood, be prevented from erecting his building beyond that line unless he had the consent in writing of the respondents, appealed, as did four other appellants, to the tribunal of appeal. The tribunal of appeal confirmed the certificate so far as regards that section of the road in which the appellants' buildings stand, which forms by far the larger portion of the road affected by the certificate. It is the space between the letters C and D on the plan annexed to the judgment of the tribunal of appeal. They reversed the certificate so far as concerned the parts of the road on the west and east, i.e., the spaces between A and C and D and E on the plan, holding as to the former that there was no general line, and as to the latter, that it was in advance of the architect's red line, in fact that it coincided with the line which the appellants contend ought to apply also to the space between C and D. The tribunal of appeal in a judgment have stated their finding of fact and their reasons, and it forms part of the case which they have stated for the opinion of the Court. They made an order on January 17, 1910, in accordance with the above decision. The question stated for the opinion of the Court is whether, on the facts which the tribunal have found with regard to the general line of buildings between C and D on the plan attached to their order, the order is right in point of law. What the tribunal of appeal have held is in substance this: they have held that, if the superintending architect was entitled to look at the buildings actually in existence at the time he made his certificate, the general line of buildings would be that for which the appellants contend. But they held, on the authority of two cases that were cited to them, that the architect was precluded in point of law from regarding those buildings as affecting the general line of buildings, and if they are disregarded they held that the general line of buildings is that fixed by the superintending architect so far as regards the space between the letters C and D.

What those two authorities decided, it was said, was this: the tribunal of appeal were of opinion that it was decided in the

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earlier of the two cases, *Scott* v. *Carritt* (1), that any building which was unlawful and a common nuisance at the time it was built continued to be unlawful and a common nuisance after the last of the prohibiting Acts was repealed, and that therefore it must be disregarded. They were of opinion that it was decided by the later of the two cases, *London County Council* v. *Metropolitan Railway* (2), that although the local authority have power to consent to buildings being erected beyond the general building line, the buildings erected in pursuance of such consent are buildings which must also be disregarded for the purpose of defining the general building line.

The tribunal of appeal say that substantially all the buildings in this part of the Euston Road, which extend within eleven feet of the roadway, fall into one or other of these two classes. They have, therefore, held that all these buildings up to the edge of the pavement must be disregarded, and the general line defined on the hypothesis that they are not there.

The question for us really is whether this is a right view in point of law or not. I ought, perhaps, to add on the facts that one or two houses appear to have been built up to the edge of the pavement since 1867 by consent; that in the case of one or two houses built since that date, they were built after consent had been asked for and refused, but the tribunal of appeal find that these buildings are so few in number that they do not affect the question.

Before considering the authorities, it is necessary to examine somewhat closely the facts that took place in the year 1867, to which I have referred.

In 1866 a Mr. Bauman, the owner of No. 316, was summoned before the magistrate for erecting a two-storeyed shop on the forecourt of his premises, that is, on the space between the front of the old buildings, which stood fifty feet back, and the edge of the pavement, without consent. The Metropolitan Board of Works had consented to a one-storey shop only being erected; Bauman had erected, as I have stated, a two-storey shop. He was convicted before the magistrate; he appealed. While the appeal was pending, in 1867, a large number of the freeholders

(1) 82 L. T. 67. (2) [1909] 2 K. B. 317.

and leaseholders of the houses in that part of the Euston Road, including the part in question in this appeal, presented a memorial to the Metropolitan Board of Works stating that they had shops, warehouses, and other buildings in the front portion of their premises and immediately adjoining the foot-pavement, and that they had adopted as an uniform line of frontage for such buildings the line where their private property adjoined the foot-pavement, and praying that the Metropolitan Board of Works would authorize their proper officer "to determine that the general line of buildings referred to by your memorialists may be held to be the general line of buildings for all the purposes aforesaid." Bauman appears to have made a separate application to the same effect as the memorial.

The superintending architect, Mr. Vulliamy, made a report to the Metropolitan Board of Works upon that memorial. It concludes as follows: "If the proposition now made by the memorialists be found practicable so as to adopt a new and regular frontage, I think the line should be kept at least eleven feet from the kerb line of the road, and I would recommend that the plan of the road shewing such a line should be submitted along with this report for the opinion of the vestry and of the freeholders and others interested." I should point out that the vestry were the proper authority to prosecute for offences under the Act, and had, in fact, taken the proceedings against Bauman to which I have referred. The power to prosecute was afterwards given to the Metropolitan Board of Works by s. 10 of the Metropolis Management, &c., (Amendment) Act, 1882. Mr. Vulliamy prepared a plan of that part of the Euston Road. That plan is in evidence. It shews by a red line where the buildings fronted which were originally built about fifty feet back, and his report did not constitute a decision by him as to the general building line, and we must act upon that finding. That he must have decided that in that part of the road where Bauman's house was the general building line was some distance back seems clear from the fact that Bauman was convicted. In my opinion the question is not of any great importance in this case, the general line in 1855 "and afterwards" being further back from the road than eleven feet.

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A copy of Mr. Vulliamy's report and of his plan were submitted by him to the vestry and to freeholders and other persons interested in property in that part of the Euston Road inviting observations. A committee of the Metropolitan Board of Works considered the report and reported to the Board of Works. In that report he recommended that the proposed line of frontage as tinted blue on the plan, i.e., the front line, be approved, and that it should be a condition that any building to be erected thereafter on the northern side of Euston Road, between Osnaburgh Street and Hampstead Road, should be kept to an extreme general line from ten to eleven feet back from the outer edge of the kerb to the front pavement so as to preserve an uniform line, and that on the southern side of the road also the foot-pavement should be kept to an uniform width of eleven feet. In November, 1867, the Metropolitan Board of Works passed a resolution in accordance with that recommendation. It was sent on November 26, 1867, and the vestry accepted and acted on it, and withdrew the prosecution against Bauman.

From that time for a period of over twenty years the resolution was, as I have said, extensively acted on. A very large number of the buildings in front of the old line of building were altered and brought up to the eleven feet line, and their heights were raised, as is shewn by comparing Mr. Vulliamy's plan with those in evidence in these proceedings. These alterations were made by the freeholders and leaseholders on the properties in almost all cases without apparently asking for, or being required to obtain, any consent from the Metropolitan Board of Works. No proceedings were taken by the vestry or the Metropolitan Board of Works in respect of these alterations.

In 1894 the London Building Act, 1894, came into operation. The respondents appear on one or two occasions to have taken exception to the new frontage being treated as the general building line. Then came the present proceedings which have led up to this appeal.

The applicants appealed to the Divisional Court from the tribunal of appeal.

1913. Jan. 15. *Astbury, K.C.* (*Ryde, K.C.*, and *Herbert Smith* with him), for the appellants.

Danckwerts, K.C. (*Daldy* with him), for the respondents.

Cur. adv. vult.

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1913. Feb. 1. The Court differed in opinion.

LUSH J. read the following judgment:—This appeal came before us on a case stated by the tribunal of appeal in a proceeding under the London Building Act, 1894.

It raises very difficult questions of law. It is a somewhat singular case. The facts, which I will endeavour to state as briefly as I can, are as follows. [His Lordship here stated the facts as above set out, and proceeded :]

It is necessary to carefully consider what was the real nature of the resolution of the Metropolitan Board of Works, and what was the authority that it purported to give to the persons interested. It certainly cannot be treated as giving a special or exceptional consent to each separate freeholder or leaseholder, on the basis that the new or altered building would be ultimately a projection in advance of the general building line in the Euston Road. On the contrary it was a general invitation or authority to any persons interested or to become interested in these buildings, or in any site fronting the road, to treat the blue line—the eleven feet line—as the general building line, and it involved further the representation that if the persons interested acted on that invitation no proceedings would be taken against them, the reason being that the local authority desired (and the vestry assented) that the buildings on the front or the eleven feet line should be taken into account in considering what the general line of buildings was. Further, whether or not it actually legalized the unlawful buildings previously erected, which I will consider in a moment, it certainly operated as a representation to the owners that they might not only alter them, but also freely deal with them on the basis that they were buildings which were lawfully there.

I will now consider the two cases which were cited to the tribunal of appeal, and on which that tribunal decided this case.

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I will deal first with the case of *Metropolitan Railway* v. *London County Council.* (1) In that case the Metropolitan Board of Works had given to many owners a consent (a separate consent in each case) to erect one-storeyed shops in front of the general line of buildings. The question was whether the superintending architect was entitled to regard those projections in defining the general line of buildings, or whether he ought to look only at the main buildings, omitting the projections. When the case was before the Divisional Court (2), the Court, consisting of Lord Alverstone C.J. and the late Walton J., held that although s. 27 of the London Building Act, 1894, enacts that "the consent by the council to the erection of any structure beyond the general line of buildings in any part of a street . . . . shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent," and although s. 216 enacts that "all consents (among other things) duly given under any Act hereby repealed shall so far as applicable for the purposes of this Act be of the same validity and effect as if they had been given under this Act," there was nothing to prevent the superintending architect from having regard to these extended buildings in fixing the general line of buildings. The 216th section, it was held, did not mean that consents so given before the Act came into operation must be treated as consents given under s. 27 so as to prevent extended buildings from affecting the general line of buildings. Walton J. in his short judgment points out that if such buildings could not be so regarded, even if the local authority had consented to the erection of buildings without any conditions up to the time of the then present frontage of the shops, and if the whole frontage had been brought forward under this unconditional consent, the general line of buildings would still be the old line and not the new one, and, said the learned judge, "I cannot agree with that conclusion. It cannot be that that was the intention of the Legislature. The superintending architect and the tribunal of appeal have to look at the road and the buildings as they exist, and to find out from those data what is the general line of buildings." The case which the

(1) [1911] A. C. 1. (2) [1909] 1 K. B. 116.

learned judge was putting in those observations was, in substance, the case with which we have to deal in this appeal. The case went to the Court of Appeal. (1) The decision of the Divisional Court was reversed, Lord Mersey, then the President of the Probate, Divorce and Admiralty Division, dissenting. It was held by the majority of the Court (Fletcher Moulton and Farwell L.JJ.) that the consents having been given as they were given to the separate applicants, the case of each applicant being treated as an exceptional case, and the consents being given on the basis that the then existing line of buildings was preserved, the buildings so erected could not be regarded in considering what the line of buildings was in fact. Fletcher Moulton L.J. says (2): "It" (i.e., s. 27) "provides that buildings erected under such consents," (they were, as I have said, limited and conditional consents) "whether obtained under the present Act or any of the repealed Acts, shall not be deemed to affect or alter the general line of buildings as then existing at the time of such consents. Any tribunal, therefore, which has to determine the general line of buildings, must exclude such buildings from its consideration—must treat them for that purpose as non-existing." And at p. 334 he says: "It" (the consent) "neither brought forward nor helped to bring forward the general line of buildings, because it was expressly a permitted exception." The terms used by the Lord Justice in considering the consequences of the opposite view shew that he is throughout dealing with the facts of that case in which the low one-storey projection had alone been consented to. Farwell L.J. (3) says this: "There is nothing in the Act enabling the Board to advance or alter the line; and it would be an extraordinary result if a public body, entrusted with the duty of preserving, not mere architectural uniformity, but sufficient areas of light and air for the general health and well-being, should, by consenting to the erection of projections of one storey and no more, in front of the line of buildings, be held to have thereby consented to the alteration of the line of buildings so as to authorize the erection of seven or eight storey buildings." The Court also held that s. 216 was an enacting section, and

(1) [1909] 2 K. B. 317. (2) [1909] 2 K. B. at p. 332.
(3) [1909] 2 K. B. at p. 336.

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that consents given before the Act were to be treated as of the same effect as if given under the Act. The case went to the House of Lords. (1) The House affirmed the judgment of the Court of Appeal. The Lord Chancellor also refers to the special kind of consent which had been given, as the Lords Justices had done, i.e., consents to one-storey projections only.

Mr. Danckwerts has invited us to look at the shorthand notes of what took place during the argument, and read certain passages to us. He pointed to certain data in the course of the argument which, he said, tended to support his contention that, whether the consents were conditional or unconditional, the buildings that were erected in pursuance of them could not under any circumstances be regarded as affecting the general line of buildings. I have read the shorthand notes, and it seems to me to be clear that after the difficulties that would follow if the judgment were extended to that length were pointed out by Sir Robert Finlay and Mr. Macmorran, the learned Law Lords abstained from expressing, and never did express, a final and definite conclusion with regard to any matter other than that which they had to decide. The Lord Chancellor more than once pointed out that he did not intend to decide anything except the actual question before the House.

Now, I have come to the conclusion that the case is not an authority for the view that these extended buildings in the Euston Road, extended and altered under the somewhat peculiar circumstances I have stated, ought as a matter of law to have been disregarded by the superintending architect. The differences between the facts of that case and the facts of this case are obvious enough. In the present case the "consent," as I have said, was not a conditional consent to erect these buildings up to a certain height only, and it was not given on the basis that the buildings, as altered, were projections in front of the general line of buildings. Nor was it given to each applicant, dealing with his case as an exceptional case. On the contrary, the Metropolitan Board of Works either invited, or at all events authorized, all persons interested to rebuild or advance and raise

(1) [1911] A. C. 1.

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the existing projections, with no restrictions as to height, i.e., to treat them as main buildings on the basis that they would not be in front of the general line. Whether they had power so to act, and what would be the consequences if they had not, I will consider later. But I do not think that the principles laid down in the case referred to conclude this case when the different circumstances are considered. It would have been a breach of faith for the licensees in that case who had obtained conditional consents to ignore the conditions and assert the right to carry the buildings to their full height. The building line, as they knew, was not to be altered. In this case the contrary is true. The chief difficulty I have felt is that s. 27 of the London Building Act, 1894, which the Court of Appeal held to be retrospective, seems, at first sight, to prevent any one, including the superintending architect, from having regard to any buildings as affecting the building line, if they have been erected by consent, under any circumstances. But if one looks carefully at the section and considers what was done by the Metropolitan Board of Works in 1867, I do not think that they gave "a consent to the erection of a structure beyond the general line of buildings" within the meaning of s. 27. That section, in my opinion, relates only to a consent to a particular structure, part of a building which is not beyond the building line, being erected as a "projection." It contemplates conditions being imposed which will be adapted to the projection. Thus, s. 28 provides for a register being kept of the conditions. The real meaning of s. 27 may, in my opinion, be expressed thus: "If an owner obtains permission to erect a projection and nothing more, that projection shall not afterwards be treated as a main building, and its front line treated as the front line of the building." If the words of the section are satisfied by giving that limited meaning to it, and if the obvious reason for the section was to prevent authorized projections from operating as main buildings on the building line, we ought, I think, to place that limited construction on it.

The difficulties in the way of the opposite view seem to me to be insuperable. In the first place the main object of requiring a building line to be observed is to obtain architectura uniformity. "The very object is uniformity," said Lord

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Selborne in *Spackman* v. *Plumstead Board of Works*. (1) In the next place it is not only for the protection of the public but of the building owner that the machinery exists for having the general line defined (see per Willes J. in *St. George's Vestry* v. *Sparrow* (2)) to enable the owner or the builder to know to what line he may build. Now if a local authority were to give permission to the owners of a large number of sites in a street to erect buildings of any height up to a certain line beyond the then general line and they acted on it, if these buildings must be disregarded so far as the general building line is concerned, all possibility of uniformity would be gone, and it would be practically impossible for a builder to know what the building line was. There would be no difficulty if conditional consent to low projections only was given, as in *Metropolitan Railway* v. *London County Council* (3); a register must be kept and the conditions would be known in such a case as that, and there would be no necessary lack of uniformity if the projections were not main buildings. Moreover, suppose that all the owners had an unconditional permission to build to an advanced frontage, as in this case, and they acted on it. As I will point out shortly, no proceedings could be taken against them as the gist of an offence in building without consent beyond the general line. Now the general building line is the line to which owners have prima facie to conform. So that, if the architect had to disregard the buildings erected by consent and define the building line without taking them into consideration, the building line in such a case would be of no interest or importance to anybody. It would mean nothing and settle nothing, and would bind nobody. It seems to me that s. 27 would not apply, and that the Legislature never intended it to apply, to such a case. In fact such different considerations apply to the two cases that the decision in *Metropolitan Railway* v. *London County Council* (3) cannot, in my opinion, be regarded as concluding our decision in the present one, or even serving as a guide to us in deciding this case. I would add that if the Metropolitan Board of Works had had no decisions as to

(1) (1885) 10 App. Cas. 229, at p. 244.

(2) (1864) 16 C. B. (N.S.) 209, at p. 218.

(3) [1911] A. C. 1.

the general building line when they passed the resolution, they would not necessarily be consenting to a structure being erected "beyond the general line of buildings" at all, but having regard to Bauman's conviction I feel some difficulty in relying on that view, notwithstanding the decision of the tribunal of appeal.

I now deal with the other case that was cited, *Scott* v. *Carritt*. (1) The question there was very different from the question here. It was an appeal from the Divisional Court who had affirmed the decision of a magistrate in a proceeding between the district surveyor and a builder. The former had objected to the builder erecting two buildings to a certain height beyond the admitted building line without consent. The builder contended that he did not require consent as the land had for the necessary statutory time been "lawfully occupied" by a building (s. 22 of the London Building Act, 1894). One of those buildings was built before the repeal of the Act of 7 Geo. 4, c. cxlii., and was therefore unlawful and a common nuisance. The other was a one-storey building erected under a conditional consent. The builder contended that, as to the first, the repeal of the Act by the Act of 1862 had made it no longer unlawful, and that as to the second, having obtained consent to a one-storey building, the land was lawfully occupied. The Court of Appeal held that the first building remained unlawful notwithstanding the repeal, and that as regards the second, the builder having nothing more than a conditional consent could not rely upon it as entitling him as a "lawful occupier" to build to an increased height.

That case also, in my opinion, had no real bearing on the question before the tribunal of appeal. The Court in that case had not to decide what buildings can properly be regarded in defining a general building line. What was decided was that a conditional consent was not a consent to occupy without conditions, and (where there was no consent at all) that an unlawful building had not become lawful merely because the prohibiting Act had been repealed. If there had been a real consent to what had been done—as in the present case—it seems to me not at all improbable that the decision would have been the other way.

It remains to consider whether the Metropolitan Board of

(1) 82 L. T. 67.

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Works had power to act as they did in 1867 and afterwards, and if not, what the consequences are of their resolution having been acted on by the persons interested. Mr. Danckwerts contends that their action was unlawful and ultra vires, and that they had no power to alter the general line of buildings, and no power to authorize the persons interested to alter or enlarge their buildings or erect new ones with a view to such buildings, when altered or erected, affecting the general line of buildings in the street. I agree that, if there be an existing line of buildings in fact, the local authority has no power to alter it and say without regard to the existing buildings "we will artificially fix such and such a line as now constituting the general line of buildings." They have not done that. They have, in the exercise of their discretion as to what was best in the public interest, said that, having regard to the highly unsatisfactory state of things existing in the Euston Road, they would be willing that the persons interested should be allowed to alter buildings and erect new ones up to eleven feet of the roadway without hindrance so far as they were concerned; and the vestry, the only authority who could then prosecute for offences under the Act, taking the same view, were content to withdraw the prosecution of Bauman, and to come into line with the Metropolitan Board of Works in order to achieve the object which they also considered desirable. I can see nothing which compels me to say that, in so acting, either body was acting unlawfully. The Board of Works may have made a mistake in stating what the consequence of the permission would be if acted on—that is what we are considering—but the permission so to build was not unlawful. They may impose conditions, but it is not ultra vires if they do not do so, and a building line in a street may become changed if, e.g., so many of the old houses are pulled down that the old line ceases to exist. This has happened with the space A to C. But if it were unlawful to pass the resolution, does it follow that the buildings which, by their permission, were brought to the eleven feet line and were raised or rebuilt must be disregarded as being unlawful buildings? This depends not on the validity of the resolution, but on the fact that it was acted on. There is no authority for that proposition, and I do not think that it is sound

in law. If the Metropolitan Board of Works, who gave the permission, could not—or if their successors, the respondents, could not—after it had been acted on proceed against those who acted on it, on the ground that the building was unlawful, I think that the building cannot be treated as unlawful and non-existing for the purpose of defining the general building line. I do not see how the Metropolitan Board of Works could have taken any such proceedings. No punishable offence was committed when a new building was erected or an old one raised and altered within eleven feet of the road. The consent given, in fact, would have been an answer to any complaint by the Board of Works. "The complaint," Lord Selborne said (speaking of a complaint such as this) in *Spackman* v. *Plumstead Board of Works* (1), "is made, not of building beyond a certain line, but of building without the requisite consent"; and see per Lord Watson. (2)

I do not see how the Metropolitan Board of Works could have made such a complaint. It would, as Mr. Herbert Smith said, be playing fast and loose with those they controlled, and a local authority could not, in my opinion, plead their own mistake and excess of authority as ground for an order to pull down a house erected in pursuance of their authority. I think that the cases Mr. Herbert Smith cited, *London and North Western Railway* v. *Bedford* (3) and *Southampton Gas Co.* v. *Southampton Guardians* (4), shew this. I am, of course, aware that the present proceeding is not a proceeding to test the legality of the appellant's building. It is to define the general line of building. But the question still is, ought these buildings in point of law to be treated as unlawful and be disregarded in defining it? Mr. Danckwerts says that the superintending architect does not act as the servant of the local authority in defining the line. That I think is correct. But that does not, in my opinion, affect the matter. His duty is, prima facie, to look at the existing buildings, and he cannot disregard those that are there unless there is good cause in law

(1) 10 App. Cas. at p. 237.
(2) 10 App. Cas. at p. 246.
(3) (1852) 17 Q. B. 978.
(4) (1877) 2 Q. B. D. 371, note, p. 375.

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for doing so. Prima facie the existing buildings determine what the general line is. "If," said Lord Selborne in *Spackman* v. *Plumstead Board of Works* (1), "there is a row of houses along the whole of that space built in a regular mathematical line as to which each person can have no doubt, the fact" (i.e. where the general line is) "is already determined and there is no further room for judgment." The superintending architect, I would add, is selected because he is a man of skill, an expert in matters of this description. He is not selected as an expert to decide questions of the kind which we have had to consider in this appeal. In my opinion, he cannot say that buildings which the local authority have sanctioned are unlawfully there and that he cannot look at them. The superintending architect in 1909 was, therefore, bound to look at what was there. The tribunal of appeal have held that if he had done so or if they are entitled to do so, the general line of buildings in the road between C and D is eleven feet from the edge of the road, coinciding with the line between D and E.

For the reasons I have stated I am of opinion that the tribunal of appeal took an erroneous view when they held that they were bound, by the authority of the two cases that were cited, to disregard those buildings, and I think that the order that they made, as regards the space between C and D, is wrong.

RIDLEY J. read the following judgment:—This is an appeal on a special case stated by the tribunal of appeal acting under the London Building Act, 1894. The superintending architect had been required by the London County Council to define the general line of buildings under s. 22 of that Act, and he had, on September 28, 1909, defined it by a red line at fifty feet from the highway. The appellants contended that the general line of buildings was the inner edge of the pavement. The spot in question is the north side of the Euston Road, and although the appellants themselves only represent three blocks of buildings, the space affected by the decision of the case is considerable, being about 380 yards. Between the line defined by the architect and

(1) 10 App. Cas. at p. 243.

the line of the street there are buildings of various heights, one, two, and three storeyed. It is not necessary to describe them in detail, but it may be taken that some of them were put up after consent had been asked and obtained to their erection within the ground building line ; others were put up after such consent had been asked and refused, and others had been put up without asking for consent.

As to dates when they were put up, excepting in a few instances, there was not reliable proof. An endeavour was made by ancient maps produced before the tribunal to shew that a large proportion of them had not been there at the dates of these maps, which were respectively 1793 and 1819. It is not necessary for us to decide whether those maps were properly looked at as evidence of their contents, for all the buildings (except those for which consent had been obtained) were unlawful buildings, either as contravening the earlier Acts of George III. and George IV., which allowed no buildings within fifty feet of the highway, if erected before 1855, or if erected since that date, because they had been erected without the consent of the Metropolitan Board of Works under the Acts of 1855 and 1862. Those, on the other hand, which had been erected with such consent could not be relied upon as altering the line of buildings because of s. 27 of the London Building Act, 1894, and of the decision arrived at in the case of *Metropolitan Railway* v. *London County Council.* (1) It was in that case decided by the Court of Appeal, reversing the Divisional Court, and by the House of Lords, that s. 216 of the London Building Act, 1894, is an enacting clause and gives to s. 27 of the same Act a retrospective effect ; so that even before the passing of that Act the erection of any building by consent could not have affected the general line of buildings. It was further decided that a consent given under s. 75 of the Act of 1862 could have no other effect. In other words, the consent to the erection of such a building was the consent to an exception ; or (to adopt the phrase of the Lord Chancellor) each consent was an exception, and each consent assumed that the building line remained. From this it resulted that in defining the general line of buildings the superintending architect must ignore all such buildings as

(1) [1911] A. C. 1.

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were erected by consent of the London County Council, or could not be proved to have been lawfully erected.

So far it appears to me that the present case is governed by the former one, and that these buildings could be rightly disregarded by the architect and by the tribunal of appeal, which had to consider his certificate. But it was contended that this case is distinguishable from the former because of proceedings which took place in 1867 when Mr. Vulliamy was superintending architect to the Metropolitan Board of Works. At that time this space had become fully occupied, or nearly so, by buildings of various heights; and more were intended to be built. Mr. Vulliamy was, therefore, approached by all the persons interested in the houses, who stated that they had adopted an uniform line of buildings adjoining the foot-pavement, and desired that such line should be established as the line of building frontage for all purposes under the Acts of Parliament for the management of the metropolis; and they asked that the general line of buildings which they referred to should be held to be a general line of buildings for all the purposes aforesaid.

Mr. Vulliamy on May 9, 1867, made a report which concludes by saying "if the proposition now made by the memorialists be found practicable so as to adopt a new and regular frontage, I think the line should be kept at least eleven feet from the kerb line of the road, and I would recommend that the plan of the road showing such a line should be submitted along with the report for the opinion of the vestry and of the freeholders and others interested." The report with first a red line shewing the former line of buildings, and secondly a blue one drawn at eleven feet from the kerb, was submitted to the Building Committee of the Metropolitan Board of Works, and on November 12, 1867, it was adopted by them, and it was resolved to approve the proposed line of frontage, and that it should be a condition that all buildings to be erected in that space thereafter should be kept ten to eleven feet back from the outer edge of the kerb, so as to preserve an uniform line as shewn on the plan. Many of the then existing buildings did not conform to this condition, as they projected by a short distance, and, whenever such buildings have been pulled down and re-erected since that date, they have been

re-erected so as to preserve the eleven feet line. The resolution has, in fact, been acted upon so far as there is any evidence since the time when it was passed.

Such being the facts, it was argued that the decision already quoted did not apply to these buildings, that there had not been as regards any of them a mere consent to their being put up beyond the building line, nor were any of them merely put up without consent and therefore to be treated as illegal. With a view to preserve these houses and to the erection of more on the line of frontage the architect himself (it was argued) had made a recommendation which was accepted by the Metropolitan Board of Works, and which did alter the existing line because it allowed the existing buildings to remain and future buildings to be put up without regard to it, so long as they had a frontage of eleven feet back from the kerb. The houses had, in effect, been allowed to remain there, to be improved and altered, not as exceptions to a building line which was to be maintained, but as part of a state of things which would be permanent, it being intended to alter the building line so far as to allow houses on the line of the road provided they were not within eleven feet of the kerb.

It must be remembered that this case is not a prosecution before the magistrates, but a case stated by the tribunal of appeal, an appeal from the architect's certificate setting out the general building line. The tribunal acted under the power given them by the London Building Act, 1894, and it was upon the validity of that certificate that the decision was given. The case stated that in the opinion of the tribunal these proceedings of 1867 took place in connection with a proposal for fixing a new building line, and were not intended to be, and were not, a decision as to the general line of buildings. In my opinion that finding is a correct description of what happened.

The certificate of the architect, given under s. 75 of the Act of 1862, as to the general line of buildings, was at that time final. That was decided in *Spackman* v. *Plumstead Board of Works* (1), in which it was held by the House of Lords (after much difference of opinion in the Courts below) that on the hearing of a complaint by a magistrate for erecting a building

(1) 10 App. Cas. 229.

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beyond that line without the consent of the Metropolitan Board of Works, the magistrate could not question the general line of buildings, but must accept it as conclusive; in other words, where the line of buildings did not exceed fifty feet from the highway, the architect alone had the power to decide where that line should be.

The Act of 1894 did not alter this state of the law except that an appeal was given by s. 25 to the tribunal of appeal, and that by s. 27 (an important enactment) it was enacted that no consent by the council to the erection of any buildings beyond the line should be deemed to alter or affect the general line of buildings as existing at the time of such consent.

Now, having regard to these proceedings of 1867, are these houses there by consent? Take it by steps; let there be some houses unlawfully in front of the building line, and others there by consent of the authority; then let the owners of the former apply direct to the authority for consent and obtain it. The effect is that they are all there by consent. Next, suppose they apply to the architect, and ask him to persuade the authority to grant such consent: that authority agrees: the result is the same. Next, let them all apply to the architect and suggest to him that it would be better to have a fresh line; and let him reply by marking the old line, but adding that he recommends they should be allowed to remain on the line of the street, subject to being eleven feet from the kerb. Surely, they are still there by consent! The one thing is absent which would make the difference, and that is the architect's certificate; let him define a line along the street, and the houses cease to be in front of the building line within s. 22.

It is true that in the present case the consent of the Metropolitan Board of Works was not given with reference to any particular building then erected or to be erected; and that it was given in connection with a project which they approved for fixing a new building line. But the plan accompanying Mr. Vulliamy's report still shewed the former general building line; and it seems to me impossible to say that these buildings were not put up by consent, conditional or not conditional. If so, why were they not within the terms of s. 27 of the Act? That

section, which I have quoted before, reads as follows: "The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street, or the erection of such building or structure, shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent." It seems to me to apply to any buildings, one or more, put up by consent of the council, and to be in effect a direction to the architect that he is to disregard all such buildings as altering the general line. In *Metropolitan Railway* v. *London County Council* (1) there were fifty houses in question, with a frontage of 420 feet. As I read the facts, there were in front of such houses nineteen one-storey shops and one two-storey shop, covering 281 feet out of 420 feet, while for the remaining 139 feet the space was vacant in front. It is true that out of these buildings nineteen were one-storey buildings, and only one was a two-storey building, and that Farwell L.J. does refer in his judgment to the buildings in question as "one-storey projections." (2) But the statute is general in its terms, and includes all buildings, and further one of the buildings in that case was two-storeyed. I do not think it possible to find a sound distinction between the cases, because there most of the buildings were one-storeyed whereas they are here one, two, and three storeyed. I am thus brought to the conclusion that the case before us is covered by the former one. I have found, however, some difficulty in arriving at a decision to that effect. First of all, it is apparent that the real physical line of building is not at the fifty feet line, but along the street, as indeed is stated by the tribunal of appeal. But that could have been said also in the previous case; and it seems to me to follow from a consideration of the statute that such a possibility was contemplated, and that power was intentionally reserved to the authority to declare the general building line, in spite of buildings projecting from it, in order to preserve air space for the metropolis.

Again, it is said if proceedings were taken against owners of these houses it would be a case of hardship, because money has been spent on them with the sanction of the council. I entirely

(1) [1911] A. C. 1. (2) [1909] 2 K. B. at p. 336.

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agree to that, and do not shrink from saying so. Similar words were used by the Master of the Rolls in *Spackman* v. *Plumstead Board of Works*. (1) But such considerations ought not to influence our decision: see observations of Lord Selborne in the same case. (2)

It is not to be presumed that the council will use the powers unjustly or unfairly to the prejudice of rights properly acquired under a resolution of the Metropolitan Board of Works, whose successors they are. Nor has the architect, in certifying, power to act wrongly or unfairly. Whether legally he is the servant of the council or not—he is not so in fact—it is his duty to have regard to private interests as well as public. If he disregards what is a general line in fact, he will have to shew that he has had good reason. But I do not think that is so in this instance, for here he followed the former line and in doing so can rely on s. 27 as justifying him. The observations of Lord Selborne in the House of Lords in *Spackman* v. *Plumstead Board of Works* (3), to which I have already referred, are of much importance on this part of the subject. For these reasons I think we are bound by the decision quoted above, and that our judgment ought to be for the respondents. But I have arrived at this conclusion with hesitation, and with much respect for the opposite opinion arrived at by my brother Lush.

LUSH J., as the junior judge, withdrew his judgment, and judgment was given for the respondents.

Appeal dismissed.

The applicants appealed.

1914. Feb. 17. *Macmorran, K.C.*, and *Herbert Smith*, for the appellants. It cannot be assumed that the old houses built on the forecourts were unlawfully there, and it is for the respondents to shew that they are not built on old foundations; Horwood's map, which was used for this purpose, was not evidence: *Hammond* v. *Bradstreet*. (4) It was not made at the instance of any public body or for any public purpose; and it appears

(1) (1884) 13 Q. B. D. 878, at p. 890.
(2) 10 App. Cas. at p. 241.
(3) 10 App. Cas. at pp. 240, 241.
(4) (1854) 10 Ex. 390.

to have come into existence merely as the speculative venture of a map-seller. If the map goes, there is no evidence that these buildings were not there as far back as 1793.

The proceedings in 1867 shew that the Metropolitan Board of Works then agreed to the inner edge of the pavement as the general building line; it was a general consent, which they were empowered to give by the Act of 1862, and the appellants are now seeking to build on a site as to which the consent of the local authority was given in 1867. Why should a consent so given not be a perfectly good consent to govern persons who choose to act upon it? It authorized all persons interested to build up to the pavement line, subject only to their leaving eleven feet from the carriageway. If the consent is without conditions, it is not limited to the particular building then existing on the spot, but enures for all time.

The cases of *Scott* v. *Carritt* (1) and *Metropolitan Railway* v. *London County Council* (2) are distinguishable on the facts; the former case decided that a conditional consent was not a consent to occupy without conditions, and that, where there was no consent, an unlawful building did not become lawful merely because the statute which imposed the prohibition had been repealed, and in the latter case the consents given by the local authority were individual consents given to individual owners; there was not, as here, a general consent to all persons interested to build up to a new general building line.

Sankey, *K.C.*, and *Daldy*, for the respondents. As to the effect of what the Metropolitan Board of Works did in 1867, *Islington Vestry* v. *Hornsey Urban Council* (3) shews that a local authority are not estopped by their conduct in giving consent. *Scott* v. *Carritt* (1) shews that the buildings were illegal buildings and ought not to be taken into consideration in determining the general building line, and *Metropolitan Railway* v. *London County Council* (2) shews that the consent of the local authority to the building of a house in advance of the general building line does not alter the general building line.

The tribunal of appeal were not bound to hold that the

(1) 82 L. T. 67. (2) [1911] A. C. 1.
(3) [1900] 1 Ch. 695.

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buildings were on old foundations. They were entitled to use their judgment in the matter and to say that these were new buildings, and the Court ought not to be astute to tie the hands of a tribunal of this nature. The maps were admissible in evidence; in any event, they were only used to support the conclusion to which the tribunal of appeal were able to come without them.

Macmorran, K.C., in reply.

Cur. adv. vult.

April 8. KENNEDY L.J. read the following judgment:—The subject-matter of the appeal to this Court in the present case is the correctness of the certificate of the superintending architect given under the London Building Act, 1894, in regard to a portion of the northern side of the Euston Road and affirmed by the tribunal of appeal under that Act. In their judgment the tribunal of appeal have found, "If our duty consisted in merely defining the general line of buildings between Hampstead Road and Osnaburgh Street, taking into consideration the whole of the buildings which now exist, we could come to no other decision than that the general line of buildings is the inner edge of the pavement." The limits mentioned in this finding comprise a length which, in the plan annexed to the judgment of the tribunal of appeal from which I have just quoted, is divided into three sections, dealt with separately in the judgment, namely, proceeding from west to east, A to C, C to D, and D to E. We are not concerned in the present appeal with any of these sections except C to D. The tribunal of appeal have as to the other sections decided that between A and C there is no general line of buildings and that between D and E there are buildings sufficient to form a general line of buildings at the inner edge of the pavement. The substantial question in the present case is whether in regard to so much of the north side of the Euston Road as lies between C and D the tribunal of appeal were right in rejecting as the general line of buildings the inner edge of the pavement which their judgment, in the passage which I have quoted, states in effect to be, on the view, the obviously right general line of buildings, if all the buildings which now exist are taken into consideration. Instead of adopting this line the tribunal of appeal affirmed

a general line, as defined by the superintending architect, some fifty feet back from the inner edge of the pavement, and, at the instance of the appellants, who represent owners of buildings within the space C to D, they stated a special case, which includes, with certain additional matter, the judgment of the tribunal of appeal, for the opinion of the King's Bench Division of the High Court of Justice, the question to be settled by that opinion being whether, upon the facts stated in regard to the defining of a general line of buildings between the limits C and D, the order of the tribunal of appeal affirming the certificate of the superintending architect was right in law. When this special case came on for hearing in the Divisional Court, the two learned judges who composed the Court differed in opinion, Ridley J. holding that the judgment of the tribunal of appeal was right, and Lush J. taking, in favour of the appellants, a contrary view. Lush J., as the junior judge, withdrew his judgment, so that the judgment of the tribunal of appeal stands, unless the decision of the Divisional Court is reversed by this Court, to which an appeal from that decision has been brought. The case, as the difference of opinion in the Divisional Court indicates, is one of difficulty; but, upon the whole, the conclusion at which my brother Lush arrived, in his full, minute, and closely reasoned judgment, appears to me to be the better one, and therefore, in my opinion, this appeal ought to be allowed.

The grounds of fact and of law upon which the judgment of the tribunal of appeal proceeded in supporting the general line of buildings certified by the superintending architect are so fully stated in the report of the proceedings in the Divisional Court (1) that it is needless for me to repeat them or to refer to them in any detail. That statement is a copy of part of the judgment of Lush J., and no question has arisen, I think, as to its accuracy or its completeness.

Substantially the position is this: The tribunal of appeal has held, and the learned counsel for the London County Council contend that it has rightly held, upon an inference drawn from the Horwood maps of 1793 and 1819, that the bulk of the older buildings erected before 1855 and abutting upon the inner edge

(1) (1913) 108 L. T. 110.

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of the pavement were in the year 1867, and are at the present time, by reason of the statutes of 1756, 1808, and 1826, unlawful erections, being within fifty feet of the highway and not being upon the site of old foundations. The importance of this is that if, as the tribunal of appeal have also held, the decisions in *Scott* v. *Carritt* (1) and *London County Council* v. *Metropolitan Railway* (2) are applicable to the present case and exclude the consideration of "unlawful" buildings, we are (argue the respondents) thrown back upon the "more or less continuous line of buildings situated about forty-eight or fifty feet from the pavement and some at a slightly greater distance which exists now and has been in existence for many years"; and that is the line, substantially, which the superintending architect has adopted and the tribunal of appeal has affirmed for this section C to D as the general line of buildings.

I cannot accept either the reasoning or the conclusion.

In the first place, I do not think that the Horwood maps were admissible in evidence for the purpose for which the respondents sought to use them. They were apparently but the speculations of a publisher, not official productions, put forth as topographical guides to parts of London in certain areas. They were not used in this case as evidence of reputation, but as evidence of a matter of fact, the evidence of the absence of building on certain sites on certain dates, wherefrom the respondents wished the tribunal of appeal to draw an inference that the buildings which now stand on those sites, and which for the most part were represented, but at lower elevation, in 1867, are "unlawful" buildings. For such a purpose I think that the maps could not properly be put in evidence (see the judgments in the recent case of *Attorney-General* v. *Horner* (3), and especially the judgment of Hamilton L.J. at p. 155). If this view is, as I think it is, the right view, the ground for holding it proved in the case of any of the structures on the inner line of the pavement, that they are unlawful erections, is taken away. But, apart from this consideration, I have come to the conclusion that the judgment in favour of the respondents ought to be reversed. It appears to

(1) 82 L. T. 67.
(2) [1909] 1 K. B. 116; 2 K. B. 317; [1911] A. C. 1.
(3) [1913] 2 Ch. 140.

me that it is not competent to the London County Council now to disregard what was authorized or approved in 1867-8 by the responsible local authorities as they then existed—the Metropolitan Board of Works and the vestry of St. Pancras—followed as it has been, on the faith of such approval and authority, by the erection in the course of the last thirty-five years in two cases at least of some new buildings up to the inner edge of the pavement and the heightening of many others which at that time stood at that line, but had a lower elevation than they have at present. It would serve no useful purpose to set out in detail what took place in 1867-8. The facts are not in dispute. They appear fully in the special case and in the documents annexed to and forming part of the special case, and they are carefully epitomized in the judgment of Lush J. (1) Very shortly stated, what happened was this. Mr. Bauman, the owner of No. 316, was summoned before the magistrate and convicted, the offence being that he had built upon the forecourt of his premises and to the pavement line a two-storeyed shop without the consent of the local authority, the Metropolitan Board of Works, which had authorized only a one-storeyed building on that site. The conviction, no doubt, involves, as a fact, the fixing by the superintending architect of a general line of buildings in rear of his forecourt so far as regards Mr. Bauman's property. The magistrate stated a special case, but the High Court affirmed the conviction. Bauman appealed. Whilst his appeal was pending, he and a number of persons interested in adjacent properties on which buildings of varying and irregular height had been erected up to the pavement line, which they had adopted as a uniform building line, memorialized the Metropolitan Board of Works and prayed the Board to authorize their proper officer to determine that the general line of buildings referred to in the memorial (i.e., the inner line of the pavement) might be held to be the general line of buildings for the frontage to the Euston Road. The Metropolitan Board of Works referred the matter to the report of Mr. Vulliamy, their architect, and, in effect, he approved of the recommendation subject to the line of frontage being left eleven feet from the kerb

(1) Ante, p. 859.

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line of the Euston Road and to the submission of his report and the plan annexed to it to the opinion of the vestry of St. Pancras, to the freeholders, and to others interested. The architect's suggestion was carried out. The vestry of St. Pancras and the other interested parties were consulted, and eventually, in November, 1867, in accordance with the report of a committee who had investigated the matter, the Metropolitan Board of Works sanctioned the proposed frontage as an improved frontage, giving, on that part of the Euston Road with which this case is concerned, a uniform line of frontage ten feet to eleven feet back from the outer edge of the kerb to the foot-pavement. The St. Pancras Vestry agreed, and the proceedings against Bauman were discontinued. Since that time, as I have already said, some buildings have been erected, and many have been raised in height, up to what Mr. Vulliamy's report calls the "new and regular frontage" proposed by the memorialists, and, as I think Lush J. is correct in saying, in almost all cases without apparently asking for or obtaining any consent of the Metropolitan Board of Works up to 1894, or, so far as I can see upon the facts stated in this special case, after that year (which was the year in which the London Building Act substituted the London County Council as the local authority for the Metropolitan Board of Works) from the London County Council.

In these circumstances one would be very reluctant to hold that the London County Council can entirely disregard the deliberate action of their predecessors in authority, upon the faith of which during a period of many years valuable buildings have been erected and bought and sold; I agree with my brother Lush that we are not obliged so to hold in the present case. It is contended by the respondents that the action of the Metropolitan Board of Works was ultra vires, because, as I understand the tribunal of appeal to find in their judgment, there was in 1855 and 1867 a general line of buildings, some forty-eight or fifty feet back from the pavement, if the buildings in front of them were to be disregarded, and at the later of these two dates, there is no doubt that, as Mr. Bauman could not otherwise have been convicted, the superintending architect had certified, at any rate in respect of his premises, a general line of buildings at

some distance back from the inner edge of the pavement—approximately, no doubt, forty-eight or fifty feet back. But no statutory enactment or judicial authority has been cited to us for the proposition that a general line of buildings, once found to exist, is to be treated as immutable. A general line of buildings is a fact which may be modified or may cease to exist. In this very case the tribunal of appeal has decided that, whereas in 1867 there was a general line of buildings some forty-eight or fifty feet back from the inner line of pavement from A to D, there are now no buildings between A and C from which a general line of buildings in that section can be defined; and the judgment finds that there is no general line now between those limits. In *Lilley* v. *London County Council* Lord Macnaghten (1), speaking of a general line of building laid down in 1898, said, "as there has been no change in the circumstances affecting that general line of building, neither the tribunal of appeal nor any other authority has power to alter it."

In the present case there has been a change in the circumstances affecting the building line, and I see no reason why we should not recognize it. I desire to adopt entirely the judgment of Lush J. upon this point. "I agree that, if there be an existing line of buildings in fact, the local authority has no power to alter it and say without regard to the existing buildings, 'We will artificially fix such and such a line as now constituting the general line of buildings.' They have not done that. They have, in the exercise of their discretion as to what was best in the public interest, said that, having regard to the highly unsatisfactory state of things existing in the Euston Road, they would be willing that the persons interested should be allowed to alter buildings and erect new ones up to eleven feet of the roadway without hindrance so far as they were concerned; and the vestry, the only authority who could then prosecute for offences under the Act, taking the same view, were content to withdraw the prosecution of Bauman and to come into line with the Metropolitan Board of Works in order to achieve the object which they also considered desirable. I can see nothing which compels me to say that in so acting either body was acting unlawfully."

(1) [1910] A. C. 1, at p. 3.

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But then it is said by the respondents—and this is the argument which prevailed with the tribunal of appeal and which was mainly relied on by the respondents in this Court—the case is governed by two decisions, *Scott* v. *Carritt* (1) and *London County Council* v. *Metropolitan Railway*. (2) Each of those cases appears to me to be upon the facts clearly distinguishable from the present. In the first, the dispute was between a builder and a district surveyor. The builder had, without the consent of the local authority, raised the height of two buildings, both being projections beyond an undisputed building line. The Court held as to one of the two buildings that the fact that a conditional consent had been given to the erection of a one-storey building did not entitle the builder to create a two-storey building—a fairly obvious conclusion. The other building in question was, when erected, an unlawful building and a common nuisance, the statute 7 Geo. 4, c. cxlii., being in force at the time of its erection. The Court held as to this that the unlawfulness remained, although that statute had been repealed, and that this building was not one "lawfully occupied" within s. 22 of the London Building Act, 1894. There was no question in that case such as is the question in the present case, as to what buildings can properly be considered in fixing a general line of buildings; both buildings were admittedly beyond the general line; and the case seems to me, therefore, to have no bearing upon the question before us.

In *Metropolitan Railway* v. *London County Council* (3) the question to be decided did arise in regard to the definition of the general line of buildings. The Metropolitan Board of Works at various dates between these years 1864 and 1880 had given separate consents to the erection of a certain number of one-storey shops beyond the general line of buildings. The consents were in each case conditional upon the buildings to be erected being one-storey. The Court had to decide whether the superintending architect when required in 1907 to define the general line of buildings legally might or might not have regard to these one-storey buildings. The Divisional Court held that he might;

(1) 82 L. T. 67.
(2) [1909] 1 K. B. 116; [1909] 2 K. B. 317; [1911] A. C. 1.
(3) [1911] A. C. 1.

the Court of Appeal by a majority (Fletcher Moulton L.J. and Farwell L.J., Sir John Bigham dissenting) held, having regard to ss. 27 and 116 of the Act of 1894, that he might not, and the House of Lords affirmed the judgment of the Court of Appeal. It appears to me that when the facts in that case and in the present are carefully compared, and the grounds of the decision in that case as stated in the judgments in the House of Lords and the Court of Appeal are considered, it is not really an authority in favour of the respondents to this appeal. In the present case there have been no individual consents or conditional consents to build to a certain height; nor was the sanction of the local authorities given upon the basis of the buildings when erected being projections beyond an ascertained general line of buildings. The sanction in 1867 was a general sanction so to build as to bring a general line of buildings into being, and it was given in order to render the continuance of legal proceedings in regard to a disputed definition of a general line of buildings unnecessary, and to secure a new regular and improved frontage which would naturally and beyond controversy form a general line of buildings. Those who were authorized to build were so authorized upon the basis that whatever they erected—one or two or three or four or more storeys, as they pleased—would not be a building beyond the general line.

In my opinion this appeal ought to be allowed.

SWINFEN EADY L.J. read the following judgment:—This is an appeal from the Divisional Court on a case stated by the tribunal of appeal, under the London Building Act, 1894.

On September 29, 1909, the superintending architect made a certificate under s. 22 of the Act, by which he certified that the general line of buildings on the northern side of Euston Road between Hampstead Road and Osnaburgh Street was as defined by a strong red line on the plan annexed to the certificate.

Upon appeal, the tribunal of appeal on January 17, 1910, made an order confirming the certificate in part and reversing it in part. The portion of the certificate which the tribunal confirmed was the middle portion of the line shewn on the plan between the letters C and D, and this confirmation was

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subject to the opinion of the Court upon the question of law raised by the case.

There are buildings erected in the portion of the Euston Road in question, of one, two, and three or more storeys, between the strong red line shewn on the plan and the pavement. In some cases the front buildings have the appearance of having been built out from the back buildings. In other cases the back and front portions form one uniform building.

The tribunal found as follows: "If our duty consisted in merely defining the general line of buildings between Hampstead Road and Osnaburgh Street, taking into consideration the whole of the buildings which now exist, we could come to no other decision than that the general line of buildings is the inner edge of the pavement." That is to say that the present general line of buildings between the points C and D on the plan, being the portion in dispute, is in fact and without doubt the inner edge of the pavement and not the strong red line. But the point of law raised by the tribunal is whether they were bound by certain legal decisions to disregard, and treat as not existent, for the purpose of defining the general line of buildings, the bulk of the buildings now standing in the portion of the Euston Road in question and built between the strong red line and the inner edge of the pavement.

It appears that Euston Road was originally laid out as a turnpike road under an Act of 1756, 29 Geo. 2, c. 88. This Act contained a provision that no buildings should be erected on new foundations within fifty feet of the highway. If so erected, they were to be deemed common nuisances. This Act, temporary at first, was renewed from time to time, and ultimately by an Act 7 Geo. 4, c. cxlii. But this last-mentioned Act was repealed by the Metropolis Management Amendment Act, 1862, and s. 75 of that Act provided that no building should without the consent of the Metropolitan Board of Works be erected beyond the general line of buildings if the distance of that line from the highway did not exceed fifty feet. The tribunal of appeal stated that they had viewed the premises and found that there is now and has been in existence for many years a more or less continuous line of buildings, situate most of them about forty-eight

to fifty feet from the pavement, and some at a slightly greater distance between the points C and D; and that there is also at the present time a row of buildings of considerable age abutting on the inner edge of the pavement between the limits A and E for the whole length of the frontage. These last-mentioned buildings are regular in frontage but irregular in height, and consist of one, two, three, and four storey buildings. There is no evidence as to whether these buildings, which abut on the inner edge of the pavement, were erected on old foundations or not. Engraved copies were tendered of Horwood's Map of London, 1793, and of the third edition of 1819, with a view of shewing what buildings were standing in the Euston Road and abutting on the inner edge of the pavement when those maps were published, or when the survey for them was made. In my opinion those maps are not admissible for that purpose. It does not appear that the persons by whom they were made or published had any duty to discharge in so doing; the maps were just a private adventure for the purpose of profit on the sale of them. They are tendered, not as evidence of reputation, but for the purpose of proving the physical condition of the ground adjoining the pavement, at a particular date or dates, in order that the Court may infer that, in the cases in which there were not buildings then standing on particular plots, there were no old foundations on the same plots, upon which the owners could rebuild to the pavement line. It was pointed out by Hamilton L.J. in *Attorney-General* v. *Horner* (No. 2) (1) that although in certain cases hearsay evidence of reputation is admissible, there is no rule which would admit maps, as such, as physical delineations of the surface of the ground without some more proof than their mere production. In my judgment, these copies or engravings of maps, produced apparently by the London County Council, are not admissible in evidence for the purpose for which they were tendered.

There is, however, direct evidence of the circumstances under which some of the buildings in comparatively recent years have been erected to the inner edge of the pavement. It appears that one Bauman in the year 1866 commenced to build out to the

(1) [1913] 2 Ch. 140, at p. 155.

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pavement line a building comprising ground floor, first floor, and second storeys. The vestry alleged that the consent of the Metropolitan Board of Works was necessary and had not been obtained, and took proceedings against Bauman. The magistrate made an order for the demolition of so much of the building as was in front of what was then claimed to be the general building line, but stated a case for the opinion of the Court: see *Bauman* v. *Vestry of St. Pancras.* (1) The Court in June, 1867, decided against Bauman, who appealed, but other proceedings supervened which led to an all-round settlement, and to the proceedings against Bauman being abandoned. What happened was this. In 1867 the owners, lessees, and occupiers of houses on the north side of the Euston Road between Osnaburgh Street and Hampstead Road presented a memorial to the Metropolitan Board of Works alleging that they had shops, warehouses, and other buildings in the front portion of their premises and immediately adjoining the foot-pavement and had adopted as a uniform line of frontage for such buildings the line where their property adjoined the foot-pavement, and stating that they desired that such line should be established as the line of building frontage for all purposes under the statutes and otherwise. The vestry of St. Pancras desired to have the same line established, and application was made on their behalf to the Metropolitan Board of Works for the regulation of the whole line of building frontage in the Euston Road. Some of the parties were heard upon the matter by the superintending architect, and an elevation was submitted shewing the probable structures to be erected if a new line of superior buildings were sanctioned. The superintending architect made a report on the subject and formally communicated his report and plan to the vestry and to the freeholders and others interested with a view (as expressed in his circular letter of September 4, 1867) to arranging a new general line of frontage for buildings in Euston Road. The matter then came before the Building Acts Committee of the Board, and on November 12, 1867, that committee reported to the Board. They stated in their report that, as some of the owners desired to build shops immediately, it had become necessary to adopt a definite line on both sides of the road, and

(1) (1867) L. R. 2 Q. B. 528.

they recommended that the proposed line of frontage as tinted blue on Mr. Vulliamy's plan be adopted. On November 15, 1867, the matter came before the Board and the report of the Building Acts Committee was brought up, and the Board resolved: "that so much of the report of the committee as related to the application of Mr. Bauman and others, for the Board to determine the general line to which shops and houses of full elevation may be erected in Euston Road, and the plan prepared by the superintending architect and now submitted showing an improved line of frontage in such road between Hampstead Road and Osnaburgh Street, be approved and adopted; and that with respect to any buildings to be erected on the northern side of Euston Road between the points indicated, it be a condition that they shall be kept to an extreme general line from ten to eleven feet back from the outer edge of the kerb to the foot-pavement so as to present a uniform line as shown on the said plan, ... and that a copy of this resolution be sent to the vestry of St. Pancras." Thereupon a copy was sent, and the matter came before the Highways and Public Works Committee of the vestry on December 14, 1867, and accordingly they recommended that all the proceedings against Bauman be stopped and that the solicitors be instructed accordingly, and the vestry approved and adopted this recommendation on January 22, 1868, so that it became unnecessary for Bauman to proceed with his appeal, all proceedings against him being stopped. Subsequently to these resolutions and upon the faith of them a large number of buildings have been erected on the pavement line and the heights of the buildings have been raised, and in numerous cases there are three and four storey buildings built up to the pavement line.

It is necessary now to consider what was the position created by the action of the vestry and Metropolitan Board of Works, which has been referred to in detail. They regarded the pavement line as an improved line of frontage for buildings of full elevation, instead of any line forty or fifty feet further back, and having regard to the shops on the road, and the great alteration in the character of the neighbourhood from the date when the road was laid out, the action of these public bodies seems to have been in accordance with the views, wishes, and interests of all

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parties concerned, and to have been generally considered as an improvement to the street.

The conduct of these public bodies amounted to a general invitation or authority to the persons then entitled to or interested in the buildings and sites fronting the road, or subsequently becoming so entitled or interested, to treat the blue line as the general line of buildings, and that if persons acted on their resolutions, and buildings were erected accordingly, the general line of buildings would in fact become and be the pavement line, and that the alterations thus in fact brought about would make the pavement line the general line of buildings, whatever it might have been previously. The general line of buildings in any street may vary from time to time as buildings in different positions are erected, and it was intended by all parties that the pavement line should become the general line of buildings when the buildings then contemplated had been erected. It was urged on behalf of the London County Council that the Metropolitan Board or the superintending architect had not any power to define what might be considered to be a proper building line, or an improved building line, but merely to define what was in fact the general line of buildings actually erected in the street. But it was open to the local authorities to take the course they did—to determine that no proceedings should be taken against persons who erected buildings in certain positions, so that when those buildings were actually built, the general line of those buildings would become the general line of buildings in the street, whatever the previous general line of buildings might have been. In no case was any separate consent given after 1867 to any person to build up to the pavement line; indeed the matter of consent was disposed of by the tribunal of appeal, who find that with regard to the part of the line in dispute those buildings as to which consents, or refusals of consent, have been shewn were so few in number that the general line of buildings at the inner edge of the pavement would not be affected by their absence—that is, if these be omitted, no difference will be made as the remaining buildings are quite sufficient for the determination of the general line of buildings to be the inner edge of the pavement.

In my opinion, there is not anything in any decided case which requires or indeed enables the tribunal of appeal to disregard the buildings up to the pavement in determining the general line of buildings. In *London County Council* v. *Metropolitan Ry. Co.* (1) separate consents were given to separate applicants to erect a one-storey building and nothing higher beyond the admitted general line of buildings, the case of each applicant being treated as an exceptional case, and the new one-storey building not to be at any time altered or raised without the consent of the Metropolitan Board of Works. Thus there were limited consents to the erection of buildings beyond the general line of buildings; and it was held that, reading into s. 27 of the Act of 1894 the relevant provisions of s. 216, buildings erected under such consents should not be deemed to alter the general line of buildings as then existing at the time of such consents. Farwell L.J. said: "It would be an extraordinary result if a public body . . . . should by consenting to the erection of projections of one storey, and no more, in front of the line of buildings, be held to have thereby consented to the alteration of the line of buildings so as to authorize the erection of seven or eight storey buildings." And in the House of Lords (2) the Lord Chancellor quoted this passage with approval. That case has no application to the present. There were not here any consents to building in advance of a general line of buildings. In the present case, a dispute having arisen, and being the subject of litigation, the public bodies concerned settled a line upon which buildings of any height might be erected, but this was not upon the footing that the buildings would be projections in front of the general line of buildings, but on the contrary would themselves constitute the general line of buildings—would be treated as main buildings not in front of the general line.

The other case to which the tribunal of appeal referred was *Scott* v. *Carritt*. (3) A builder was there erecting two buildings beyond an admitted building line, on the ground that he did not require the consent of the London County Council, as the land had for the statutory time been "lawfully occupied" by a building

(1) [1909] 2 K. B. 317. (2) [1911] A. C. 1, at p. 4.
(3) 82 L. T. 67.

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(London Building Act, s. 22, sub-s. 2). It was decided that the former building on one of the plots, which had been erected within fifty feet of the road, at a time when an Act was in force declaring such a building to be a nuisance, was and remained a common nuisance, and therefore the ground was not "lawfully occupied" by that building. The building on the other plot was a one-storey building, erected under a conditional consent, and it was held that such a consent ceased to exist when the condition was broken.

It was urged that all the buildings abutting on the pavement (unless built on old foundations) were common nuisances if built between 1756 and 1855, and therefore unlawful, or if built after 1855 were either erected by consent, or were unlawful if erected without consent. There is not any evidence that the erections made before 1855 were not on old foundations. As they have been standing without objection from any one for nearly sixty years, the presumption is in favour of their having been lawfully erected. With regard to the buildings since that date, the proceedings of 1867, with which I have already fully dealt, negative any illegality in making or continuing these erections.

I am of opinion that the judgment of Lush J. in the Court below was quite right, and that the buildings abutting on the pavement must be considered when fixing the building line, and that upon the facts stated in the case the order of the tribunal of January 17, 1910, defining the general line of buildings between the points C and D was wrong in law, and that the true general line of buildings between the same points is the inner edge of the pavement.

KENNEDY L.J. I am desired by Vaughan Williams L.J., who is unable to be present, to say that he regards this case as one of considerable difficulty, but that he desires not to differ from the conclusion at which my brother Swinfen Eady and I have arrived.

Appeal allowed.

Solicitors for appellants: *Dalston, Sons & Elliman.*
Solicitor for respondents: *E. Tanner.*

NOTE.—By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75, " . . . . No building, structure or erection shall, without

the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being . . . . " By s. 76, " The Metropolitan Board may, in giving consent for any erection beyond the regular line of the buildings in any street, annex any condition to the consent given by the Board . . . ."

The above sections were repealed by s. 215 and the Fourth Schedule to the London Building Act, 1894.

By s. 22, sub-s. 1, of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), " No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall, if required, be defined by the superintending architect by a certificate, such certificate to be issued within one month from the date of the application therefor."

By s. 25, " The local authority or any person deeming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal."

By s. 27, " The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent."

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[IN THE COURT OF APPEAL.]

CUE *v.* PORT OF LONDON AUTHORITY.

Employer and Workman — Compensation—Basis of Calculation—"Average weekly earnings"—Casual Labourer—Concurrent Contracts of Service—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched.* I. (1.) (*a*) (i.) *and* (2.) (*a*).

The deceased, a workman employed by the Port of London Authority, having met with an accident which resulted in his death, his widow applied for compensation under the Workmen's Compensation Act, 1906. Liability was admitted and 150*l.* paid into Court by his employers. The deceased had worked for them for three years as a casual labourer; there was no obligation on him to work for them, nor on them to employ him. During the three years preceding the accident he had worked for them on an average forty-two weeks in each year at wages alleged by the employers to amount to 18*s.* 9*d.* a week. During the last twelve months he had also earned 67*l.* 7*s.* 10*d.* at 1*l.* 5*s.* 2*d.* a week as a casual labourer in the employment of the Cunard Thompson Line. The county court judge held that there were concurrent contracts of service, and that the deceased's wages for both employments during the last twelve months had averaged 2*l.* 3*s.* 11*d.*; and he awarded the widow 300*l.* compensation:—

Held, that there were no concurrent contracts of service and the average weekly earnings of the deceased must be calculated under Sched. I., pars. (1.) (*a*) (i.) and (2.) (*a*); that these paragraphs must be read together and that the words in (2.) (*a*) "the rate per week at which the workman was being remunerated" meant remunerated by the same employer; and that the case must go back for assessment of the compensation.

Appeal from an award of the judge of the Southwark County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On August 16, 1913, James Cue, a workman employed by the Port of London Authority, met with an accident arising out of and in the course of his employment, which resulted in his death. He worked as a corn porter, and whilst discharging grain at the Commercial Docks fell into the dock and was drowned. His widow and children applied for 300*l.* compensation and gave his earnings for the last three years as averaging 2*l.* 8*s.* per week. The employers, the Port of London Authority, alleged

that his earnings in their employment during the three years next preceding his death amounted to 146*l.* 1*s.* 2*d.*

It appeared that the deceased workman was a casual labourer and had worked for the employers for three years, averaging about forty-two weeks for each year. During the twelve months from August 2, 1912, to the end of July, 1913, he also earned 67*l.* 7*s.* 10*d.* as a casual labourer in the employment of the Cunard Thompson Line. He was only employed by the employers when there was a job and a vacancy, and there was no obligation on him to work for them, and no obligation on them to employ him.

The employers admitted liability; alleged that his average weekly wages earned with them during the previous three years were 18*s.* 9*d.*; that that sum multiplied by 156 in accordance with Sched. I. (1.) (*a*) was less than 150*l.*; and they paid 150*l.* into Court.

The learned judge held that the deceased had concurrent contracts of service with the employers and the Cunard Thompson Line; his average weekly earnings were admitted to be 18*s.* 9*d.* a week with the former and 1*l.* 5*s.* 2*d.* with the latter, so that during the last twelve months he earned 2*l.* 3*s.* 11*d.* a week; that amount multiplied by 156 under Sched. I. (1.) (*a*) came to more than 300*l.*; therefore he awarded the applicants 300*l.*

The employers appealed on the grounds that there were no concurrent contracts of service and that the learned judge ought to have assessed the compensation due to the applicants at an amount not exceeding the sum of 234*l.*, i.e., 30*s.* a week, representing the average wages of a workman of the same grade, multiplied by 156.

George Wallace K.C., and *C. B. Marriott*, for the appellants. Where a man is casually employed by two different employers there can be no concurrent contracts of service within the meaning of those words in Sched. I., paragraph 2 (*b*). The county court judge was wrong in finding upon the facts of this case that there were concurrent contracts of service. Such a construction would apply to every case of casual labour. There must be concurrent contracts, and not merely concurrent service.

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"Concurrent" does not mean consecutive contracts. [They referred to *Lloyd* v. *Midland Railway* (1), *Perry* v. *Wright* (2), and *Cain* v. *Leyland*. (3)]

E. M. Pollock, K.C., and *S. Duncan*, for the respondents. The county court judge has rightly held that there were concurrent contracts of service. The man worked at one time for one employer and at another time for another, and his wages during the past twelve months averaged 2*l*. 3*s*. 11*d*.

The dominant principle which governs the method of ascertaining "average weekly earnings" is to be found in the first sentence of Sched. I. (2.) (*a*). (4) That applies to the case of any number of employers.

(1) [1914] 2 K. B. 53.
(2) [1908] 1 K. B. 441.
(3) [1908] 1 K. B. 444.
(4) Sched. I. (1.): "The amount of compensation under this Act shall be—

"(*a*) where death results from the injury—

"(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer."

(2.) "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—

"(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman

[PICKFORD L.J. What then is the use and purpose of clause 2 (*b*)?]

That applies to cases of distinct contracts of service entered into with different employers. In *Snell* v. *Bristol Corporation* (1) Sir S. Evans P. said that it might be practicable in cases of casual labour to make a fair computation of what the average weekly earnings were. The first part of paragraph 2 (*a*) affords the rule; the provisoes are merely ancillary.

[SWINFEN EADY L.J. referred to *Hathaway* v. *Argus Printing Co.* (2)]

That was under the Act of 1897. Assuming that the learned judge was wrong in holding that these were concurrent contracts of service, he has nevertheless arrived at a correct result. Under paragraph 2 (*b*) there may be several contracts of service, each for part only of a day, which will thus fill up the workman's time. An employer for part of a day would not be liable for the whole day under paragraph 2 (*a*), although he would be so under 2 (*b*). But under 2 (*a*) the earnings under all the employers must be taken into consideration. Casual labourers are in a different position from men employed on continuous contracts: *Lysons* v. *Andrew Knowles & Sons* (3); but the earnings under all the casual employers are material. The Act did not intend to exclude any labourers from compensation.

[SWINFEN EADY L.J. Under the proviso to 2 (*a*) the arbitrator must do the best he can in difficult questions of casual labour: *Barnett* v. *Port of London Authority*. (4)

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has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

(1) [1914] 2 K. B. 291, 297.
(2) [1901] 1 K. B. 96.
(3) [1901] A. C. 79.
(4) [1913] 2 K. B. 115, 121.

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PICKFORD L.J. The question is whether we can [consider wages paid by more than one employer.]

Under the proviso to 2 (*a*) the arbitrator has to do the best he can, and he may if necessary refer to persons in the same grade. That is not necessary here, for the true result can be arrived at by adding together all the wages earned by the deceased. His earnings from all his employers must be taken into consideration. Further, allowance must be made for his personal qualifications.

George Wallace, K.C., in reply. The case need not go back to the county court. This Court has ample materials before it on which to give judgment for 234*l.* It should not be assumed without evidence that the deceased had any special qualifications. It is quite clear that earnings under one employer only are contemplated by Sched. I., paragraphs 1 and 2. The words "was being remunerated" in 2 (*a*) mean remunerated by the same employer. Earnings from other persons are not considered except under the last two lines of 2 (*a*) on questions of grades, or under 2 (*b*) as concurrent contracts.

COZENS-HARDY M.R. This is an appeal which raises a point as to the principle upon which the earnings of a casual porter employed by the Port of London Authority ought to be ascertained.

Now it has been my fate in at least three cases, namely, *Perry* v. *Wright* (1), *Snell* v. *Bristol Corporation* (2), and *Barnett* v. *Port of London Authority* (3), to go at some length into what in my view is the true principle to apply. Having listened to all the arguments in the present case, I do not desire to detract from or vary one single sentence in any of those judgments, but it is right, having regard to what we have heard from Mr. Pollock, that I should say a few words. The deceased man, who met with his death by an accident undoubtedly arising out of and in the course of his employment, had been employed casually by the Port of London Authority for about forty-two weeks in each of the three years next preceding his death, that is on the average, or, in other words, he was employed for parts of 126 weeks during the three years. He was also employed by another shipping

(1) [1908] 1 K. B. 441. (2) [1914] 2 K. B. 291.
(3) [1913] 2 K. B. 115.

company for a considerable time during which he earned much higher wages.

The case before the learned county court judge was put in this way: The Port of London Authority said "Add up the actual earnings which he has made in our employment and divide it by the proper number of weeks, and that will be the right figure," and then they submitted to an award for a sum which they now admit to have been inadequate. They now offer 234*l.*, arrived at in the manner which I shall describe.

The learned county court judge based his judgment on this. He said it was a case of concurrent contracts, one with the Port of London Authority, another with a shipping company; and that what had to be done was this, to make a very simple calculation, to add up the total earnings under those concurrent contracts, and that that would give sufficient to entitle the dependants to the maximum figure under the Act. It has been scarcely contended here—in fact I am entitled, I think, to say that it has not been contended—that the decision of the learned judge on that ground can be supported. It is quite clear there were no concurrent contracts; there were successive contracts, and the point about concurrent contracts was not argued by counsel for the defendants. I think, therefore, that the learned judge's decision so far as it was based on that ground cannot be supported. Prima facie, therefore, the case ought to go down for a new trial; but Mr. Pollock has ingeniously sought to raise this point. He says that, assuming that it is a casual contract, the proviso in Sched. I., paragraph 2 (*a*), has nothing whatever to do with the case; that we have to find on the language of the Act itself what were the actual average earnings of the man; that we can do it, and that we can only go to the proviso if necessary. I am not in sympathy with that view. I can see no justification for saying that we are to disregard the clear words of the Act in Sched. I., paragragh 1 (*a*) (i.), where it speaks of the weekly earnings under the same employer. I think it is altogether wrong to disregard those words, and to say that we are not called upon to consider what were his earnings under the same employer. Mr. Pollock relied on these words of Sched. I., paragraph 2 (*a*): "average weekly earnings shall be computed in

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such manner as is best calculated to give the rate per week at which the workman was being remunerated." It is very curious drafting, but I think that means that the average weekly earnings shall be computed in the manner which is best calculated to give the rate per week at which the workman was being remunerated under the same employer. Then the proviso says there may be difficulties in doing that. Take the case of a "season" occupation, as it is sometimes called, such as harvesting, and of a man who is injured during harvesting, when it is common knowledge that his earnings are much higher than they are during the rest of the year. That is a case in which we cannot have regard to that period as at all decisive or sufficient to enable us to arrive at the rate at which he was actually being remunerated. The proviso says: "Where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." Throughout it seems to me that what we have to find as best we can is what were his weekly earnings under the same employer for the particular period in question. In some cases that is three years. In other cases it may only be for twelve months. This is a casual labourer; and the proviso expressly mentions the casual labourer. The casual labourer was held to be within the old Act in *Lysons* v. *Andrew Knowles & Sons* (1), where a man was only employed for a few days, but it was quite obvious that injustice was done by the provisions of that Act. Then this strange clause was put in; I say strange, but it is still more strange when we look at Sched. I., paragraph 2 (*b*), because, having said in the earlier part that what we have to ascertain is the earnings of the workman under the same employer, the proviso

(1) [1901] A. C. 79.

goes on to say that if there are two concurrent contracts we are to add up the earnings under both of them. It is a very strange piece of drafting for which I have not heard a word of commendation uttered by anybody; certainly no word of commendation has ever fallen from the Bench.

The arbitrator has to find what the amount of earnings under the same employer would have been for the last twelve months; and I think this also is clear: that in cases to which the proviso applies we cannot take the average earnings of men in the same class and disregard the fact that the particular workman in question may be a specially bad man, an average man, or a specially good man. We have to deal with the particular grade, and there is a grade of these porters. Some may be better than the average and some lower than the average. I think without any difference of opinion in any Court it has always been held that, acting under paragraph 2 (*a*), the personal qualifications of the man may be considered, and that the mere average is not conclusive of the matter. Mr. Wallace does not dispute that as a proposition, but he says there is no evidence here that the deceased man was other than an average man; that that being so, the thing we must have regard to is what were the average wages of this grade; and that the average wages were 30*s.* a week. By his amended notice of motion he has offered to accept an award of 234*l.* on that footing. This is the point on which alone I have felt any difficulty. What we have to ascertain as best we can is what were the average earnings or would have been the average earnings of this man during the previous three years. We cannot ascertain that in the same way as we should where a workman has been employed for three years under a contract for so many shillings a week. The test we have to apply is not what would his earnings have been in another employment of the same class, but what is it reasonable to suppose that his earnings would have been in the previous twelve months, and not the three years. What we have to find is not what this man could have got in the whole market, but what would have been his average earnings under the same employer. It is said that in arriving at that we ought to disregard the fact that if he had gone elsewhere he might have got

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more than he got at the Port of London. If, as is said, the Port of London Authority are in the habit of paying lower wages than other employers, that, of course, is a fact that would be taken into consideration, but with the evidence before us that this particular man when employed by other people did earn wages considerably in excess of the average of 30*s.* a week, and having regard to the fact that the learned county court judge seems to have disregarded altogether that consideration, I think that the case ought to go back to him to be dealt with, not on the footing of Mr. Pollock's contention, and not necessarily on the footing of Mr. Wallace's contention, but that he should have regard to the personal qualifications of the man. He seems to have disregarded them and proceeded on an entirely different footing.

For these reasons I think the appeal should be allowed, and there must be a new trial unless the parties can agree on a figure.

SWINFEN EADY L.J. I am of the same opinion. The learned judge in the Court below has given the applicants the compensation claimed upon the footing of concurrent contracts. He says that the deceased workman had entered into contracts of service both with the respondents and the Cunard Thompson Line during the twelve months immediately preceding his death. In my opinion the judgment proceeding on that ground was erroneous. It is not a case of concurrent contracts of service. Perhaps these may be called successive contracts, because technically, even with casual employment, for the time of the actual employment there was a subsisting contract, but it was merely casual employment; that is to say, there were no running contracts under which the employer was entitled to require the labour of the workman or under which the workman was entitled to demand employment from the employer. Sched. I., paragraph 2 (*b*), is a useful clause applying to cases where there are strictly concurrent contracts of service, where a workman may have contracts at the same time running with two or more employers during the same week or month or whatever the period may be. During part of the day or part of the week he would work for one employer, and during another part of the

day or another part of week, as the case may be, he would work for another employer. In that case the weekly earnings under the two are added so as to ascertain what his earnings were, and they are to be treated as if those were the earnings earned in the employment of the employer for whom he was working at the time of the accident. Paragraph 2 (*b*) refers to concurrent contracts properly so called, and not to a case of casual employment where there are no co-existing contracts at all. For these reasons I am of opinion that the judgment below was erroneous.

Then it was argued that the learned judge ought to have ascertained the average weekly earnings which the workman was in fact earning, and that they ought to have been ascertained by taking the aggregate earnings under all his employers during the last year. The short answer to that is that the schedule does not give the workman remuneration on that basis. Sched. I., paragraph 1 (*a*) (i.), applies where the workman has been in the employment of the same employer for some time: if for three years, then his earnings are to be ascertained on that basis. If for less than three years, the earnings are to be ascertained on the basis of the period of his actual employment whatever that period may be under the same employer. Then it may be that the period is so short or for some other reason we cannot fairly estimate the workman's wages; either not fairly towards the workman or not fairly towards the employer, especially where the period is very short. In the present case, as there was only a casual employment, paragraph 1 (*a*) (i.) cannot be applied. It is impracticable to apply that paragraph because under it the man's earnings cannot be ascertained. Then paragraph 2 provides that "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman the following rules shall be observed:—(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." In my opinion that means was being remunerated by the same employer. It may be that the man was ill during part of that time, and could not work, it may be that work was short, it may be that some holidays intervened, it may be that there were exceptional circumstances under which it would not be fair

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to take the strict application of paragraph 1 (*a*) (i.). Then his earnings must be computed in the manner best calculated to give the rate per week at which he was being remunerated. Then comes the proviso which does in my opinion apply to the present case. There is a provision "that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration." Here it is impracticable by reason of the casual nature of the employment. It would be unfair to the workman to take only his employment under the Port of London Authority, because his average there would work out at something like 18*s.* 9*d.* a week. Then we may have regard to the average weekly amount which during the twelve months previous to the accident was being earned by the man; and this is where the twelve months comes in; previously it was three years. When we take the average for the purpose of this paragraph we may have regard to what during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer. The word "same" being repeated in this proviso indicates that it is to that employment that we are to look in order to fix a scale of compensation under the statute. We are to have regard to the weekly amount which during the twelve months previous was being earned by a person in the same grade and at the same work under the same employer. It does not follow from that—in fact the contrary has been established—that although we may refer to the grade or to the position in which the man was being employed, workmen in the same grade are all equal. Some workmen are better than others, and if the man in question was a superior workman evidence may be given of that fact with a view of increasing the compensation that should be paid. But the amount of compensation would be limited by the grade of men employed in the same work by the same employer; that is the limit of the compensation. In determining the amount of compensation to which the man is entitled we may also have special regard to his personal qualifications. I can see no difficulty in

the present case in arriving at the compensation on that basis. It has not been done in the Court below.

In *Snell* v. *Bristol Corporation* (1) Cozens-Hardy M.R. first of all pointed out during the argument that it was wrong to add together the actual earnings of the man with various employers in order to arrive at his wages earned. Then he says (2): "The learned judge really seems to have thought that the only question was: Is it to be 12*s.* 6*d.*, which is half the average, or is it to be the half of 2*l.*, which the man himself had earned during the previous twelve months? That, I think, is not the test. Those earnings are elements which may be taken into consideration, and that is all." Sir Samuel Evans P. in the same way said (3): "It would be wrong for the judge in this case, or in any other case, to adopt a hard and fast rule and to say that a man has actually worked for a twelvemonth and has had the average weekly earnings of so and so. If that is adopted as a hard and fast rule it is wrong; but that is obviously not only a consideration, but a very important consideration, in making a computation as to what the average weekly earnings of a man ought to be estimated to be." That really means this: that in arriving in the best way we can at what the average weekly earnings ought to be estimated at under the Port of London Authority we may have regard to what his earnings were elsewhere, what his conduct has been, what his qualifications were, in order to see whether or not he is entitled to be regarded as capable of earning, and whether he would probably have earned, the maximum rate of wage paid by that employer.

On these grounds I think the case ought to go back to the learned judge for the compensation to be settled, and that there ought to be a new trial.

PICKFORD L.J. I am of the same opinion. The learned county court judge has decided the amount of compensation to be awarded to this applicant on the principle of there being concurrent contracts which he was entitled to take together. The man was a casual labourer. He worked for two different employers,

(1) [1914] 2 K. B. 291. (2) [1914] 2 K. B. 295.
(3) [1914] 2 K. B. 298.

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the Port of London Authority and the Cunard Thompson Line. Now the nature of casual employment of that kind is quite well known. The contract that exists is the contract that arises from the taking on of men to do a job and the job is for a whole day or a half-day, as the case may be. As soon as that job is done the contract is done. He then on the next day, or if he has only worked half a day possibly the same day, takes another job from another employer, but he does not do that till the first job is finished. The result of that is that he only takes the second job, on which the contract arises, after the first one is finished, and he only takes a later one after the former one is finished. They never exist together, and I have been from the moment that this case was opened at the greatest loss to see how two contracts can possibly be concurrent when they never exist together. Indeed the respondent to the appeal has never attempted to uphold the learned county court judge's judgment on that basis, and, as I gather, it was not a point that was argued before the judge or was expressly taken. But the respondent seeks to uphold the amount of the award of compensation on another ground, namely this, that the man being employed casually, and it being possible to ascertain for the twelve months preceding this award of compensation what his average weekly earnings were, that amount is to be taken as the amount of his average weekly earnings; that is to say that, inasmuch as taking the whole time that he has worked for the previous twelve months he has averaged something like 45*s.* a week, that and that alone is the thing which is to be looked at in arriving at what his average weekly earnings for that period were. Now that seems to me to proceed upon an erroneous construction of the opening words of Sched. I., paragraph 2 (*a*). It proceeds upon a construction which gives the meaning to those words that in the case of casual employment we are to look at what the man has earned under any number of employers, and say that those are his average weekly earnings for the purpose of the paragraph, namely, that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." I think that is an erroneous construction. "Average weekly earnings" in paragraph 2 must

be read as having the same meaning as "average weekly earnings" in paragraph 1, and it means average weekly earnings under the same employer. It was conceded by Mr. Pollock that anybody apart from authority and having regard to grammar and common sense would read it in that way, but he said there were authorities which obliged us to read it in a different way. I have heard no authority which comes within any measurable distance of laying down such a meaning for those words, and I think therefore that they must be read in the way that has been mentioned by the other members of the Court, namely, that his earnings must be computed in such a manner as is best calculated to give the rate per week at which the workman was being remunerated by the employer under whom he was working, and it seems to me that if that were not the meaning paragraph 2, sub-paragraph (*b*), would be quite without meaning; because the opening words of sub-paragraph (*a*) are not confined to casual labour, they apply to contract labour, and every other labour, and therefore, if that be the proper meaning, the earnings under every employer would have to be taken together and the provision as to concurrent contracts would be quite meaningless. Also I think the proviso to paragraph (2.) (*a*) points very strongly in that direction too, because it says that where by reason of the shortness of the time or the casual nature of the employment or other matters it is impracticable to compute the rate of remuneration, regard may be had in the first instance to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer.

Now, if the opening words of (2.) (*a*) would apply to every employer, why, when we cannot apply them, should we go to a person in the same grade employed by the same employer? It seems to me that the two must be read together, and we go to a person employed by the same employer first because we are dealing with the remuneration paid by the same employer; and it is only when we cannot find a person in the same grade employed by the same employer that we go to a person employed somewhere else of the same grade in the same district. If that is so, it is clear that the award cannot

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be supported on the ground on which the respondent seeks to support it.

The right principle which has to be applied has been laid down in several cases. It is this. In a case like this it is impracticable to ascertain the remuneration in the ordinary way: we must therefore look at a person in the same grade; we look at the average earnings of persons in the same grade, and then, if there be any special qualification in the man with whom we are dealing which would make him likely to earn more than the average or less than the average, regard must be had to that personal equation, as it has been called, as well. That is the principle which will have to be applied by the judge when this case comes before him again. The only doubt that I have had is whether there is any evidence at all of differentiation of this man from other men before the county court judge. The applicants did not run their case on that line at all, and therefore no positive evidence was given, and the only evidence was that the deceased had in fact earned during the previous twelve months more than the average wages of persons in the same grade employed by the same employer; but as that was brought about by his being employed by a company who paid higher wages for part of the time, I have some doubt whether that really was evidence of exceptional ability or steadiness or industry on the part of this man. But on the whole I think, as the applicant raised an erroneous contention before the county court judge, as the main contention by the respondents, the present appellants, before the county court judge was also erroneous, and as the county court judge's decision was erroneous on a principle which was not contended for by either side, it is more satisfactory that the case should go down and be retried. It seems to me that the fact that the workman had earned more than the average wages of a person in the same grade employed by the same employer cannot be used to raise his average weekly earnings above the maximum earnings of persons in the same grade employed by the same employer. That is the outside to which we can go. We must still have regard to earnings of persons in the same grade employed by the same employer, and if his wages are higher than the maximum

earned by persons in that grade he cannot be entitled to that excess. I agree, therefore, that this case should go down for a new trial.

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Appeal allowed.

Solicitors: *Ernest Glenshaw; Berry Tompkins & Co.*

H. C. R.

HITCHINGS AND COULTHURST COMPANY *v.* NORTHERN LEATHER COMPANY OF AMERICA AND DOUSHKESS.

1914 *July* 20, 24.

[1913 H. 2806.]

Promissory Note—Note given for Goods supplied to Makers—Surety—Oral Agreement that Surety should not be liable if Goods supplied were not equal to Sample — Admissibility of Evidence — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 21, *sub-s.* 2 (*b*).

The plaintiffs sued the defendants on a promissory note made by the defendant company and indorsed at the request of the plaintiffs by the defendant D., who was president of the defendant company. The note was given in part payment of goods supplied by the plaintiffs to the defendant company. The defendant company did not appear at the trial, but the defendant D. appeared and set up an oral agreement made by him with the plaintiffs, contemporaneous with the promissory note, that he was not to be called upon to pay if the goods supplied to the defendant company should be unequal to sample. The goods were retained by the defendant company, but D. proved that they were unequal to sample:—

Held, that the oral agreement relied upon by D. not being an agreement suspending the coming into force of the contract contained in the promissory note, but being an agreement in defeasance of that contract, evidence in support of it was inadmissible, and, therefore, that D. was liable on the promissory note.

ACTION tried by Bailhache J. without a jury.

The plaintiffs sued the defendants the Northern Leather Company of America as makers, and the defendant Doushkess as indorser, of a promissory note dated August 18, 1913, payable sixty days after date to the order of the plaintiffs. The note was given in respect of goods supplied by the plaintiffs to the defendant company, and the plaintiffs requested the defendant Doushkess,

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who was president of the defendant company, to indorse the note. Notice of the dishonour of the note had been duly given.

The goods were in fact delivered by the plaintiffs to the defendant company, who retained the same. The defendant company put in a defence alleging that the plaintiffs had not delivered goods of the description, quality, and grade of the samples submitted to them, but they did not appear at the trial and judgment was given against them.

The defendant Doushkess by his defence said that he indorsed the note as surety for the defendant company, and he proved an oral agreement made between him and the plaintiffs, contemporaneous with the promissory note, to the effect that if the goods when received by the defendant company from the plaintiffs should be unequal to sample he was not to be called upon to pay. He also proved that the goods were not in fact equal to sample.

Rayner Goddard, for the plaintiffs.

Austin Farleigh, for the defendant Doushkess. This is an action between immediate parties to the promissory note, and the defendant is entitled to shew that he signed it conditionally. He in fact signed the note on the condition that the goods supplied should be equal to sample, and that condition not having been satisfied he is not liable. In *Lindley* v. *Lacey* (1) Byles J. said (at p. 587) that "evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend." That is precisely in point in the present case.

[BAILHACHE J. referred to *Abrey* v. *Crux*. (2)]

Rayner Goddard in reply. Sect. 21, sub-s. 2, of the Bills of Exchange Act, 1882, provides as follows: "As between immediate parties, ... the delivery . . . . (*b*) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill." In this case it is clear that the promissory note was delivered to the plaintiffs for the purpose of transferring the property therein to them. The test whether oral evidence is admissible in such cases

(1) (1864) 17 C. B. (N.S.) 578. (2) (1869) L. R. 5 C. P. 37.

was laid down by Vaughan Williams L.J. in *New London Credit Syndicate* v. *Neale* (1), where he said this: "If the evidence were such as would support a plea of the general issue in an action of contract, like non est factum, that is to say, if it amounted to shewing that, though the defendant signed the instrument, he signed it on the understanding that it should not be an effective instrument until some condition was fulfilled, then it was admissible." This note was not delivered as an escrow, and therefore oral evidence to defeat its terms is inadmissible.

Cur. adv. vult.

July 24. BAILHACHE J. read the following judgment:—This is an action upon a promissory note given to the plaintiffs, the payees, by the defendants the Northern Leather Company of America, the makers, in part payment of a consignment of leather goods about to be shipped to them by the plaintiffs. The note is indorsed by the defendant Doushkess. It has been dishonoured and the plaintiffs are suing both the makers and indorser. The defendants joined in their defence and pleaded in paragraph 3 as follows: "The defendants the Northern Leather Company of America drew the said note, if at all, for and on account of the price of 818 dozen 'H. & C. glazed kid,' mark L.M., and 200 dozen 'H. & C. glazed kid,' mark M., to be delivered by the plaintiffs to the defendants the Northern Leather Company of America and to be of a quality and grade equal to samples submitted by the plaintiffs to the defendants. The plaintiffs have failed to deliver any goods of the said marks and of the quality and grade of the said samples." This is a plea of total failure of consideration, but the buyers kept the goods and counterclaimed for the difference between their actual value and the contract price. The plea therefore could not be sustained and it was not relied upon at the trial. The defendants the Northern Leather Company of America, the makers, did not appear, and judgment was given against them.

The defendant Doushkess for himself pleaded in paragraph 4 as follows: "The defendant Israel Doushkess indorsed the said

(1) [1898] 2 Q. B. 487, at p. 491.

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note if at all as surety for the defendants the Northern Leather Company of America, and for and on account of the price of the goods specified in paragraph 3 hereof, and conditionally on the said goods being delivered." He fought the action upon this plea, and in support of it proved an oral agreement with the plaintiffs, contemporaneous with the promissory note, that if the goods when received should prove unequal to sample he was not to be called upon to fulfil his promise to pay. He also proved that the goods were not equal to sample. I received this evidence reserving the question of its admissibility and the question of the validity of the plea, which is in effect the same thing.

The agreement sought to be relied upon is not an agreement suspending the coming into force of the contract contained in the promissory note, but an agreement in defeasance of that contract, and not being an agreement in writing the plea is in my judgment bad and evidence in support of it is not admissible: see particularly the judgment of Erle C.J. in *Wallis* v. *Littell* (1) and of Vaughan Williams L.J. in *New London Credit Syndicate* v. *Neale*. (2) There are numerous other decisions to which I might refer, but it will be sufficient to mention one, *Abrey* v. *Crux*. (3) There must be judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Rubinstein, Nash & Co.*
Solicitors for defendants: *Ralph Raphael & Co.*

(1) (1861) 11 C. B. (N.S.) 369. (2) [1898] 2 Q. B. at p. 491.
(3) L. R. 5 C. P. 37.

J. S. H.

LYELL *v.* LORD HOTHFIELD AND ANOTHER.

[1914 L. 666.]

1914
June 24, 25;
July 2.

Common—Rights of Common of Pasture—Contentious User—Claim to Ownership of Soil—Prescription—Lost Grant—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 1.

In order that a title by prescription to a right of common of pasture may be acquired under s. 1 of the Prescription Act, 1832, by actual enjoyment by the person claiming right thereto without interruption for the periods mentioned in the statute, the claim must be grounded upon acts acquiesced in or consented to by the owner of the land over which the right of common is claimed and shewing a claim to the right of common of pasture, and not a claim to the ownership of the soil itself.

The doctrine of lost grant applies only where the enjoyment cannot be otherwise reasonably accounted for.

Earl De La Warr v. *Miles* (1881) 17 Ch. D. 535 and *Dawson* v. *McGroggan* [1903] 1 I. R. 92 distinguished.

ACTION tried before Shearman J. without a jury upon issues settled under s. 56 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118).

The facts which gave rise to the action are stated in the judgment of the learned judge and may be summarized as follows: Under the Commons Regulation (Winton and Kaber) Provisional Order Confirmation Act, 1911 (1 & 2 Geo. 5, c. lxxx.), the commons or waste lands of the lordships of Winton and Kaber (otherwise known as South Stainmore) in the county of Westmorland were in course of regulation. These commons included two "fells" known as Winton Fell and Kaber Fell situate upon the extreme southern or south-eastern boundary of Westmorland where it abuts upon Yorkshire. The plaintiff was lord of the manor of Muker in Yorkshire and the commons or waste lands of the plaintiff's manor adjoined the two Westmorland "fells" before mentioned. The boundary between the commons respectively belonging to the plaintiff's Yorkshire manor and to the defendant Lord Hothfield's Westmorland manor or lordships (hereinafter called "South Stainmore") was at the time of the passing of the Act of 1911 and had for a long time been in

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dispute. The plaintiff and his predecessors had by themselves, their tenants and commoners claimed that the true boundary was the watershed or "waterdeal," whereas Lord Hothfield and his predecessors had by themselves, their tenants and commoners claimed as the true boundary a line considerably south of the watershed running from one fixed natural object to another. This dispute had prior to the present action been determined by an award dated December 20, 1912, and made by an assistant commissioner (Mr. G. P. Leach) acting under s. 39 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118). The boundary set out by the assistant commissioner's award included as part of the South Stainmore commons a considerable tract of land lying to the south or south-east of the watershed, and the question in the present action arose entirely as to this tract.

The plaintiff in the course of the regulation proceedings had claimed (inter alia) that he was entitled to a right of common over the commons of South Stainmore as appurtenant to each of two farms parcel of his Yorkshire manor, one being his own freehold (Lyell's Ravenseat), the other being held of him as lord by a copyhold tenant (Cleasby's Ravenseat). This right was claimed in each case by virtue of the user enjoyed by the occupiers of these two farms before the boundary dispute had been decided over the tract of land which lay between the watershed (which they had claimed to be the boundary) and the boundary line as set forth in the assistant commissioner's award.

The plaintiff's claim had been rejected by the valuer as to each of the two farms, and this decision had been affirmed by the Inclosure Commissioners upon an appeal brought under s. 55 of the Inclosure Act, 1845.

Thereupon the plaintiff brought the present action under s. 56 of the Act of 1845 against the defendants as the persons whose objections to his claim had been upheld. Issues had been settled under s. 56 raising as to each of the said two farms the question whether the plaintiff was entitled to the right of common of pasture claimed by him over the commons of South Stainmore.

These issues were tried by Shearman J. without a jury on

June 24 and 25, 1914, at the Appleby Summer Assizes, when judgment was reserved.

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Gordon Hewart, K.C., and *Eustace Hills*, for the plaintiff.
Sanderson, K.C., and *G. C. Rankin*, for the defendants.

Cur. adv. vult.

July 2. SHEARMAN J. read the following judgment:—The plaintiff in these issues is Captain Lyell, who is lord of the manor of Muker, in the North Riding of Yorkshire, and the defendants are Lord Hothfield, the lord of the manor of South Stainmore, in the county of Westmorland, and a Mr. Longrigg, a representative of the commoners of the last-mentioned manor. The plaintiff seeks to establish, first, a right of common, namely, to feed sheep appurtenant to a freehold property called Lyell's Ravenseat, on behalf of himself and his yearly tenants; and, secondly, a similar right on behalf of his copyhold tenant as appurtenant to a copyhold property known as Cleasby's Ravenseat, and each of these rights is claimed as against the owner of the manor of South Stainmore under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71) (1), or alternatively under the presumption

(1) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 1: "No claim which may be lawfully made at the common law, by custom, prescription, or grant to any right of common or other profit or benefit . . . . shall where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 7: "The time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant . . . . or tenant for life . . . . shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

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of a lost grant. As it is admitted that since 1849 the manor of South Stainmore has always been under strict settlement, it is necessary for the plaintiff to prove an enjoyment of sixty years in order to enable him to succeed under the Prescription Act, 1832. The exact position of the boundary between the two manors, which adjoin one another, has been unsettled for a large number of years, and it has always been considered that the true boundary, wherever it might be, formed the boundary between the two counties of Yorkshire and Westmorland. Under the provisions of the Commons Regulation (Winton and Kaber) Provisional Order Confirmation Act, 1911, and under an award made by Mr. G. P. Leach as commissioner, dated December 20, 1912, the boundary has been definitely fixed. It has been admitted that the award shews what the true boundary always has been. Prior to the award Captain Lyell had always claimed that the whole of the area coloured grey on the map "A" was part of the common of the manor of Muker in Yorkshire (1), and once in every ten years a posse of men had ridden over the boundary which coincided with a ridge or watershed, or "waterdeal," as it was called by the witnesses, while at irregular intervals in 1854 and in 1896 a considerable body of men on behalf of Lord Hothfield had ridden over what they claimed to be the boundary of Lord Hothfield's manor of South Stainmore (otherwise known as Winton and Kaber). Full details were given in evidence of the boundary riding of 1896, which shews that it was open and notorious, preceded by announcements in local newspapers, and largely attended. The boundary claimed by Lord Hothfield previous to the award of December 20, 1912, is shewn by the red and blue lines on the map "A." (2) A large number of witnesses were called in support of and in opposition to the plaintiff's claim, and the conclusions of fact at which I have arrived are as follows: For upwards of sixty years before the issue of the writ in this action,

(1) I.e., the area bounded on the north by the watershed. The map "A" was an ordnance map which formed part of the judgment.

(2) This area included, in addition to that determined by Mr. Leach to be part of the manor of South Stainmore, a considerable portion of land held by him to be within the manor of Muker, situated to the south-west of the boundary fixed by him.

two " heafs " of sheep, as they are called, levant and couchant at Lyell's Ravenseat had used as part of their feeding ground land which is admitted now to be outside the manor of Muker and to be part of the common of the manor of South Stainmore, and one heaf of sheep levant and couchant at Cleasby's Ravenseat have used as part of their feeding ground other parts now admitted to be outside the manor of Muker. Both the owners and shepherds used these grounds, claiming them to be part of the common of Captain Lyell's manor, and well knowing that it was disputed ground and that the ground in question, together with other ground now found by the award to be part of the common of Captain Lyell's manor, was claimed by Lord Hothfield and the commoners of the Hothfield manor to be part of the common of Lord Hothfield's manor. Simultaneously with the enjoyment of parts of this ground by the owners of the sheep from the two Ravenseats, one or more " heafs " of sheep from the Westmorland side of the waterdeal have come over the waterdeal, and not only have Westmorland farmers pastured their sheep also on disputed ground, but upon one occasion two sheepfolds of stone were erected on part of the disputed ground by a tenant of the Hothfield manor, and were used and suffered to remain in use. There have been during these sixty years not infrequent disputes between the shepherds, each asserting their own rights on the ground that the land belonged to the lord of their own manor and not to the lord of the other manor. During the time in question some Westmorland sheep have fed in parts now settled to belong to Captain Lyell's manor at the same time that sheep from the Ravenseat in Yorkshire were feeding on ground now settled to belong to Lord Hothfield's manor. These disputes do not ever seem to have led to blows or to legal proceedings, although there was evidence that on one occasion one of Lord Hothfield's tenants consulted a solicitor, who wrote a letter. The conclusion I have arrived at is that the disputant farmers, finding that there was enough grass for all the sheep on the extensive wastes of the two manors, preferred in a sensible way to live in peace together, and, as one witness said, to " let the higher powers decide " which was right. It was urged on behalf of the plaintiff that under these circumstances, although the

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rights of feeding sheep from the two Ravenseats had been exercised on a mistaken ground—namely, that the land was part of the manor of Muker—yet the fact that it had been enjoyed under a claim of right for an uninterrupted period of sixty years conferred a title to common appurtenant on the owner of the Ravenseats under the Prescription Act, 1832, or at common law, and in support of that contention I was referred to the cases of *Earl De La Warr* v. *Miles* (1) and *Dawson* v. *McGroggan*. (2) On behalf of the defendants it was urged that under the terms of the Prescription Act, s. 1, the right had not been actually taken and enjoyed for sixty years by the person claiming the right thereto within the meaning of that section, because, first, the user was contentious and not acquiesced in or consented to by the owner of the servient tenement; and, secondly, because the claimant had never made during the sixty years any claim to a profit, but only a claim to a title in the soil, and that therefore the cases of *Earl De La Warr* v. *Miles* (1) and *Dawson* v. *McGroggan* (2) had no application to this case. Other contentions were also raised on behalf of the defendants which it is not necessary to refer to.

In my judgment both the above-mentioned contentions raised for the defendants are sound. In my judgment there was not for sixty years an enjoyment by or on behalf of the plaintiff which could be described as a non-contentious user: see *Eaton* v. *Swansea Waterworks Co.* (3), which is referred to with approval by Bowen J. in *Dalton* v. *Angus*. (4) Bowen J. states specifically what he understands to be the principle laid down by *Eaton* v. *Swansea Waterworks Co.* (3) See also *Tickle* v. *Brown* (5), referred to with approval by Erle C.J. in *Gaved* v. *Martyn* (6), where it is said that the enjoyment under the Prescription Act, 1832, must be "had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser."

Under the circumstances above stated I am unable to find that

(1) 17 Ch. D. 535.
(2) [1903] 1 I. R. 92.
(3) (1851) 17 Q. B. 267.
(4) (1881) 6 App. Cas. 740, at p. 744.
(5) (1836) 4 Ad. & E. 369.
(6) (1865) 19 C. B. (N.S.) 732, at p. 786.

the feeding of sheep upon this part of his manor was done with the consent or acquiescence of Lord Hothfield, and it is the consent or acquiescence which lies at the root of a claim for prescription: see per Thesiger L.J. in *Sturges* v. *Bridgman*. (1)

In the second place, in my judgment the case of *Earl De La Warr* v. *Miles* (2) and the Irish case of *Dawson* v. *McGroggan* (3), which follows it, do not apply to this case. In those cases the acts upon which the claims were grounded were acts shewing a claim of right to a profit in alieno solo, although the claim was made under a mistaken belief. Here the acts were acts attributable to a claim to the ownership of the soil itself. I think the words "claiming right thereto" in the 1st section of the Prescription Act, 1832, mean claiming right thereto as a common or profit. As regards the claim which is made under the presumption of a lost grant, I need only refer to the judgment of Lord Lindley in *Gardner* v. *Hodgson* (4), where he says that the "doctrine" of lost grant "only applies where the enjoyment cannot be otherwise reasonably accounted for." Here the enjoyment, such as it was, was attributable to a mistaken claim to right to the soil. For these reasons my judgment is for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiff: *Petch & Co., for Rogers & Hudsons, Richmond, Yorkshire.*

Solicitors for defendants: *Gray, Mounsey & Fuller, for E. & E. A. Heelis, Appleby.*

(1) (1879) 11 Ch. D. 852, at p. 863.
(2) 17 Ch. D. 535.
(3) [1903] 1 I. R. 92.
(4) [1903] A. C. 229, at p. 240.

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April 29, 30;
May 1;
July 6.

[IN THE COURT OF APPEAL.]

GENERAL ESTATES COMPANY *v.* BEAVER.

[1912 G. 689.]

Ferry—Franchise—Presumption of Lost Grant—Vill to Vill Ferry—Point to Point Ferry—Disturbance—Change of Circumstances—New Traffic.

The franchise of a ferry from vill to vill is a franchise recognized by the law.

Held (Lush J. dissenting), that such a franchise confers the exclusive right of ferriage throughout the area of the vills.

In an action claiming a declaration that the plaintiffs were entitled to and possessed of an ancient ferry from vill to vill, and an injunction restraining the defendant from disturbing them in the enjoyment thereof:—

Held (Lush J. dissenting), that, upon the evidence, a lost grant to the plaintiffs' predecessors of the franchise of a ferry from vill to vill ought to be presumed.

Held, further (Lush J. dissenting), that, even if the plaintiffs were entitled only to a ferry from point to point, no change of circumstances or new and different traffic had arisen which would justify the defendant in setting up a new ferry in proximity to the plaintiffs' ferry.

Newton v. *Cubitt* (1862) 12 C. B. (N.S.) 32 and *Cowes District Council* v. *Southampton Steam Packet Co.* [1905] 2 K. B. 287 considered.

Judgment of Pickford J. [1913] 2 K. B. 433 affirmed.

Appeal from the judgment of Pickford J.

The plaintiff company claimed a declaration that they were entitled to the exclusive right of ferrying foot passengers and their goods across the river Yare from and to all parts of the vills or towns of Gorleston and Little Yarmouth on one side to and from all parts of the vill or town of Great Yarmouth on the other side, or, in the alternative, that they were entitled to two ancient ferries across the river known respectively as the upper and lower ferry; and an injunction restraining the defendant from in any manner disturbing their ferry or ferries by carrying foot passengers and their goods across the river within the limits of their exclusive ferry or near to their ferry or ferries.

At the trial Pickford J. gave judgment in favour of the plaintiff company declaring that they were entitled to such

exclusive right of ferrying, and granted an injunction restraining the defendant from ferrying passengers as he was then doing and from in any other manner disturbing or interfering with the ferry of the plaintiff company.

The facts are fully and sufficiently stated in the report of the case in the Court below (1) and in the judgments of the Court of Appeal.

The defendant appealed.

Claughton Scott and *D. N. Pritt*, for the appellant.

P. O. Lawrence, K.C., and *A. H. Poyser*, for the respondents.

The arguments were the same as in the Court below, the following further cases being cited: *Stork* v. *Fox* (2); *Lawrence* v. *Johns* (3); *Wilson* v. *Law* (4); *Addison* v. *Otway* (5); *Matthews* v. *Peache* (6); *Dibden* v. *Skirrow* (7); *Blankley* v. *Winstanley*. (8)

Cur. adv. vult.

July 6. (9) LORD READING C.J. The plaintiff company claimed that they were entitled to and possessed of an ancient ferry which gave them the exclusive right of ferrying passengers and their goods across the river Yare from the vills of South Town or Little Yarmouth and Gorleston in the county of Suffolk to and from the vill of Great Yarmouth in the county of Norfolk, and that the defendant had committed an actionable wrong by disturbing them in the possession of the said ferry. The plaintiff company purchased this right of ferry in 1907 and continued to exercise it at two points on the river Yare: one, the upper ferry, 620 yards south of South Town Bridge, the other, the lower ferry, 1650 yards south of the upper ferry.

The case alleged against the defendant was that he had infringed the plaintiffs' rights of exclusive ferriage and had disturbed their possession of the said ancient ferry by carrying for hire passengers and their goods across the Yare, at a point

(1) [1913] 2 K. B. 433.
(2) (1604) Cro. Jac. 120.
(3) (1611) Cro. Jac. 274.
(4) (1694) 1 Ld. Raym. 20.
(5) (1676) 2 Mod. 233.
(6) (1855) 5 E. & B. 546.
(7) [1908] 1 Ch. 41.
(8) (1789) 3 T. R. 279.
(9) The judgments were written.

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some 350 to 400 yards above or to the north of the lower ferry and within the limits of the plaintiffs' exclusive ferry. The defendant denied that the plaintiffs were entitled to or possessed of an ancient ferry or such exclusive right of ferry and denied that he had disturbed them in the possession of the ferry. The defendant further alleged, alternatively, that he was accommodating a new and different traffic from that accommodated by the plaintiffs' ferry, and that this new and different traffic had arisen out of altered circumstances and new conditions created in the district in question. The defendant conceded at the trial that he could not dispute the plaintiffs' right of ferriage from point to point at the lower ferry, but contended that this was the only ancient ferry to which the plaintiffs were entitled and that they had not established any right to the upper ferry. The plaintiffs claim that this upper ferry was instituted in exercise of a vill to vill franchise and admit that it is only under this franchise that they can support their claim to the upper ferry. The plaintiffs contended that a lost grant should be presumed for the franchise of a vill to vill ferry. It was admitted by Mr. Lawrence on behalf of the plaintiffs that, having regard to the evidence, he could not ask the Court to presume a lost grant for a point to point ferry at the upper ferry.

Pickford J. decided in favour of the plaintiff company, made a declaration that they were entitled to the franchise of a vill to vill ferry, and granted a perpetual injunction restraining the defendant from disturbing or interfering with the plaintiffs' ferry. The questions involved in the appeal are: (1.) Have the plaintiffs established that they are entitled to the franchise of a vill to vill ferry? (2.) Has the defendant disturbed the plaintiffs in possession of their ferry, that is, (*a*) Did the defendant carry within the line of the plaintiffs' ferry? (*b*) Was he accommodating a new and different traffic from that carried by the plaintiffs' ferry?

The case has been ably and elaborately argued before us. At the trial a number of ancient documents, records and grants, were produced, and evidence was given of user within living memory. From an examination of the documents I think it is established that there was a vill or township of Great Yarmouth,

and that Gorleston and Little Yarmouth constituted either one vill or township, or two vills or townships, within the manor of Gorleston within the hundred or half hundred of Lothingland, and that on various occasions the lord of the manor of Lothingland asserted the rights of Gorleston and Little Yarmouth against Great Yarmouth.

From the documents, of which the substance is set forth by Pickford J., it appears that Henry III., in 1237, granted to John Baliol and Devorguilla his wife the manor of Luddingland and Thorkesey "together with the farm of our vill of Gernemuth with all appurtenances, easements, ferries . . . . and with all their appurtenances in whatsoever way belonging within vills and without as well on land as on water as fully as we had them when the said vills were in our hands." From the documents produced of the years 1331, 1377, and 1391 it is shewn that the passage or ferry of Little Yarmouth and Gorleston formed part of the rights of the manor of Gorleston. From a document of the fourteenth century containing a statement "of the profits which the ancestors of the King were accustomed to take in the vills of Little Yarmouth and Gorleston when the manor was in their hands And also (those which) the other lords have taken who held the said manor of the King . . . . ," there is included an item "for ferriage of the moiety of the haven 40 shillings."

In the year 1309 and thereafter the bailiffs of Great Yarmouth were exercising a right of ferriage from the banks of the vill of Great Yarmouth and were leasing the same and receiving payment in respect thereof until the early part of the next century. The lords who held the manor of Gorleston received profits "for the ferriage of the moiety of the haven," which would indicate that the lords of the manor of Gorleston were entitled to the profits of the ferriage from Gorleston and Little Yarmouth to Great Yarmouth and that the bailiffs of Great Yarmouth were entitled to the profits of the ferriage from Great Yarmouth to Gorleston and Little Yarmouth. In my judgment these inferences may reasonably be drawn from the documents.

Until the year 1398 there is no record indicating that there was more than one ferry; but in that year reference is made to two ferries, one called the horse ferry, which seems to have

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existed at or about the site of the lower ferry, and the other, the upper ferry, at or about the site of the present bridge. In the year 1390 the manor of Gorleston was granted to Anne of Bohemia, Queen Consort of Richard II., for her life, and there is no further record of any grant until 1509, when it again came into the hands of the Crown and was granted by Henry VIII. to E. Jernynham and his wife for life, and in 1510 was granted to them in tail, and doubtless descended to the Sir Henry Jerningham who was lord of the manor of Gorleston in 1570. In 1417 Henry V., in response to a petition, granted a licence to the burgesses and commonalty of Great Yarmouth to build and set up a bridge across the river so that all men on horse or on foot with their carts and carriages might ride across the bridge without being charged for such carrying. One of the grounds of the petition was that persons crossing were charged a toll by the bailiffs of Great Yarmouth. From this time forward there is no trace of any charge or toll made by the bailiffs of Great Yarmouth for ferriage except at the time of the Star Chamber decree, to which reference is made later, but it appears that the lords of the manor of Gorleston henceforward made charges to persons crossing the river at the lower ferry both from and to the Gorleston side of the river. From the date of building the bridge until 1570 there is no evidence of events relating to the ferries. It would appear from the record of events in 1570 and thereafter that, from the time of building the bridge, horse and vehicular traffic ceased to be carried by ferry and passed over the bridge. The upper ferry was no longer used, and the lower ferry was only used as a foot ferry. In 1570 there was a great tempest whereby vessels were driven against the bridge with such violence that it was destroyed. The corporation of Great Yarmouth then instituted a ferry near the bridge as a temporary means of passage across the water pending the reconstruction of the bridge, whereupon the lord of the manor of Gorleston (Sir Henry Jerningham) asserted, by reason of his inheritance of the manor, a right of ferry at the bridge, and also proceeded to use the lower ferry for the carriage of horses across the water. The corporation of Great Yarmouth repudiated both claims. Both parties continued to assert their rights in these and other matters.

Eventually proceedings were instituted in the Star Chamber, and in the year 1572 the disputes, including those relating to the rights of ferry, were referred by the Star Chamber, with the consent of the parties, to two arbitrators, whose award was thereafter made a decree of that tribunal.

In respect of the ferry disputes the arbitrators decided that "during such time as the bridge shall happen to be in decay whereby it shall be needful to use ferriage for people over the water that then and so long until the bridge be renewed," Sir Henry Jerningham and his heirs should use and take the profit of ferriage coming towards Yarmouth, and the town of Yarmouth should have the like commodity of ferriage for all that passed over the water at Yarmouth, and "that Sir Henry and his heirs shall enjoy their foot-ferry over against Gorleston for ever as hath been used and now is." This decree was a settlement of the disputes which had arisen with regard to ferriage. After the bridge was rebuilt the upper or temporary ferry was no longer used, and those who wished to cross the river travelled either over the bridge or by the lower ferry, which continued henceforward to be used as a foot ferry only. There is no evidence of any events relating to the ferry rights from 1572 until 1829, when we arrive within the region of living memory. In 1829 an action was tried at the Suffolk Assizes in which the Reverend George Anguish, the then lord of the manor of Gorleston, contended that one Ebden, the defendant in that action, had infringed the rights of the lord of the manor by setting up a ferry some half a mile above the lower ferry whereby he was depriving the lord of the benefits and profits of his ferry. A verdict was found for the plaintiff in that action, and he recovered one shilling damages. It is not clear whether the franchise claimed was a vill to vill or a point to point ferry. I can find nothing in the language of the record which is not consistent with either claim. In 1834 a bill of complaint was filed in Chancery by the Reverend George Anguish against the same defendant, Ebden, with the object of restraining that defendant from repeating the aforementioned acts. From the records it appears that an interlocutory injunction was granted, but there the proceedings seem to have ended. In accordance with the decision in *Pim* v.

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Curell (1), these proceedings, being merely proceedings on which an interlocutory and not a final judgment had been pronounced, could not be given in evidence against the defendant. In the present case, however, the defendant himself relied upon these proceedings, and it was agreed between counsel that no objection should be raised to their being used in evidence, but they do not, in my judgment, add anything material to the evidence already before the Court.

In 1834 another matter occurred which, in my view, is of considerable importance. A memorial was presented to the Reverend George Anguish, the plaintiffs' predecessor in title, praying him as proprietor of the ferry to provide an additional crossing place in the vicinity of the Armoury at South Town, and he did, in compliance with that request, provide both boats and landing places and carried passengers to and fro at the site of the upper ferry now in existence. On behalf of the plaintiffs in this action it is contended that this memorial was presented because the lord of the manor of Gorleston was the only person lawfully entitled to provide an additional ferry across the Yare. The plaintiffs argue that this would indicate that the lord of the manor of Gorleston was the owner of a vill to vill franchise. On the other hand, the defendant contends that, as the lord of the manor had just established his right to the lower ferry, and had restrained Ebden from setting up a ferry some half a mile away, no person would set up a new ferry and thus risk an action for wrongful disturbance, even though the new ferry would be at a greater distance than Ebden's from the lower ferry, and consequently the memorial was presented to the lord of the manor. If the latter is the correct view, there is no legal authority that can be presumed for the upper ferry. I have come to the conclusion that the memorial and events subsequent thereto tend to support the plaintiffs' contention. The corporation of Great Yarmouth gave protection at once to the new line of crossing and issued directions to the water bailiff to prevent ships from berthing or mooring opposite the space allotted for a ferry boat, and to afford proper facilities to such ferry and convenience to passengers.

(1) (1840) 6 M. & W. 234.

In the following year, by s. 67 of the Yarmouth Haven Act, 1835 (5 & 6 Will. 4, c. xlix.), penalties were imposed upon the master or person having command of a vessel who should lay or moor such vessel in such a situation as to impede or obstruct the ferry lately established by the Reverend George Anguish across the haven from the quay at Great Yarmouth to the hamlet of South Town. These penalties are not imposed for obstruction to the lower ferry. It may be, as Pickford J. thinks, that it was not necessary; but, whatever the reason, it seems difficult to conceive that these penalties would have been imposed unless there was a legal right in the lord of the manor to the upper ferry. Subsequently, by the Great Yarmouth Fish Wharves Act, 1866 (29 & 30 Vict. c. cclxiii.), power was given, under s. 33, to the corporation to purchase and use the ferries over the haven called the north and south ferries, but prohibiting the corporation from taking the one without the other. By the Great Yarmouth Corporation Act, 1904 (4 Edw. 7, c. ccviii.), power is given, under s. 27, to the corporation to purchase these ferries together with all the rights and privileges held by the owners of these ferries and to establish a new ferry or new ferries across the haven at such point or points as they may deem expedient, but it is provided that the corporation shall not establish a new ferry across the haven until they shall have purchased both the north and the south ferry. In each of these local Acts there is a recognition of the upper ferry as existing by virtue of some legal right.

Except during the temporary period of the rebuilding of the bridge, the corporation of Great Yarmouth ceased to receive any profit or toll or to make charge for any ferry rights from the first building of the bridge, and from about that period until the right of ferriage was severed from the manor after the Reverend G. Anguish's death the lords of the manor have been in possession and have enjoyed the exclusive right of the lower ferry, and have charged and received the profits or tolls in respect of it.

The plaintiffs do not rely upon any grant in evidence as establishing their title to the franchise. They rely upon the presumption of a lost grant. The principle of law to be applied

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is stated by Lord Herschell in *Philipps* v. *Halliday* (1) in the following passage: "Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title." And again the noble Lord in criticizing some observations of Willes J. in *Rogers* v. *Brooks* (2) said (3): "I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

I am reluctant upon such evidence as is available in this case to come to the conclusion that the plaintiffs are entitled to so comprehensive a franchise as a vill to vill ferry, but I must have regard to the doctrine so emphatically affirmed by the highest tribunal in *Philipps* v. *Halliday*. (4) If every reasonable presumption is to be made to support the possession and maintain it as having been of right, that can only be effected, if at all, by presuming a lost grant of a vill to vill franchise. I come to the conclusion that originally there was a Royal grant from the Sovereign to the lord of the manor of Gorleston of the right to the ferry from the vills of Little Yarmouth and Gorleston across the Yare to the vill of Great Yarmouth, and a Royal grant from the Sovereign to the bailiffs of Great Yarmouth of the right to the ferry from the vill of Great Yarmouth to the vills of Little Yarmouth and Gorleston. Pickford J. has drawn the inference that at some time and in some way, either when the bridge was built or when it was reconstructed, the corporation of Great Yarmouth transferred their rights derived from the Royal grant to the lord of the manor of Gorleston. In view of the history of the ferry from either of these periods such an inference is not, in my judgment, impossible or unreasonable, and applying the principle of law above mentioned I come to the conclusion that it should

(1) [1891] A. C. 228, 231.
(2) (1783) 1 T. R. 431, n.
(3) [1891] A. C. at p. 234.
(4) [1891] A. C. 228.

be made. When once the bridge had been built the corporation probably attributed less importance to the retention of their rights of ferry, and it may well be that they transferred them in consideration of some right from the lord of the manor of Gorleston in connection with the building or the reconstruction of the bridge. Their claim in 1570-1572 may have been based on some right to resume the ferry if the bridge ceased to exist. Or it is possible, and, having regard to their claim in 1570-1572, it appears to me more likely that it was when or after the bridge was rebuilt that the corporation of Great Yarmouth transferred their ferry rights to the lord of the manor of Gorleston. Certain it is that they made no claim to any such rights at any subsequent period, and that in 1834 when there was a public demand for a new line of crossing nearer the bridge not only did they not claim any rights in such a ferry, but they extended their protection to it, and in their subsequent Acts obtained powers to purchase it.

My reluctance to find in favour of this wide franchise is, to some extent, modified by the reflection that the right to this vill to vill ferry carries with it, in accordance with the law, obligations as well as privileges. Such rights were originally granted for the convenience of the public so that some person might be bound to carry persons across the water highway, and should be proceeded against if he neglected to perform the obligations of an owner of a ferry. It may be that, if a demand was made for another line of crossing the water highway to meet the convenience of the public, the owners of the franchise would be bound to comply with it. This point is not now before us, and I express no opinion upon it except as indicating that there are burdens imposed upon the plaintiffs as well as rights assured by virtue of the declaration of Pickford J.

If, on the evidence, it had been open to us, I should have preferred the conclusion that there were originally Royal grants of two point to point ferries, but in view of the plaintiffs' admission and the evidence this is not a possible view, and if we must presume a legal origin for the upper ferry it can only be that of a vill to vill franchise. That such a franchise is recognized by law is, I think, at this date, unquestionable, although instances

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in the books are comparatively rare. In *Tripp* v. *Frank* (1) the plaintiff proved a prescriptive right to an exclusive ferry between Kingston-upon-Hull and Barton on the opposite coast of Lincolnshire, with certain exceptions. The defendant had carried persons on market days from Kingston to Barrow, to which place they were going, and which is two miles lower down the Humber than Barton. The plaintiff was claiming to extend his rights to prevent the ferriage of persons from the one vill to another place beyond the vill, the terminus on the other side. It was held that the plaintiff's right extended only from Kingston to Barton, and not from Kingston to Barrow, but it was assumed throughout by the Court that the franchise of exclusive ferriage from Kingston to Barton was good in law.

In *Huzzey* v. *Field* (2) Lord Abinger says: "A public ferry, then, is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious"; and (at p. 443) the exclusive right of the plaintiff of ferrying passengers from Nayland to Pembroke is distinctly recognized by him, and as a ferry from vill to vill. It is not part of the decision in the case, but was the considered opinion of the Court after hearing arguments upon the point. In *Pim* v. *Curell* (3) a claim was discussed of exclusive right of ferriage from the township of Birkenhead to the township of Liverpool. Elaborate arguments were heard by the Courts as to the effect of the declaration, but it is sufficient for the present purpose to say that the validity of such a franchise as a vill to vill ferry was not questioned.

In *Matthews* v. *Peache* (4) Coleridge J. says: "A ferry may be granted in more or less extensive terms. If Doust here could show a legal grant of the right of exercising a ferry from any

(1) (1792) 4 T. R. 666.
(2) (1835) 2 C. M. & R. 432, 442.
(3) 6 M. & W. 234.
(4) 5 E. & B. 546, 557.

landing place in the Isle of Dogs to any landing place in Greenwich, that, whether convenient or not, would be the extent of the ferry. That, however, would impose upon the owner of the franchise the obligation of keeping boats enough to carry passengers from all those points and of maintaining such boats in repair. And, though the words in the deed are large, it is clear to me that it was intended to grant the ferriage only from one definite place to another definite place."

In *Newton* v. *Cubitt* (1) Willes J. says: "A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land, coming to a landing place on the water's edge, or, where the ferry is from or to a vill, from or to one or more landing places in the vill."

The franchise of a vill to vill ferry has again been recognized in the judgment of Kennedy J. in *Cowes District Council* v. *Southampton Steam Packet Co.* (2) and in the recent case in the Court of Appeal of *Dysart* v. *Hammerton.* (3)

It was pressed upon us by the defendant that the area and the limits of the vills on either side are not sufficiently defined, but I do not think that this consideration should affect our judgment. Again, it was urged that Gorleston and Little Yarmouth are two vills, and not one vill, and that in law there could not be an exclusive right from a vill to or from two vills. First, I think that in substance Gorleston and Little Yarmouth are treated as one vill, although in strictness they may have been two vills; secondly, I can see no reason why such a franchise should not be valid in law.

It would be sufficient for the determination of this part of this case to decide, in accordance with my opinion, that the defendant's acts constituted prima facie an actionable interference with the plaintiffs' admitted right to the lower ferry without pronouncing judgment upon the vill to vill franchise, but in view of the course taken before Pickford J., and of his judgment, it is better to deal with the whole case.

If the plaintiffs are entitled to a declaration of a vill to vill franchise, it is clear that the defendant has infringed their rights.

(1) 12 C. B. (N.S.) 32, 58. (2) [1905] 2 K. B. 287.
(3) [1914] 1 Ch. 822.

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If the plaintiffs are entitled only to a declaration of a point to point franchise at the lower ferry, it becomes necessary to consider whether the acts of the defendant amount to an actionable disturbance of that right. It cannot be doubted that if the defendant be permitted to ply for hire for the purpose of carrying passengers across the Yare at 350 to 400 yards distance from the lower ferry, he will divert traffic which would otherwise be carried by the plaintiffs, and, unless he can justify his acts on the ground that he has accommodated new traffic, the plaintiffs' rights have been infringed by the defendant. There is no limit of distance imposed by law as the boundary on either side of a point to point right. It must be always a question of degree whether a new passage across the river is sufficiently near to the ancient ferry to constitute an actionable disturbance, and all circumstances and conditions should be taken into consideration in determining this question.

Long ago it was decided that—"If I have a ferry by prescription, and another erects another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced." (1) In *Hopkins* v. *Great Northern Railway* (2) this passage was quoted by Mellish L.J. in delivering the judgment of the Court, and, as he added, there are other authorities to the same effect. Upon the facts proved before Pickford J. it appears to me clear that prima facie the defendant has invaded the plaintiffs' right of ferry and has committed an actionable wrong.

The more serious defence to this branch of the case is the allegation by the defendant that he has set up his ferry for the purpose of accommodating a new traffic and a different traffic from that accommodated by the old ferry, and has therefore not disturbed the plaintiffs in their possession. This raises a problem difficult of solution, inasmuch as the principle of law to be applied is not very clearly stated in the cases. It is, however, important to note that this exclusive right to ferry is a right created for the convenience of the public, and not contrary to the interests of the public, as at first sight the

(1) 2 Rolle Abr., p. 140. (2) (1877) 2 Q. B. D. 224, 231, 232.

grant of such an exclusive right would appear. In the words of Willes J. in *Newton* v. *Cubitt* (1), "The franchise is established to secure convenient passage, and the exclusive right is given because in an unpopulous place there might not be profit sufficient to maintain the boat, if there was no monopoly." The owner of the ferry is entitled to say to persons wishing to be ferried across the river highway, "You must cross by my ancient ferry; here am I, possessed of this right, and I provide a suitable boat and charge a reasonable toll and am liable to be indicted if I fail to perform my obligations to the public in return for my exclusive right of ferry." It may well be that it would be convenient to some members of the public to have another ferry a little higher up, or a little lower down. Every one would prefer to be ferried directly across the river without having to walk some distance along the bank to or from the ferry, but that convenience in itself is an insufficient reason for holding that the establishment by another of a ferry in proximity to an ancient ferry is not an interference with a right of the owner. Indeed, if it were otherwise, an ancient ferry from point to point would confer no legal right except at the exact line of crossing. I cannot take this view, and, moreover, it would be contrary to the opinion of the majority in the Court of Appeal in the very recent case respecting Twickenham Ferry, *Dysart* v. *Hammerton*. (2) The owner of the ferry has a right, in my opinion, to the carriage of the passengers crossing the river highway by means of a ferry, and the person would commit a wrong who carried directly in the line of the plaintiff's ferry, and indirectly in its proximity so as to divert traffic from the owner of the ferry. But, to quote again from Mellish L.J.'s judgment: "It does not conclusively follow as a matter of law that because a new ferry diverts some of the traffic from an old ferry it is actionable, and it may be that no action can be maintained in respect of the new ferry, if it has been set up bona fide for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry." This doctrine is based upon the following passage in the judgment of Willes J. in *Newton* v. *Cubitt* (3):—"The principle

(1) 12 C. B. (N.S.) 32, 58. (2) [1914] 1 Ch. 822.
(3) 12 C. B. (N.S.) 59, 60.

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by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that, if the franchise of a ferry is established for facility of passage and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such labourers pass now to Greenwich where one traveller passed in 1800, it seems oppressive to fix on such a large number of labourers the perpetually repeated loss of three-quarters of a mile of walking for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable."

It is difficult to understand what is meant by the phrases "new traffic" and "a different traffic." In the Twickenham Ferry case, *Dysart* v. *Hammerton* (1), the above passage from *Newton* v. *Cubitt* (2) was much discussed, and the majority of the Court of Appeal held, contrary to the opinion of Warrington J., that there was no new traffic, that the ferry had always been used by the same class of persons as were then using the defendant's ferry, and that mere convenience to persons wishing to cross 500 yards away from the ancient ferry was not, in itself, sufficient to constitute new traffic. It follows, I think, that the concluding part of the above quotation from *Newton* v. *Cubitt* (2) must be read not separated from, but in conjunction with, the rest of the paragraph. "Public convenience," as there used, cannot merely mean that it will be more convenient to the members of the public that there should be another passage across the river in proximity to the ancient ferry. The language used by Willes J. must be interpreted by the light of the facts to which it was being applied, and I come to the conclusion that

(1) [1914] 1 Ch. 822. (2) 12 C. B. (N.S.) 32.

the learned judge was explaining on the ground of public convenience that "a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway." I think the only case in which it may possibly be said that a different view has been taken is *Cowes District Council* v. *Southampton Steam Packet Co.* (1) I have some doubt, with all respect to the learned judge, whether I should have arrived at the same conclusion as to new traffic. I cannot, however, agree with the reason given for the decision as to new traffic, "for the traffic on the ancient ferry is at the same time not diminishing but an increasing and progressive traffic." (2) It is not clear that the learned judge meant to adopt this as the reason for his judgment, but our attention has been called to it, and, if he did, I must express my dissent from that part of it. Whether or not an actionable wrong has been committed by the interference cannot depend upon whether or not the traffic carried by the old ferry is increasing and progressive.

In the present case it is not suggested, and in any event it is not proved, that such new highways on land have been created. The material facts proved before Pickford J. are, briefly, as follows: The industry is now, as it was before 1867, the herring fishery, but, whereas before that period it was carried on by sailing trawlers and drifters, it is now, and has been for some time, carried on by steam drifters. The fish was formerly discharged on the jetty, or beach, facing the sea, whereas since the fish wharf was constructed in 1867 it has been landed on the riverside. Formerly the regular method of treating the fish was by smoking; now it is by pickling; as a consequence the river banks on both sides have become the site of the fishing industry, large establishments have been provided for pickling, there has been a notable increase in ship repairing works, and as a result of the change from sail to steam there are various important engineering works on the river banks. It naturally follows that there has been a large increase in the industrial population, more particularly as some twenty thousand persons come in the fishing season from Scotland to Yarmouth and Gorleston for the purpose of taking part in the pickling industry, and

(1) [1905] 2 K. B. 287. (2) Ibid. at p. 299.

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there has been a large addition to the number of streets and houses on both river banks. Pickford J. finds that in consequence of these changes Yarmouth has developed and increased in population enormously, and the amount of fish taken, and the number of persons concerned in the trade, and the number of ordinary visitors to Yarmouth, including Gorleston, have also very largely increased. If it were right merely to consider the convenience of the public I should conclude on these facts that the defendant had not disturbed the plaintiffs' point to point ferry, that it was for the public advantage that workmen crossing to and fro should not have to travel 400 yards along one side of the bank, and 100 yards along the other, for the purpose of crossing the water highway by the plaintiffs' ferry. But, for the reasons already stated, it is not, in my judgment, open to me to come to such a conclusion. If the plaintiffs have this right of ferry, I cannot understand why they should be deprived of any part of it because, by the increase of population and extension of industrial works, this right has become more valuable. It may be that increased and better accommodation for the ferry traffic should be provided by the plaintiffs; it may be that there is legitimate cause for complaint that passengers have to wait too long for the boat, or that the transit in these days should be more rapid, or that more comfortable boats should be provided. I express no opinion upon these matters, which are not material to this decision, as, if established, they would form no ground in this action for depriving the plaintiffs of their rights, if these had been proved to exist. I cannot come to the conclusion that the increased and additional traffic is new traffic within the doctrine of *Newton* v. *Cubitt*. (1) It is old traffic in the sense that it is old industry, which is being carried on by new and different methods. It is old traffic under altered circumstances and different conditions. In the ordinary and natural course of human affairs population will increase, new houses will be built, progress in methods and extension of industries will take place, and that is what has happened at Gorleston and Little Yarmouth. I cannot find anything in the circumstances and conditions of the vill of Great Yarmouth and the vill or vills of

(1) 12 C. B. (N.S.) 32.

Gorleston and Little Yarmouth which would justify the decision that the defendant was "accommodating new traffic," as I understand the meaning of the phrase. In any event I should have the greatest hesitation in differing from Pickford J., who heard the evidence, and whose judgment on this part of the case is based, in the main, upon findings of fact; and I agree with his conclusions.

It follows that I am of opinion that this appeal should be dismissed.

PHILLIMORE L.J. This is an appeal by the defendant from a judgment of Pickford J., now Pickford L.J., declaring that the plaintiff company is entitled to the exclusive right of carrying foot passengers and their goods across the river Yare, from and to the vill or vills of Gorleston and Little Yarmouth or South Town, in the manor of Gorleston in the hundred or half hundred of Lothingland in the county of Suffolk, to and from the vill of Great Yarmouth in the county of Norfolk, and restraining the defendant from carrying passengers or goods across the Yare from or to the Gas House Quay in South Town to or from the fish wharf in Great Yarmouth, and from in any other manner disturbing or interfering with the plaintiff company's said ancient ferry.

The case has been very well argued. It arises in the way described by the Lord Chief Justice. A ferry from vill to vill is a franchise known to the law, but the instances in which it has been litigated, or in which the litigation has been reported, are few. It is possible that there are only two actual instances, the ferry over the Humber from Kingston-on-Hull to Barton, which came into question in the year 1792 in the case of *Tripp* v. *Frank* (1), and the ferry over an arm of Milford Haven from Nayland to Pembroke, which came into question in the year 1835 in the case of *Huzzey* v. *Field*. (2)

It is therefore necessary to examine with some care the nature of the franchise. First, what is—for this purpose—a vill? The word, at one time in much use in legal matters, has almost dropped out of use in our later jurisprudence. But from Coke's

(1) 4 T. R. 666. (2) 2 C. M. & R. 432.

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Institutes, pp. 122 and 125b; Viner's Abridgment, title Vill, and, with reference to the choice of juries, under the title Trial, Z. a, et seq.; Pollock and Maitland's History of English Law, bk. ii., ch. 3; Elphinstone on Deeds, pp. 168n and 624; and the cases of *Stork* v. *Fox* (1), *Lawrence* v. *Johns* (2), *Wilson* v. *Law* (3), and *Addison* v. *Otway* (4), sufficient light on the subject can be gathered.

For the purpose of the decision I think the conclusions which I am about to state, though by no means exhaustive, will suffice. Every borough corporate or city is a vill, or, as Pollock and Maitland say, a group of vills. It seems to me possible that in cities where there are ancient divisions into wards the ward may take the place of the vill. Outside municipal corporations the rest of the country was supposed to be divided into country vills—villae campestres. A country vill was not always, but generally, conterminous with a manor, or formed with one or more other vills the parts of a manor and was thought of as having a lord. It had a defined circumscription and was the smallest civic area known to the law. The parish had been originally regarded as an ecclesiastical area, and seems only to have gradually acquired recognition as a unit of locality for temporal purposes; possibly not till the statute of Elizabeth (43 Eliz. c. 2) made it the unit for poor law purposes. Whenever, therefore, any act had to be described as done at a particular place, or a recovery of lands had to be suffered, or the habitation of any person had to be described, the proper territorial description was "of such a vill in such a county"; and though gradually the parish superseded the vill as a more convenient territorial description the conservatism of the officers of the Courts, as narrated in the case of *Addison* v. *Otway* (5), for a long time led them to refuse to use the word "parish." But in time, for convenience' sake, it was presumed that the parish and the vill were conterminous, unless the contrary was shewn. The division was carried to America. In New England the counties are divided into "towns"; in the Central States of the United States into "townships," as the

(1) Cro. Jac. 120.
(2) Cro. Jac. 274.
(3) 1 Ld. Raym. 20.
(4) 1 Mod. 250; 2 Mod. 233.
(5) 2 Mod. 233.

smallest civic areas. (See Fairlee on Local Government, the American States series, ch. 829.)

A vill, therefore, was a defined legal area, in respect of which a franchise could be granted without danger of uncertainty; and when the franchise of a ferry from vill to vill was granted, the vill might either be a corporate borough or a villa campestris; and it would seem to follow that as the franchise is recognized in the law as a distinct franchise, so it gave the privilege and involved the duty of providing as many suitable lines of ferry as might be required for communication between the two vills.

In this case there is on the one bank the well-defined vill of the corporate borough of Yarmouth, and on the other bank there is either one compound vill or the two vills of Gorleston and Little Yarmouth, otherwise South Town, in the manor of Gorleston and in the hundred or half hundred of Lothingland, the existence of which is shewn in the pleadings of a cause in the second year of Edward III., and by the inquisition on June 11, 1331, where the vill of Great Gernemuth or Yarmouth and the vill or vills of Little Gernemuth and Gorleston are described, and their legal rights are defined, and the boundary is drawn along the thread of the water between Great Yarmouth on one side and Little Yarmouth and Gorleston on the other. In both these documents the vills of Little Yarmouth and Gorleston are treated as, to a certain extent, separate, and also to a large extent conjoint, so that decisions can be arrived at on disputes between Great Yarmouth on the one side and the other two vills on the other, and sometimes, (it may be only a clerical question,) the Suffolk side is written of as a vill, sometimes as two vills. I see no reason in law why, if the usage is in accordance, one should be prohibited from holding that a ferry franchise may rightly be granted from or to a compound vill or the sum of two adjacent vills.

It would appear from the proceedings in the case that should the vills of Little Yarmouth and Gorleston need to be distinguished, their boundaries inter se are unascertainable, and they certainly had at all material times of which we have information one lord. Therefore I think the franchise claimed by the plaintiff company may legally exist.

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Next, that there was or were a franchise of ferry or franchises of ferry over the Yare from and to Great Yarmouth, which must mean landing on the other side in one or other of the vills of Little Yarmouth or Gorleston, is certain. It appears from the Yarmouth Corporation records for the year 1309 and later years that the corporation had and leased the "passage," that is, some right of ferry over the Yare; while on the other hand the inquisition post mortem in the year 1377, on the death of the Countess of Pembroke who held the hundred of Lothingland, which included the vills of Little Yarmouth and Gorleston, shews that she had the "passage" of Little Yarmouth. It is suggested and is possible that the two rights of the corporation of Yarmouth and the lord of Lothingland or of the manor of Gorleston are to be reconciled only by supposing that the right of ferriage was held in moiety. It is agreed that there were two ancient lines of ferry: one at or near the place of the present lower ferry which may be sometimes called the horse ferry, and one where the bridge now is, which was superseded by the bridge, and may have been called Weston or West Yarmouth Ferry. I do not think it necessary to go through the other ancient documents which have been reviewed by the Lord Chief Justice. Their general effect is to support the proposition that the two Suffolk vills made one manor, and that there was a franchise of ferry from vill to vill held in ancient times in moieties.

In 1417 Henry V. gave licence to build anew and set up a bridge at the spot where the present bridge is. The licence recites that there had been time out of mind across the water at Yarmouth a certain and common ferry which people, men from the country and others coming with victuals and other things to the town, were accustomed to use without payment; and that lately for about ten years the bailiffs and men of the town—which I think means the governing body of the corporation—for their own gain and profit, to the injury of the commonalty and manifest harm of the men from the country (a doubtful proposition in political economy), have made the ferry several and enforced tolls by not allowing the countrymen to draw their boats to the shore and so evade the ferry, unless they paid the tribute. The bridge having been built superseded the line of

ferry which coincided with it; and nothing further of importance is known until it appears about 1570 that the bridge was broken down, and that the corporation ordered their chamberlains to provide a boat to ferry over horses and men, presumably along the line of the bridge. This apparently led to proceedings by the lord of the manor, Sir Henry Jernegan, against the corporation in the Star Chamber; and by the records of the common council his claim is said to be for the ferry at the bridge. Eventually under the authority of the Court, though in pursuance of an arbitration, the various disputes between Sir Henry and the town were settled, with the following provisions as to the ferry: "ITEM, that during such time as the bridge, called Yarmouth bridge, shall happen to be in decay, whereby it shall be needful to use ferriage for people over the water, that then, and so long until the bridge be renewed, it shall be lawful for Sir Henry Jernegan, and his heirs, to use and take the profit of the ferriage for all persons coming towards Yarmouth: and likewise the town of Yarmouth to have like commodity of ferriage for all that shall pass over the water at Yarmouth. And that for want of boats on either part, the one to supply, in the want or absence of the other, on either side. ITEM, Sir Henry, and his heirs, shall enjoy their foot-ferry over against Gorleston for ever, as hath been used, and now is."

The inference which Pickford J. has drawn from these documents is that there was a franchise of ferry from vill to vill enjoyed in moieties between the lord on the Suffolk side and the corporation on the Norfolk side, and that when the bridge was built for the benefit of Yarmouth and the lord lost thereby his moiety of the ferriage that would be taken away by the bridge, he was conceded the moiety of the rest of the ferriage which had been belonging to Great Yarmouth. The inference is a possible one. In the Close Roll of 38 Charles II. there is an indenture by which the hundred or half hundred of Lothingland with various lordships, including that of Gorleston, and all that water passage or ferry commonly called or known by the name of Gorleston Ferry, is conveyed; which is followed by a fine completing the assurance. And in 1 James II. the ferry—passagium—over the water to Yarmouth passed in the same way. In 8 William III. it

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passed by fine as the passagium ultra aquam of Great Yarmouth. And in 4 George II. there is a recovery with the same parcel; and in 51 George III. another recovery where it is described as "the passage over the river Yare at South Town otherwise Little Yarmouth."

The next item in the history is that, in 1829, the Reverend George Anguish, lord of the manor, recovered judgment against one Ebden for trespass upon his ferry franchise. It was suggested for the defendant that this judgment could be supported on the assumption that Anguish was owner of the lower ferry as a point to point ferry, and that Ebden had plied sufficiently near so as to become a disturber of the point to point franchise. On the other hand it was contended for the plaintiff company that, upon the true construction of the declaration, the franchise in suit was that of a ferry from vill to vill. Pickford J. and, as I gather, the Lord Chief Justice think that the record is consistent with either claim. I am inclined to think that it points to a vill to vill franchise. The language is certainly large enough. The right is described, in two counts, as "a certain ferry over a certain river commonly called Gorleston Ferry from South Town otherwise Little Yarmouth in the county of Suffolk to Great Yarmouth in the county of Norfolk," and vice versa, or as "a ferry over a certain water from South Town," &c. In either count the claim is that the plaintiff was thereby entitled to carry all and every the liege subjects of our Lord the King passing over the said river or water, as well from South Town otherwise Little Yarmouth to Yarmouth as vice versa.

For the defendant it is said that in the case of *Pim* v. *Curell* (1), the case of a ferry at Birkenhead, a declaration with similar counts was supported as one for a point to point ferry. The declaration, however, was not the same. There the claim was for a ferry over the Mersey "from the township, parish, chapelry, or place of Birkenhead to the parish, township, or place of Liverpool"; but the persons claimed to be ferried were "all passengers and other persons having occasion for the same," not as in Anguish's case "for the liege subjects passing from South Town to Great Yarmouth" and vice versa. There were

(1) 6 M. & W. 234.

two objections taken at the trial and afterwards to the effect that there was a variance between the ferry stated in the declaration and that proved. The first was that the declaration claimed a ferry both ways and that there was only proof of a ferry one way. This was afterwards cured by amendment. The second was that the plaintiff had claimed the ferry over the entire district of Birkenhead, whereas it had been proved only from point to point. The case was sent down for a new trial on another ground without this point being decided. But at the second trial the plaintiff succeeded; and he held his verdict; and in the case of *North and South Shields Ferry Co.* v. *Barker* (1) this result is taken as a decision that a point to point ferry can be claimed in this way.

If the franchise of a vill to vill ferry embraces and wholly contains in it the minor franchise of a point to point ferry (of which I am not sure), there would be no variance between the declaration and the evidence, if the claim were for vill to vill and the proof only came up to point to point. But still if the proof only did come up to point to point, the judgment should not be entered as from vill to vill. I do not think that it was on the ground of omne majus continet in se minus that the verdict in *Pim* v. *Curell* (2) was upheld. It was, I think, because the words "township" or "place" &c. were held to be words of topographical distinction merely. There must be some way of shewing by your declaration which franchise you are claiming. And it seems to me that the words in Anguish's declaration claiming the right of ferrying "the liege subjects passing from South Town to Great Yarmouth" are apt words for the claim of a ferry from vill to vill.

Shortly after the verdict in *Anguish* v. *Ebden* a petition was presented by the inhabitants of Yarmouth to Mr. Anguish asking him to set up a second line of ferry, and he did so upon the line which is now the upper ferry, and the corporation helped him by granting him facility of landing on the Yarmouth side, and by passing a by-law in their capacity of controllers of the harbour directing the water bailiff to prevent ships berthing opposite the space allotted for the landing, so as to afford proper

(1) (1848) 2 Ex. 136, 147. (2) 6 M. & W. 234.

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facilities to the ferry. This matter is further referred to in Suckling's History of Suffolk and in certain Chancery proceedings which Anguish subsequently took against Ebden, who further trespassed after the judgment against him. These Chancery proceedings were brought before us in the circumstances mentioned in the judgment of the Lord Chief Justice. In the bill of complaint it is stated by Anguish that he has at the request of the inhabitants set up this second ferry. Apparently the only reason for stating this was as a matter of aggravation against the defendant Ebden, and so stated it may, or may not, be rather carelessly stated. Counsel for the defendant deduced from the statement that Anguish only claimed a point to point ferry. But in the cases there is often confusion between the franchise of ferriage and the actual line or lines where the ferry is de facto worked, and if any inference were to be drawn from the language, at p. 102 of the documents, such as defendant's counsel contends for, there are expressions, at p. 100, which seem to me to negative the supposed inference.

As far as one can tell, from the time of the Star Chamber dispute in 1570 there was, with the exception of the trespass by Ebden, no challenge of the right of the lord of the manor or the predecessors in title of the plaintiff company to the whole ferriage from Little Yarmouth and Gorleston to Great Yarmouth, and vice versa, or any instance of it being exercised by any one else. Upon the death of Anguish the manor and the ferry became severed. From this date the title to the ferry was deduced to the plaintiff company, and the language in which the parcels were described was relied upon. It was as follows: "Thirdly all that ferry or passage beyond the water of Great Yarmouth over and across the river Yare at South Town otherwise Little Yarmouth in the county of Suffolk commonly called Gorleston Ferry and all ferries and passages of ferry boats and barges whatsoever appurtenant thereto being or reputed deemed taken or known as part parcel or member thereof or held or enjoyed therewith or in respect or as part or parcel thereof or appurtenant thereto And the fares profits tolls etc." This is taken from an indenture of mortgage. Contemporaneously with that indenture there was a receivership deed in which the parcels

were more particularly expressed in the schedule, and I think them worth mention; they shew the difficulty arising from the imperfections of language, the word ferry meaning sometimes the franchise and sometimes the particular exercise of it: "And that ferry or passage beyond the water at Great Yarmouth over and across the river Yare at South Town otherwise Little Yarmouth called Gorleston Ferry then in the occupation of William Musson at the several yearly rents and containing the several particulars following (that is to say) the Upper Ferry at the yearly rent of 250*l*. . . . The Lower Ferry together with a messuage or dwelling-house on the west side of the said river adjacent to the said ferry and the use of the wooden house on the east side of the said ferry at the yearly rent of 175*l*. . . . ."

It was suggested by counsel for the defendant that the lower ferry could not be relied upon as an instance of the exercise of a vill to vill ferry, because its terminus on the Yarmouth side was outside the vill of Yarmouth. This point depended upon its being that which was known as the horse ferry, which was probable, and upon a licence from the Crown in 16 Richard II. to the corporation, to "make a certain new port near the vill within their liberty there in a certain place called the Horseferry." It would be rash to infer from this solitary document that there is a liberty. If there be, its existence could be easily proved. The document, I observe, is a translation. It is consistent with it that there is no such franchise in the legal sense, and that the phrase is a good topographical expression for the part of the vill that was outside the town wall. If it were otherwise, the nature of a liberty is that it partakes of the rights and immunities which the principal body of the town or parish—for I know of liberties of a mere parish—possess; and I see no reason why the grant of a ferry to a vill should not be construed as the grant of a ferry to a vill and its liberties.

These being the facts as far as known, counsel for the plaintiff company contend that there is a claim to the full franchise at any rate clearly put forward in 1829, and usage going back to 1750 which is consistent with that claim; and that at any rate the usage since 1829 is sufficient to make it the duty of the Courts to support the full franchise, it being one which

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can exist in law. They further say that the establishment of the upper ferry shortly after 1829, and its peaceable continuance since, should be referred, if possible, to a legal origin, and the only way in which it can have a legal origin is upon the supposition that the franchise was not that of a point to point ferry at the lower ferry, but a vill to vill ferry, one of the incidents of which is, according to the judgment of Coleridge J. in *Matthews* v. *Peache* (1), already quoted by the Lord Chief Justice, to impose on the owner of the franchise the obligation of keeping boats enough to carry passengers from or to any landing place on the river bank.

The observation on the other side is that the upper ferry is a convenient arrangement; that inasmuch as Anguish had successfully maintained that ferrying at some distance away from his usual line of ferry was a disturbance, no one but he could establish a second line of ferry, and nobody but he could object to a second line of ferry. This would make the upper ferry lawful in the sense that it was not a trespass, but a matter of no legal importance, a purely voluntary arrangement, while no tolls could be charged as of right, nor could the service of the ferryman as of right be required. All this seems hardly consistent with the action of the corporation or with the mention of the upper ferry in three local and personal Acts which have been brought to our attention and which were dealt with by Pickford J. The Yarmouth Haven Act, 1835, was passed the year after Anguish established the upper ferry and it speaks of it as a ferry lately established by the Reverend George Anguish, and imposes a summary penalty upon any vessel lying in the harbour which impedes or obstructs the ferry. Probably, if a vessel was to moor in the line of a point to point ferry or of an ancient and accustomed passage, by which the vill to vill ferry was exercised, there might be an action against the master for obstruction. But the remedy here given is a much more effective remedy, and such as would not exist at common law. This being so, this provision seems to me to amount to some recognition of the fact that the upper ferry is more than a mere voluntary arrangement. The other two Acts of 1866 and

(1) 5 E. & B. 546, 557.

1904 enable the corporation of Yarmouth to buy up the north and south ferries, meaning no doubt the upper and lower ferries. But they provide that the corporation shall not purchase one without the other and they enable the corporation when they have purchased the two ferries to establish a new ferry across the haven.

Counsel for the defendant insist upon the fact that the two ferries are spoken of as mere point to point ferries, and not lines along which the general right of ferriage is exercised. When, however, it is remembered that these were Acts of which the corporation, and not the owners of the ferry, were promoters, very little inference can be drawn from the description. On the other hand, the upper ferry is apparently recognized as a purchasable entity, an incorporeal right, and as it has no legal origin as a point to point ferry, this seems to indicate that it is one of the lines by which the owners exercise their ferries from vill to vill.

On the whole matter I think that the learned judge was right in holding that the vill to vill ferry was proved. I need not in this judgment refer to the well-established rules which direct the Court to presume the possible and legal origin for a right openly asserted and long enjoyed. I referred to these in my judgment in the recent Twickenham Ferry case, *Dysart* v. *Hammerton* (1), and they have been dwelt upon by the Lord Chief Justice.

If this be so, there seems little doubt that the defendant has trespassed upon that franchise. It has been argued that the doctrine of "change of circumstances," or new traffic, laid down in the cases of *Newton* v. *Cubitt* (2) (Isle of Dogs case) and *Cowes District Council* v. *Southampton Steam Packet Co.* (3), applies to a claim by the owner of a franchise from vill to vill. I shall have occasion to advert to this doctrine later on. For this purpose it seems to me that the point can be very shortly dealt with. Assuming that in certain cases the connection of new highways coming down to the water on either side by new lines of ferry may not be disturbance of a point to point ferry, still

(1) [1914] 1 Ch. 822. (2) 12 C. B. (N.S.) 32.
(3) [1905] 2 K. B. 287.

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if these new highways come from and to parts of the areas of the vills which are the subject of the franchise, it follows from the nature of the franchise that the owner has the duty of exercising it so as to comply with any reasonable convenience of the public, and a corresponding privilege of preventing others from taking his place. I do not know what would happen as to a point to point ferry if the line of highway were shifted owing to inundations or to engineering schemes providing better access; whether the point to point right would be transferred to the new terminus or termini. Possibly it would be a question of degree. But if the franchise were from vill to vill it clearly would be the duty of the owner of the ferry to transfer his line of ferry in correspondence. If authority be wanted for the duty of the owner of the vill to vill franchise to adapt or increase his lines of ferry, it is, I think, to be found in the judgment of Coleridge J., which I have already cited. Or the matter may be put in another way. Nobody has ever contended that a rival ferrying in the line of a point to point ferry could be justified. If the owner of a point to point ferry can always stop any one from ferrying in his line, by parity of reason the owner of a vill to vill ferry should be able to restrain ferrying over his area.

There is in my opinion enough to support Pickford J.'s judgment and his declaration in the widest sense. But in view of certain contingencies I must briefly discuss the alternative claim and finding.

Assuming the plaintiff company's right to be only that of a point to point ferry at the lower ferry, have they established that the action of the defendant has disturbed that ferry, or has he a right to say that he is no disturber, but has only accommodated, as he lawfully may, new traffic which change of circumstances has brought about? The case in this respect is stated for the defendant with sufficient fulness by Pickford J. in his judgment in the passages reported in the *Law Reports*. (1) The Lord Chief Justice has given full effect to it in his judgment, and I need not repeat it. I have given my attention to the facts proved. I think the learned judge was right in saying that these

(1) [1913] 2 K. B. at pp. 440, 441.

facts would not prevent the defendant's action from being a disturbance. It is not material that at present, at any rate, the plaintiffs are not losing customers. They are quite as much entitled to the natural increase of traffic as to hold their own, and moreover if a competitor is allowed a footing he may underbid or over-attract. As to the expression "class of traffic," if it means that a new style of people are travelling and for a new purpose, I know no reason why this should justify a new service. I went as far in this matter as I could, and for very special reasons there expressed, in my judgment in *Dysart* v. *Hammerton* (1), and I feel bound to say that further consideration has rather diminished the doubt which I there expressed, and led me to incline to the more unqualified opinion expressed by the Master of the Rolls.

The argument of the change of circumstances derives its origin from the *Isle of Dogs Case.* (2) It came incidentally before the Court in *Hopkins* v. *Great Northern Railway* (3); but the only other cases in which it has formed the subject-matter of decisions are the *Cowes Case* (4) and the *Twickenham Case.* (1) As to the *Twickenham Case* (1) and my share in it, I have just expressed myself. As to the *Cowes Case* (4) I have nothing to add to the observations I made upon it in the *Twickenham Case* (1); but I desire to add some further observations upon the *Isle of Dogs Case.* (2) To understand that decision I think we must go back a little into the history of that ferry. The Isle of Dogs was an unbuilt-on marsh, across which people coming from Poplar and desiring to go by the shortest way to Greenwich travelled by a road which went nearly straight to Potter's Ferry Stairs, and so directly across to Greenwich. The ferry being an ancient one, and the grant of the franchise being lost, it might possibly have been thought that it was a vill to vill ferry from Poplar to Greenwich; but the nature of the documents of title forbade this and the alternatives were to say that it was a ferry from the district known as the Isle of Dogs to the vill of Greenwich, or a point to point ferry at Potter's Stairs. As to the first alternative it is difficult to conceive that it could be a

(1) [1914] 1 Ch. 822.
(2) 12 C. B. (N.S.) 32.
(3) 2 Q. B. D. 224.
(4) [1905] 2 K. B. 287

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legal franchise, and the contrary had been previously decided in *Matthews* v. *Peache.*(1) In that case the Court held that the right of ferry was from Potter's Stairs to Greenwich, and could not be extended so as to warrant the new line of ferry from Cubitt's Wharf to Greenwich. This having been decided, Cubitt set up a ferry from a point still lower down the river than his wharf to carry to Greenwich a number of people living or being in Cubitt Town, which by that time was a large assemblage of houses on the eastern side of the Isle of Dogs, off the line of the old highway from Poplar to Greenwich. To the point from which Cubitt's ferry boats started a number of streets and highways came, all new, all unconnected with traffic from Poplar, and only accidentally connected at the back with the old highway from Potter's ferry. It was this fresh traffic from a new town, travelling along no part of the old highway, coming down to the river at right angles to the old line, and requiring a totally different line of ferry up the river, and across at a fine angle, which was held not to be a disturbance of the old ferry. The most pointed expression by the Court is in the language where Willes J. says (2) that change of circumstances creating new highways on land will carry with it a right to continue the line of those ways across a water highway, and it is obvious that a single landing place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics. Having laid this down, the learned judge passes to details, and to the consideration of what proximity is actionable; and those are the principles that must determine this matter.

The limit of actionable proximity may be affected by a change of circumstances, and by the balance of public convenience. Whenever this question has to be decided, the considerations to apply are, on the one hand, the advantage of preserving an ancient ferry, with the duties and liabilities of its owner, its fixed moderate tolls, and the obligation to serve at all hours and in all weathers, and the reasonable rights of the owner of the franchise, including his right to share in the improvements in the neighbourhood, on the other hand, the reasonable con-

(1) 5 E. & B. 546. (2) 12 C. B. (N.S.) at p. 59.

venience of the public, when new highways bring them down to the water's edge with corresponding new highways on the other side, in which case they may fairly complain if they are compelled to make an unreasonable detour.

The application of these principles is always a question of detail and fact, and I have only to say that on this point also I see no sufficient reason for disagreeing with the judgment of the learned judge.

LUSH J. The respondents, who were the plaintiffs in the action, claimed a declaration to the following effect: that they are entitled to the exclusive right of ferrying foot passengers and their goods across the river Yare from all parts of the vills or towns of Gorleston and Little Yarmouth on one side to all parts of the vill or town of Great Yarmouth on the other side and vice versa, or, in the alternative, that they are entitled to two ancient ferries across the river known respectively as the "upper" and "lower ferry"; and they claimed an injunction to restrain the appellant, the defendant, from carrying passengers and their goods across the river within those limits or from otherwise disturbing their said ferry or ferries.

Pickford J. held that they were entitled to the exclusive right of ferriage and that the appellant committed a wrongful act in so ferrying; but, further, that if as the appellant contended the lower ferry was the only ancient ferry which was entitled to protection, he had "disturbed" the ferry by what he had done, and an injunction was accordingly granted. The defendant has appealed against that judgment.

The first question to be considered is whether the respondents have established, from the ancient documents which were put in evidence, that their predecessors in title, the lords of the manor of Gorleston, were the owners of this exclusive right of ferriage. It is said that they owned a vill to vill ferry as distinguished from a point to point ferry or two point to point ferries, and that this franchise imports the right of exclusive ferriage throughout the whole area of the vills, and the right to restrain every other person from ferrying passengers across, even though such ferrying would not constitute a "disturbance" of the ferry rights which

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have actually been exercised by the ferry owner. The area is an extensive one; it comprises about two miles in length. The two ferries in fact worked by the respondents are roughly ¼ mile apart; the appellant's ferry is between them, being rather less than a quarter of a mile above the "lower" ferry.

Pickford J. held that a lost grant of this exclusive right of ferry to the respondents' predecessors in title ought to be presumed, mainly upon two grounds. One was that two lines of ferry had at different times been established by the respondents' predecessors in title, for which a right had been asserted and exercised, and applying the principle laid down in *Philipps* v. *Halliday* (1), the learned judge held that a legal origin must be found if reasonably possible for the assertion and exercise of this right, and that the only legal origin which could be presumed was a grant of a vill to vill ferry, which, it was said, involves this exclusive right of ferriage. The other ground was that their predecessors had successfully asserted this exclusive right in certain proceedings to which I will shortly refer.

I have come to the conclusion, differing with great hesitation from Pickford J., that the documents shew that the respondents' predecessors in title were the owners not of one exclusive right of ferriage over the whole area, but at the most of two separate ferries; and, further, that it is not a correct view of the law to say that a vill to vill ferry imports this exclusive right independently of how and where the right has been exercised; and therefore that in order to succeed the respondents must shew that the appellant has disturbed their ferries or one of them.

One must bear in mind in considering what the extent of the respondents' right is that the exclusive right which they claim, being in derogation of the rights of the public over the highway of the river, must be proved with reasonable clearness. Now the documents undoubtedly shew that the lords of the manor of Gorleston owned from the earliest times what is now called the lower ferry, which is admittedly an ancient ferry. They also shew that about 500 years ago there was another ferry in existence higher up the river, not far from the site of the respondents'

(1) [1891] A. C. 228.

upper ferry. When and how it first came into existence does not appear. This is one of the two ferries for which a right has been asserted and exercised. I do not see why it is not legitimate and proper to presume a lost grant of this franchise, the two ferries both being ancient ferries connecting the vills. The date when it was first established is, as I have said, unknown, as are the circumstances under which it came to be established. This ferry fell into disuse when a bridge was built in 1417. The bridge was destroyed in 1570. Disputes then arose between the corporation of Yarmouth and the lords of the manor of Gorleston with regard to the right of ferrying passengers across the river and proceedings were taken in the Star Chamber which were referred to arbitration. An award was published which was made part of the decree of the Star Chamber. By this award the two disputants divided the profits of the ferriage by the bridge pending its restoration. The lords of the manor of Gorleston took the profits of the ferriage from persons going to Yarmouth and the corporation the profits from persons crossing from Yarmouth. As to the lower ferry, the foot ferry as it was called, the lords of the manor of Gorleston were to enjoy it "for ever as hath been used and now is." The bridge was restored and the then upper ferry ceased to be used.

I find it difficult to see how the exclusive right of ferriage over the whole area of the vills can have belonged either to the corporation or to the lords of the manor as matters stood under this award. The lower ferry and the ferry by the bridge seem to me to have been separately treated as two distinct properties or franchises. If, as the fact is, they were not vested in the same owner, it was in my opinion impossible to say that the exclusive franchise over the whole area can have belonged to either owner. There is no evidence that I can find that the right that the corporation took under the award ever became vested in the lords of the manor, or that, if it did, the nature or character of their franchise ever became changed.

The next incident of importance is the action which Mr. Anguish brought in 1829. He was the owner of the lower ferry, and he sued one Ebden for disturbance and obtained a verdict. In 1834 he took proceedings in Chancery for an injunction.

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Although in the common law action he claimed the right in his declaration to "carry every the liege subjects of our Lord the King passing over the said river" from South Town to Yarmouth and vice versa, that was the common form of declaration for a point to point ferry (see *Pim* v. *Curell* (1) and *North and South Shields Ferry Co.* v. *Barker* (2)). In the petition in Chancery the ferry which was alleged to have been disturbed was described as Gorleston Ferry "of which his predecessors in title have been in the uninterrupted enjoyment for very many years," and the defendant's ferry was described as "at the distance of about half a mile from your orator's said ferry." The only ferry claimed in those proceedings appears to me to have been the actual lower ferry; not an exclusive right of ferriage over an area such as is now claimed by the respondents.

About this time Mr. Anguish was requested by adjoining owners to provide an additional ferry to ply near the Armoury at Little Yarmouth. He provided it, and this is the present upper ferry. This fact, that he was asked to and did provide a ferry boat and landing stage, does not appear to me to be sufficient to justify the inference which Pickford J. drew that it was established by virtue of the grant of an exclusive right of ferriage between all points in the vills. The owner of the lower ferry would be the natural person to undertake the task; he had established his right to be free from disturbance and there might be some risk of further proceedings if a stranger had undertaken it. He was not, so far as I can see, asserting a right to set up another "ancient" ferry which would have a new area of protection. A more important matter is the enactments contained in three local Acts which were passed in 1835, 1866, and 1904 respectively. By the first of these Acts the corporation of Yarmouth were empowered to take summary proceedings to prevent persons in charge of vessels from mooring so as to "impede or obstruct the ferry lately established by the Reverend George Anguish" &c. If this Act had stood alone, I do not think that the fact that in regulating the use of the haven provision was made for preserving the efficiency of a ferry, which was no doubt of great practical utility, would be sufficient to

(1) 6 M. & W. 234. (2) 2 Ex. 136.

justify the inference that it was established by virtue of the grant of the exclusive right of ferriage. But the two other Acts seem to me to clearly treat the upper and lower ferry as two distinct properties or franchises and not as two modes of exercising one exclusive franchise. The Act of 1866 provides that the corporation may for the purposes authorized "purchase take and use the ferries over the haven called the north and south ferries provided that the corporation shall not purchase take or use one of such ferries unless the corporation purchase both of such ferries." By the Act of 1904 the corporation were empowered to "purchase take and use the ferries over the haven called respectively the 'north ferry' and the 'south ferry' together with the property (real and personal) rights powers and privileges held or enjoyed by the owners of those ferries respectively for the purposes thereof and the provisions of the Lands Clauses Acts incorporated with this Act shall so far as applicable extend and apply to the purchase and taking of such ferries property rights powers and privileges as if the same were lands within the meaning of those Acts provided that the corporation shall not purchase take or use one of such ferries unless they purchase both of such ferries." The next sub-section empowers the corporation to establish a new ferry or ferries across the haven at such points as they may deem expedient (subject to the approval of the commissioners), but they must first purchase the north ferry and the south ferry "under the foregoing provisions of this section."

It seems to me that these Acts shew that the two ferries were recognized and treated as two separate and distinct properties and that they were to be purchased as such. The Act of 1904 contemplates and provides for their being in the ownership of different persons. It speaks of the "owners of those ferries respectively," and no exclusive right of ferriage over the whole area could in that case exist. The notice to treat would be a notice to treat for two distinct ferries and not a notice to treat for one exclusive right of ferriage such as is now claimed. There would, moreover, be no need in the latter case to provide for the right to establish new ferries between the upper and lower ferry if the corporation were going to purchase the exclusive right of

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ferriage all along the bank of the river. If the corporation should establish a new ferry after purchasing the two existing ones, their right to do so would be derived from the statute and not from the grant to their vendors' predecessors in title. Further, I doubt whether after the Act was passed Mr. Anguish could have established a new ferry within the area and claimed that it had all the rights of an ancient ferry, thereby prejudicing any new ferry established by the corporation, and if so I do not see how he could have restrained another person from ferrying without proving that he was disturbing one of the two existing ferries.

There remains no doubt the fact that the Legislature by a local Act has treated as a property to be purchased a ferry which is not an ancient ferry, and it may be has validated it as a ferry entitled to protection. I do not think it is necessary to decide whether it has done so. But if it has, and if at the same time it has treated the ferry as a separate and independent property, and not as a mere instance of the exclusive right over the whole area, I do not see how we can draw from the legislation the inference that that exclusive right was recognized as belonging to the ferry owner.

The next question is whether it is correct in law to say that the owner of a ferry from vill to vill has the right, without having exercised the ferry right except between defined termini, to restrain any other person from ferrying persons across the water between other points in the vills when such ferrying is not a disturbance of his actual line of ferry. If, for example, traffic which is admittedly new traffic has arisen which for the public convenience requires to be accommodated, is it an actionable wrong to ferry persons across between two points in the opposite vills so far from the existing ferries as not to constitute a disturbance? I do not think that it would be necessary for the protection of the ferry owner to give him such a right, or to do more than protect the ferry which he works and for which he has constructed landing stages from being disturbed or interfered with; and bearing in mind that the franchise is only granted for public convenience, and that it ought not to be so "fenced round by legal protection as to enable the franchise owner to defeat that

which was the only justification for the grant, namely, the public advantage" (see judgment of the Master of the Rolls in *Dibden* v. *Skirrow* (1)), I think that it would be wrong, unless one is compelled by authority to say so, to hold that so extensive a right was conferred by the grant of a ferry from vill to vill. Moreover, if the grant of a vill to vill ferry imports such a right, it must, to make it effective, have conferred the right on the persons ferried to have access to the water at all points in the vills, which it could not do. It is not to be supposed that the public then had and always would have such right of access. So far from the cases being in favour of the respondents' view, in my opinion the question was decided adversely to the respondents in *Newton* v. *Cubitt*. (2) That case related to a ferry from the Isle of Dogs to Greenwich. It was stated in the case subject to which a verdict for the plaintiff had been entered that "The ferry company have at all times claimed the exclusive right to convey passengers from all parts of the Isle of Dogs to the opposite shore." It was contended for the defendants that in none of the cases had a claim been made to carry all the passengers from a whole district, but that the ferry was always between a particular point and some other point or vill. Willes J., delivering the judgment of the Court, held that the claim could not be sustained. The decision proceeded upon two grounds: first, that one must have regard to the user in order to ascertain what the extent of the right was—a view which Lord Campbell also expressed in *Matthews* v. *Peache*. (3) The second ground was that such a franchise was bad in law. "Furthermore," said Willes J., "the nature of the franchise seems to be repugnant to the plaintiffs' claim of a ferry from every part of the isle indiscriminately"; and a little later: "The notion that a large area of land should be subjected to the servitude that the owners and occupiers thereof should be prohibited from using the highway of the Thames as they may choose and should be under an obligation to get to the highway leading from Potter's Ferry Stairs, and cross to Greenwich only therefrom, is anomalous."

(1) [1908] 1 Ch. 41, 44. (2) 12 C. B. (N.S.) 32.
(3) 5 E. & B. 546.

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I cannot find in any of the earlier cases, of which *Tripp* v. *Frank* (1) and *Huzzey* v. *Field* (2) are instances, any decision to the effect contended for by the respondents. In all the cases in which the rights conferred by a vill to vill ferry are discussed the question considered and decided seems to me to have been whether the ferrying complained of was so near to the plaintiff's actual line of ferry as to constitute a disturbance, and whether the defendant had or had not evaded or defrauded the plaintiff of the traffic that would naturally use his ferry.

The difference between a vill to vill and a point to point ferry in their origin was this: the latter was a highway on water connecting two defined highways on land; the former was a highway on water connecting two vills. The grantee of the vill to vill ferry might have constructed more than one landing stage and therefore might have more than one ferry entitled to protection; but he was not, as I have said, in my opinion entitled to treat the whole area of the vills as subject to the burden or servitude independently of the mode in which and the extent to which this right had been exercised. I have already observed that the award to which I have referred adjudging that the lords of the manor of Gorleston were entitled to the lower ferry contained the words "as hath been used and now is." I therefore think that the theory to which the respondents appeal in explanation of the assertion of right by their predecessors in title is not sound in law, and that they must prove disturbance of the lower ferry in order to succeed.

I ought perhaps to add that there is very little, if any, evidence that the lower ferry was within the limits of the vills. It is spoken of as being "near the vill" in document 14 of the appendix.

The last question is, was Pickford J. right in holding that the respondents proved a disturbance of the lower ferry? The principle to be applied in deciding this question was stated thus by Willes J. in *Newton* v. *Cubitt* (3): "The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport

(1) 4 T. R. 666. (2) 2 C. M. & R. 432.
(3) 12 C. B. (N.S.) 32.

of the passengers using the way; and, if the alleged wrong-doer makes a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to travellers, such a wrong-doer would be guilty of the wrong complained of in the second count; he would indirectly carry in the line of the plaintiff's ferry"; and, after stating that it had been found by the jury that the defendants had not the purpose of evading the plaintiff's ferry or of diverting traffic therefrom, the learned judge added: "The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that, if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances, creating new highways on land, would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such labourers pass now to Greenwich where one traveller passed in 1800, it seems oppressive to fix on such a large number of labourers the perpetually repeated loss of three-quarters of a mile of walking for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable."

In the recent Twickenham case, *Dysart* v. *Hammerton* (1), the Court treated the defendant in such a case as this as having a right to carry traffic across the water if it is substantially new traffic, or traffic which would naturally and for reasons of public convenience cross the river at points not those which are the termini of the ancient ferry. This is, as I understand the judgment, really the same proposition in effect as that stated by Willes J. in *Newton* v. *Cubitt.* (2) In order to ascertain whether the traffic is new traffic or not one must, it seems to me, have regard to the traffic which the ferry was created to accommodate.

(1) [1914] 1 Ch. 822. (2) 12 C. B. (N.S.) 32.

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Now the facts are set out in the judgment of Pickford J. (1) I would supplement them by saying that the persons ferried across by the appellant were workmen who had to cross to get to the engineering works, &c.,—some had to cross several times a day—and the purpose of the appellant was not, I think, to divert traffic which would naturally cross by the respondents' ferry in order to reach the highway to which that ferry led, but to meet a need which had arisen and enable the workmen to avoid waste of time in getting to their work. In my opinion, the circumstances were so changed that this was new traffic, and it was traffic which naturally and for reasons of public convenience crossed the river at different places or termini from those at which the lower ferry is worked by the respondents. I do not think, therefore, that the appellant has committed an actionable wrong. He may of course so act as to tempt persons who would naturally use the lower ferry to use his ferry, but I do not think that the evidence establishes that he has done so. It is true that the respondents lose traffic which they would otherwise secure, but it seems to me impossible to say that on that ground alone they are entitled to complain. The question must be one of degree, and each case must necessarily depend on its own peculiar circumstances; but while, as I have said, I differ with hesitation from Pickford J., I cannot come to any other conclusion. I do not think that I am differing on a mere question of fact. Accepting the facts as found by the learned judge, I differ on the conclusion, which I think is rather one of law, to be drawn from those facts.

For these reasons I am of opinion that the appeal ought to be allowed.

Appeal dismissed.

Solicitors for appellant: *Dubois & Co., for Chamberlin, Talbot & Bracey, Great Yarmouth.*

Solicitors for respondents: *Morris & Bristow, for Harmer, Ruddock & Son, Great Yarmouth.*

(1) [1913] 2 K. B. at pp. 440, 441.

J. H. W.

[IN THE COURT OF APPEAL.]

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POAD *v.* SCARBOROUGH GUARDIANS.

[1913 P. 1129.]

Poor Law—Relieving Officer—Superannuation Allowance—Resignation "in consequence of any offence of a fraudulent character, or of grave misconduct" — Irregularities in dealing with Money not of a Fraudulent Character—Poor Law Officers' Superannuation Act, 1896 (59 & 60 *Vict. c.* 50), *s.* 7.

By s. 7 of the Poor Law Officers' Superannuation Act, 1896, an officer or servant in the service or employment of the guardians of a union who ceases to hold office "in consequence of any offence of a fraudulent character or of grave misconduct" shall forfeit all claim to any superannuation allowance under the Act in respect of his previous service:—

Held, that the words "grave misconduct" are not limited by the previous words "any offence of a fraudulent character" so as to be confined to grave misconduct of a fraudulent character, but that in order to constitute "grave misconduct" the misconduct must be of a higher standard than that which would justify an employer in dismissing his servant and must be of a very serious character.

The plaintiff was employed by the defendants as (inter alia) relieving officer and collector. For several years he had been in the habit of using money received by him as the defendants' collector for his own purposes, instead of paying it into their account, and, with the aid of his salary, had paid quarterly to the defendants' account the amount of the money so used by him. Upon being told that the practice must cease he nevertheless continued it, and in particular he did not pay into the guardians' account until June 5, 1912, a sum of money he had collected in April, 1912, and then only by the aid of money he borrowed for the purpose. A sum of money which he had collected during June, 1912, ought to have been paid into the guardians' account on or before July 4, 1912, but the plaintiff failed to make this payment. He also debited the defendants in his books with the sum of 3*s.* a week for thirteen weeks for relief to a man who was in fact dead; and he debited the defendants with a sum of 8*s.* due to the overseer of another union, but did not in fact pay the 8*s.* until about nine months later. There was no suggestion of fraud against the plaintiff, who resigned his office in consequence of these irregularities:—

Held, that although the plaintiff had not committed any offence of a fraudulent character he had been guilty of "grave misconduct" within

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the meaning of the section and was therefore not entitled to any superannuation allowance under the Act in respect of his previous service in the offices of relieving officer and collector.

APPEAL by the plaintiff Poad from a judgment of Rowlatt J. given at the trial before him without a jury at the Leeds Assizes on July 21, 1913.

The plaintiff claimed a declaration that he was entitled to receive during his life out of the common fund of the defendants' union a superannuation allowance according to the scale laid down in the Poor Law Officers' Superannuation Act, 1896. (1)

The plaintiff Poad was from 1892 to 1912 (inter alia) in the employment of the defendants as a relieving officer and collector and had also been for several years prior to 1912 vaccination officer and registrar of births and deaths to the defendants. He alleged that he had become incapable of discharging his offices by reason of permanent infirmity, and claimed a superannuation allowance under s. 2 of the Act of 1896. The defendants admitted that he was entitled to a superannuation allowance as regarded his office of vaccination officer and registrar, but as to his office of relieving officer and collector they alleged that he resigned it in consequence of "grave misconduct" within the meaning of s. 7, and that therefore he was not entitled to a superannuation allowance in respect of that office.

The following statement of the facts is taken, in substance, from the judgment of Lord Reading C.J. :—

The plaintiff had been in the service or employment of the defendants for a very considerable time, it is said for twenty years.

(1) By s. 2 of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body . . . . shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union, a superannuation allowance according to the scale laid down in this Act."

By s. 7, "An officer or servant who is dismissed or resigns or otherwise ceases to hold office in consequence of any offence of a fraudulent character, or of grave misconduct, shall forfeit all claim to any superannuation allowance under this Act in respect of his previous service . . . ."

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On February 23, 1912, a letter was received from the Local Government Board which brought to the attention of the defendant union the fact that their district auditor had reported irregularities—as I will call them—with reference to some transactions of the plaintiff. Thereupon the matter was considered by the board of guardians, and they came to a conclusion which is recorded in a minute of March 21, 1912, referred to in a letter from the Local Government Board of March 22, 1912. The effect of the minute was that the matter had received attention, that the complaints had been carefully gone into, and that the finance committee of the guardians which dealt with this matter did not think that they could look upon Mr. Poad's explanations as being in any way satisfactory. They thought that his statements amounted to admissions of indifferent bookkeeping and general carelessness, but at the same time they had no hesitation in exonerating him of any fraudulent intent. They thought that the matters brought before them were evidence of his extreme negligence—though they did not recommend that any definite step should be taken at that time, considering it better to postpone their final decision till the end of June. Further, they came to the conclusion that the system of checking, which was the same then as had been carried on for a number of years, was inadequate, and that a new method which had been instituted would meet the requirements. In March, 1912, it was drought to the notice of the plaintiff by Mr. Smales, who acted as clerk to the guardians,—he was in fact assistant clerk, but acted in this instance as the representative of the guardians—that the system which apparently had been carried on for a considerable time must cease. At the trial the plaintiff admitted on cross-examination that henceforth he was to pay monthly into the account of the guardians the amounts which he collected. The position which had existed up to this moment apparently was that, apart altogether from irregularities in bookkeeping, Mr. Poad had used for his own purposes the money which he collected into his account as collector, and used it as it came in; but he said that he was always in a position to pay the amount which he had collected if and when he received his salary from the board of guardians. Undoubtedly that was a

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system which was most irregular. The moneys which were collected by him were the moneys of the guardians, and although, as Rowlatt J. has said, it was not essential that he should pay over the specie—the exact coin—as he received it, still he ought to have been in a position to pay over the funds as he collected them whenever he was required by the guardians to do so; but for a period of years he had been in the habit of using the money and then making the necessary payment by means of the salary which he received from the guardians. During the period which preceded March, 1912, there were two matters in particular which came before the board of guardians. The first was with reference to the payment of a sum of 3*s.* a week to a man named Colling for relief, which was debited against the guardians in the plaintiff's book for some thirteen weeks after the death of the man as well as for a number of weeks when the plaintiff was not in fact paying over that sum. It was explained at the trial that that was a mistake, and when it was found out, which was in December, 1911, the plaintiff paid over this money to the guardians' account. The next matter was with reference to a man called Walker, who was overseer for some other union, and was entitled to a payment of 8*s.* as expenses of removal of a pauper. The amount apparently accrued due on May 29, 1911. Nothing was done with reference to it except that at the end of May or beginning of June the plaintiff debited the guardians with this amount of 8*s.* He was entitled to debit them if he paid over the amount, but he did not pay it over, and in fact it was not paid until February 3, 1912, when the overseer had again sent in an account for the sum, thus indicating that he had previously demanded and not received it.

Then there were two further matters to which a good deal of importance attaches. March, 1912, was the time from which the moneys were to be paid in monthly, and, according to the evidence which is before us, the amounts received during the quarter ending March 31, 1912, were paid in monthly. I notice, on looking at a document, which for convenience has been called document No. 6, and contains a statement shewing the amounts collected by the plaintiff and the dates when he paid the same into the bank, and the dates of the

payment of his salary, that, going back as far as June, 1910, there is one payment in at the end of every three months, which is what the plaintiff said had been his system. His salary was paid monthly. For the quarter ending December, 1911, he appears to have paid in three separate amounts, each in November, December, and January, which seem to be payments in of amounts which had been received as follows: what was paid in in November was what had been collected in October; what was paid in in December was what had been collected in November; and what was paid in in January was what had been collected in December. During the next quarter the complaints were made by the district auditor which were inquired into, and in respect of which the instructions were given to the plaintiff for the future to pay monthly into the account the amounts collected. The learned judge decided the case upon the plaintiff's evidence, and, according to the evidence of the plaintiff, he did pay in during the three months of the quarter ending March 31, 1912, sums monthly which balanced his account at the end of March.

Then there is an item of great importance of 6*l.* 16*s.*, which to the extent of 6*l.* 10*s.* he had collected in the month of April, 1912. That money ought to have been paid in in the beginning of May, but it was not paid in then, and evidently some complaint was made with reference to it, because the plaintiff admitted in cross-examination that he had been asked to pay that money in, and the inference which I draw from the evidence is that he promised to pay it in, but he did not do so, and on June 5, 1912, Mr. Smales, the assistant clerk to the overseers, again drew attention to the fact that he had not paid in the sum of 6*l.* 10*s.* and a further sum of 6*s.*, amounting together to 6*l.* 16*s.*, which he had promised to pay in. Then he asked Mr. Smales to lend him the money, which Mr. Smales did, and in that way the 6*l.* 16*s.* was paid. The next day the plaintiff received his salary, and out of the salary from the guardians he repaid Mr. Smales the 6*l.* 16*s.* which he had borrowed. But it is to be observed that he had also received his salary on May 2, and, although he had received his salary then, he had not paid in this amount of money. I do not leave out of account the

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argument that it may be that he was so used to the other system of paying in only every three months that, though he had promised to pay in in May, he forgot and did not do it. But it is clear from that statement of facts, on which there can be no dispute, that he had not done what he was told to do by Mr. Smales as the result of what had happened in February and March, 1912; neither had he carried out that which he had promised in March in pursuance of the same instructions.

Then we come to a later period. He apparently had collected a sum of 16*l.* 19*s.* 8*d.* during the month of June, 1912, which sum ought to have been paid in on July 4, 1912, or earlier to the defendants' bank. He had not paid it. His explanation for not doing it was that he was waiting till he got his salary, and he says that he was quite justified in the course which he took of using the moneys and paying them over when he did get his salary. But in any event the amount of his salary, even with the addition of commission to which he would have been entitled, would not have been sufficient to liquidate the sum of 16*l.* 19*s.* 8*d.* It is said it would have left him with an amount outstanding of 2*l.* 3*s.* 10*d.* or 2*l.* 13*s.* 10*d.*, which he would then have had to pay; but, according to his statement, he always had the money out of which he could have paid this balance with the addition of the salary and the commission which was coming to him. So that he said that, once he had got his salary, he was never in the position of not being able to pay over whatever money was due.

On July 4, 1912, he was suspended, and was told that he had better consider his position before the next weekly meeting of the defendants' board on July 11. On July 8 the plaintiff had an interview with Mr. Sowerby, the chairman of the defendants' finance committee, who desired the plaintiff to give an explanation. This the plaintiff did not do, nor did he then pay any of the money which was in arrear, being apparently waiting for his salary. On July 10 he obtained a medical certificate that owing to the state of his health he was unable to perform his duties properly. On July 11 he attended a meeting of the finance committee of the defendants' board and tendered his resignation of the offices of relieving officer and collector, which was accepted by the

defendants' board on the same day. No suggestion was made that the plaintiff had committed any offence of a fraudulent character, but Rowlatt J. found as a fact that the irregularities with regard to the moneys collected by him on behalf of the guardians of which he had been guilty amounted to grave misconduct within the meaning of s. 7 of the Act of 1896, and that it was in consequence of this grave misconduct that he had ceased to hold office. He therefore gave judgment for the defendants.

The plaintiff appealed.

Bairstow, K.C., and *Charles Mellor*, for the plaintiff. The facts do not shew "grave misconduct" within the meaning of s. 7 of the Poor Law Officers' Superannuation Act, 1896. The plaintiff has been exonerated from any intention to defraud. The words "grave misconduct" must be construed with reference to the preceding words "in consequence of any offence of a fraudulent character." The question as to what constitutes "grave misconduct" within the meaning of the section cannot properly be answered except in connection with the words and phrases with which the expression "grave misconduct" is associated. In s. 7 the expression is associated with words of far more serious import and it cannot be construed without reference to the preceding words "offence of a fraudulent character." In Maxwell on the Interpretation of Statutes, 5th ed., p. 529, it is laid down that "when two or more words, susceptible of analogous meaning, are coupled together, noscuntur a sociis; they are understood to be used in their cognate sense. They take, as it were, their colour from each other." [*Moore* v. *High Bailiff of Brompton County Court* (1) was also referred to.]

The term "offence" means "crime": *Derbyshire County Council* v. *Derby Corporation.* (2) The whole of the provisions of s. 7 must be read together, and, when that is done, they shew that the words "grave misconduct" indicate something which must be in the nature of an "offence," that is, of a crime. If there is no guilty intent, but only negligence or carelessness, there cannot be an offence or grave misconduct within the meaning of s. 7.

(1) (1893) 41 W. R. 557.

(2) [1896] 2 Q. B. 53.

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The words "grave misconduct" were intended to include acts of misconduct which would shew that a person was unfit to be a relieving officer, such as immorality with or inhumanity towards a patient he had to remove.

E. Tindal Atkinson, K.C., and *T. P. Perks*, for the defendants. There was evidence upon which the judge at the trial could come to the conclusion that the plaintiff had been guilty of "grave misconduct" within the meaning of s. 7 of the Poor Law Officers' Superannuation Act, 1896. In order to ascertain whether there has been grave misconduct all the circumstances of the case must be taken into consideration. An isolated act might not amount to grave misconduct, although if repeated systematically or after warning or notice it might. Dealing with money stands upon a different basis from that of other ordinary affairs of life. The plaintiff was guilty of grave misconduct in relation to his employment.

[They were stopped.]

Bairstow, K.C., in reply. In order to constitute grave misconduct there must be some moral obliquity, and there is no evidence of that. Sect. 7 of the Act of 1896 is a penal one and ought to be construed strictly. The words "grave misconduct" apply to a case where, although there has been no fraud in connection with money or stores, the officer has still been guilty of such misconduct that it would be a scandal to allow him to take his pension. There is no evidence that the plaintiff was guilty of acts of misconduct in relation to his office.

LORD READING C.J. This action was brought by Mr. Poad, who occupied (amongst other offices) the position of relieving officer and collector to the defendants the guardians for the rural district of the Scarborough Union. He brings this action against the defendants to recover from them payment of the superannuation allowance to which he claims to have become entitled under the Poor Law Officers' Superannuation Act, 1896. Sect. 2 of that Act says: "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent

infirmity of mind or body, or of old age, or who shall have attained the age of sixty years and have completed an aggregate service of forty years, or who shall have attained the full age of sixty-five years, shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union a superannuation allowance . . . ." The plaintiff says that, but for the facts which are alleged against him, he would be entitled to the superannuation allowance which he claims and that those facts are not sufficient in law to deprive him of it.

The question turns upon s. 7 of the Act of 1896, which in substance says that any officer or servant who would otherwise become so entitled shall forfeit his right, if he resigns or ceases to hold office in consequence of any offence of a fraudulent character, or of grave misconduct. The first question here is whether the plaintiff did resign or cease to hold his office in consequence of grave misconduct. It is not suggested that he had committed an offence of a fraudulent character, and what we have to determine is whether, upon the facts as proved, he has been guilty of grave misconduct. [Having stated the facts above set out, his Lordship continued:] Now those are the material facts in this case, and upon them Rowlatt J. came to the conclusion that the plaintiff had been guilty of grave misconduct within the meaning of the words in s. 7 of the Act of 1896, and entered judgment for the defendants; and we must therefore treat this appeal as a rehearing. Mr. Bairstow has contended very strenuously on behalf of the plaintiff—on whose behalf he has said all that possibly could be said—that there was no evidence upon which the learned judge could come to that conclusion, and that, even if there was some evidence, he ought not to have arrived at such a conclusion, but have found that the plaintiff had not been guilty of grave misconduct. He bases that contention upon the ground, substantially, that grave misconduct in s. 7 means something of a fraudulent character. He says that the words "grave misconduct" following the words "any offence of a fraudulent character" necessarily mean that the grave misconduct must be of a similar fraudulent character. I do not come to that conclusion as to the meaning of this

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statute. I think that in the first part of the section the Legislature is dealing with a person who ceases to hold office in consequence of any offence of a fraudulent character and that that part of the section is limited to any offence of a fraudulent character; and if those were the only words, of course Mr. Bairstow would be right in saying that no such offence has been found or proved against his client. But we have to give a meaning to the words "grave misconduct," and I come to the conclusion that those words mean that if a person has been guilty of misconduct alone to which one would not apply the adjective "grave," that is not sufficient to disentitle him to his superannuation. The misconduct must be of a higher standard than that which would be applied, for example, in the test of whether an employer was justified in dismissing his servant for misconduct. I think we must come to the conclusion that when Parliament introduced the word "grave" before the word "misconduct" it meant that the misconduct must be not only of a character which could properly be described as misconduct, but also that the misconduct must be such as would amount to misconduct of a grave—that is serious and even very serious—character.

The next question is whether on the facts there has been such misconduct, that is grave misconduct, within the meaning of the statute. I have had some doubts about the matter during the argument, but having all the evidence before me, and taking into account the added fact that Rowlatt J. had the plaintiff before him, and bearing in mind everything that has been proved in this case, I cannot see my way to disagree with the finding of the learned judge. I think that he was quite justified in the conclusion to which he came upon the facts of the case, and I reluctantly come to the same conclusion.

One cannot help feeling, as Rowlatt J. himself felt, some commiseration for the plaintiff in the circumstances, but the learned judge had to administer the law upon the facts as proved before him, as we have also to do, and in those circumstances I am forced to the conclusion that the plaintiff has forfeited his right to the superannuation allowance by reason of his misconduct.

A further point was taken that the plaintiff resigned or ceased to hold office on account of ill-health, and did not resign on

account of grave misconduct. Rowlatt J. has come to the conclusion that on the facts proved it was impossible to come to any other conclusion than that he resigned on account of these various matters, which the plaintiff thought were serious, even if he did not think that they might amount to misconduct, and I think that is abundantly established by the evidence. He was called to account on July 4. On July 8 he had an interview with Mr. Sowerby, the chairman of the defendants' finance committee, who desired an explanation of the occurrences in question, which was not forthcoming; that is to say, he could get no payment of the money at that time, since apparently the plaintiff was still waiting for his salary, which had not then been paid, and could not make up the deficiency until it was paid. On July 10 for the first time he consulted a doctor with reference to his state of ill-health. It is said he suffered from writer's cramp, and from what has been called rider's cramp, which made it difficult for him to get about on his pony to do his work, and also from loss of memory. But on the evidence these things do not seem to have pressed him very seriously until a late period in the history of this case, and he did not go to the doctor till July 10, after these events had happened, and he had been called upon to account, and understood that this was a serious matter. Then he received a certificate from the doctor. It is unnecessary for me to go at length into what happened then, because, on the view I take of the facts of this case, it is wholly immaterial, as I come to the conclusion that in fact he did resign and ceased to hold office on account of the acts to which I have referred, and which amounted to grave misconduct. Rowlatt J. came to a very definite conclusion upon that, and I fully agree, and therefore I think it is useless to go into the evidence in any detail on that point. The conclusion at which I have therefore arrived is that the appeal must be dismissed.

PHILLIMORE L.J. Rowlatt J., after hearing the plaintiff's own evidence, and such other evidence as he called, decided against him apparently without hearing or requiring argument from counsel for the defendants. Whether the case would

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have been stronger or weaker for the plaintiff if the defendants had gone on and called their witnesses it is idle to speculate upon. I think we must take the case as it was left at the trial, and form our own opinion upon it.

Now the plaintiff had used the money which he had collected to finance himself. I agree that counsel for the plaintiff said that the guardians had allowed that system, but that statement was immediately contradicted by the counsel for the defendants. But the case for the plaintiff was, and is, that he had used money which he had collected for the guardians to finance himself. That was improper. Whether the guardians allowed that system, or whether they simply did not discover it, I think was unnecessary to be decided. My impression is that no evidence fit for consideration was given that the guardians allowed the system. No doubt the system had gone on, until at a later date it was discovered. Now he financed himself on, considering that the sums were small, a relatively somewhat large scale, because his habit was to pay only at the end of each quarter—and sometimes a day or two into the next month—that which he had collected during the three previous months. [The learned Lord Justice having reviewed the facts continued:] In these circumstances he was warned that he had better resign, which he did in writing, saying in the resignation that he would give the reasons later, and he sent in later a document evidently drawn up for the purpose, but which defeated its own ends, because it obviously had been prepared for that very purpose, being a document in which a medical gentleman took upon himself to say that the plaintiff was entitled to a pension—obviously drawn up with a view to meeting s. 7 of the Poor Law Officers' Superannuation Act, 1896, or of putting in a recommendation for superannuation allowance.

That section says: "An officer or servant who is dismissed or resigns or otherwise ceases to hold office in consequence of any offence of a fraudulent character, or of grave misconduct, shall forfeit all claim to any superannuation allowance under this Act in respect of his previous service, provided that in the case of any such officer or servant the guardians may, if they see fit, return to him out of the common fund of the union a

sum equal to the amount of all or part of his contributions under this Act."

What is an offence of a fraudulent character? That seems to me merely a compendious way of saying the offences of larceny, false pretences, embezzlement, falsification of accounts, and possibly some of the offences under the Debtors Act. The argument is that if he ceases to hold office in consequence of an offence which is not of a fraudulent character he does not lose his pension because the offence will not be one of grave misconduct. I might suggest one of the offences which would not be of a fraudulent character but which would lead to his losing his office. He might be convicted of manslaughter, which would not be an offence of a fraudulent character. I can conceive that such a man might nevertheless lose his pension if he ceased to hold office for such an offence. It would not be an offence of a fraudulent character but still might be grave misconduct.

There are other offences which might constitute grave misconduct and would not be offences of a fraudulent character. That the words "grave misconduct" cannot be confined to conduct of a fraudulent character is obvious. If he is not to be dismissed for any offence unless it is of a fraudulent character he might assault a person with intent to kill him, or he might be guilty of rape or a number of very serious offences, and yet he might hold his superannuation allowance.

It is therefore, to my mind, clear that "grave misconduct" is not limited by the words "fraudulent character," but includes other offences, and the officer may cease to hold office in consequence of any such offences, or in consequence of grave misconduct. We are left to determine for ourselves what "grave misconduct" means. The words are incapable of definition, and the tribunal must apply its mind to the words and give a meaning to each of them. I quite agree with what the Lord Chief Justice has said as to the meaning of the word "grave," and we must then see whether or not what this man did was grave misconduct, and whether he ceased to hold office in consequence of it. That he ceased to hold office in consequence of what he did, and of the complaints which were being made of him, and of the fear which he entertained of the way in which

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they would be received, is clear. There was obviously something in the plaintiff's demeanour which impressed Rowlatt J. unfavourably; and the documents and the evidence are against him, and though no doubt there is something to be said against the misconduct being grave, on the whole, after hearing the argument very fully and very elaborately developed by Mr. Bairstow and his junior, I come to the conclusion that Rowlatt J. was right, and that what the plaintiff did amounted to grave misconduct. I come to the conclusion that the judgment below was right.

LUSH J. I had very grave doubt with reference to this case during the argument, but on the whole I also come to the conclusion that the appeal fails, and I will very shortly state my reasons.

Before a person in the plaintiff's position can be deprived of his right to superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, two things must be established: first, that he has been guilty either of an offence of a fraudulent character, or, if not that, of some other conduct which is rightly described as grave misconduct; and, secondly, that it was in consequence of that conduct that he either was dismissed, or if not dismissed, that he resigned or ceased to hold office. Now with regard to the second fact, namely, that he resigned in consequence of misconduct, I have felt no difficulty. I entirely agree with Rowlatt J., who held that the real effective cause of the plaintiff's resignation was not his illness but his conduct, which Rowlatt J. held constituted grave misconduct. My difficulty has arisen in this way: I think it is quite clear that the misconduct referred to in s. 7 must be misconduct of a gross or flagrant kind. As Lord James of Hereford said in *Johnson* v. *Marshall, Sons & Co.* (1), speaking of the words "serious misconduct" in the Workmen's Compensation Act, 1897, "I think that the words of the statute, 'serious misconduct,' represent a higher standard of misconduct than that which would justify immediate dismissal." Therefore in the present case it is not enough to say that the plaintiff was guilty of misconduct,

(1) [1906] A. C. 409, at p. 413.

although grave enough or serious enough to justify dismissal. It must be shewn that the misconduct justified the use of the word "grave" in s. 7 of the Poor Law Officers' Superannuation Act, 1896. I was at first inclined to think that the learned judge had held that the mere fact that the plaintiff had retained in his own hands the moneys of his employers that he had collected, until he received his salary, and that he had done that on two occasions, justified him, taking those acts by themselves, in saying that the plaintiff was guilty of grave misconduct. If that had been all I should have hesitated before I had come to that conclusion, because one must recollect that the plaintiff had, through a long series of years, been in the habit of retaining moneys that he had collected, not for the purpose of embezzling them or defrauding his employers of them, but because he knew that the salary that he was to receive would be paid, and that if he paid these moneys in when the salary was received there would be no injury to his employers. He had done that for something like twenty years, and, as I say, I should have thought that the mere fact that he did the same thing on these two occasions would not have constituted grave misconduct within the meaning of s. 7. But what has influenced me in coming to this conclusion is what was pointed out by the Lord Chief Justice with regard to the plaintiff's conduct between the months of March and July, 1912. We know from the uncontroverted facts which were elicited in cross-examination from the plaintiff that he had been cautioned, and expressly cautioned, to stop this practice. He had been told that he was not to rely on repaying moneys that he had taken, and that a new system of paying in monthly was established, and his duty was to conform to it, and he did, as far as I can gather, conform to it in the month of March, 1912. But between April and June, 1912, he slipped back again into the very same practice that he had been told to discontinue, and he was not, as I read the evidence, always in a position, between April and June, 1912, at any moment of being able to refund the moneys of his employers which he had collected, and which it was his business to pay into the bank. That appears to me to shew something more than mere misconduct: it seems to me to shew a persistent refusal to comply with the

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orders that were given to him, and a persistent refusal to do that which it was his duty to do from the first, namely, to pay the moneys in, or keep them apart and not mix them with his own. I think that that, added to the two other instances of the plaintiff's conduct in reference to Colling and Walker, does bring it within that class or category of cases as to which it may be truly said that his acts constitute grave misconduct, and it is on that ground that I think the judgment was right, and that the appeal fails.

Appeal dismissed.

Solicitors for plaintiff: *Jaques & Co., for Richardson & Parker, Scarborough.*

Solicitors for defendants: *A. F. & R. W. Tweedie, for J. W. Read, Scarborough.*

J. E. A.

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[IN THE COURT OF APPEAL.]

BAGLEY *v.* FURNESS, WITHY & CO., LIMITED.

Employer and Workman—Compensation—Review of Weekly Payment—Retrospective Operation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16.

Upon an application under the Workmen's Compensation Act, 1906, for a review and termination of a weekly payment payable by way of compensation to a workman who has been injured by an accident arising out of and in the course of his employment, where the issue whether the incapacity has ceased and when is fairly raised, there is jurisdiction to make an order terminating the weekly payment as from a date antecedent to the date of the application for review.

Gibson v. *Wishart* [1914] W. N. 232; 7 B. W. C. C. 348, followed.

Appeal from a decision of the judge of the Southwark County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On January 12, 1912, the appellant whilst working on board the respondents' steamship *Rappahannock* in the Surrey Commercial Dock was injured by some tea chests falling upon his head.

About a year afterwards he commenced proceedings for compensation, and on March 13, 1913, an award was made by the Southwark County Court judge in his favour for 9*s.* a week, such weekly payments to continue during partial or total incapacity for work or until the same should be ended, diminished, or increased.

In July, 1913, the appellant applied for a review, asking that the weekly payment should be increased to 18*s.* on the ground that he had since March 13 been totally incapacitated from following his employment and had been unable to obtain light work.

The respondents contested this application and it was dismissed, the award of 9*s.* a week thus remaining unaffected.

On July 24 the respondents gave the workman light work at his old wages and stopped payment of the 9*s.* a week. The appellant afterwards left the respondents' employment, and on February 5, 1914, he made a second application for a review, asking that he be paid 6*s.* 3*d.* a week as from July 24, 1913, on the ground that he had only been able to get odd work since that date, and that for the period dating from that time to the present his average weekly earnings had been 1*l.* 9*s.* 9*d.* as compared with 1*l.* 16*s.*, his former earnings.

By their answer the respondents denied those allegations and pleaded that the appellant was neither totally nor partially incapacitated or at all in consequence of the accident, and stated that on the hearing of the application to review they would apply that the award made on March 13, 1913, in favour of the appellant be terminated.

The arbitration was heard on March 3, 1914, when the learned county court judge made an order terminating the weekly payments as from July 24, 1913.

The appellant appealed on the ground that the judge was wrong in terminating the weekly payments from a date antecedent to the date of the application for review.

F. C. Wynn Werninck (*Horace Fenton* with him), for the appellant.

E. M. Pollock, K.C., and *Harold Stanger*, for the respondents.

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BAGLEY v. FURNESS, WITHY & CO., LIMITED.

Where a dispute as to whether the incapacity has ceased and when it ceased is formulated there is jurisdiction to make an order terminating the weekly payment from a date antecedent to the application for review: *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (1); *Gibson* v. *Wishart.* (2) Here there was a formulated dispute.

F. C. Wynn Werninck in reply. In *Gibson* v. *Wishart* (2) an antecedent date for termination of the weekly payment was specified in the application. That is not so in this case. The county court judge had no jurisdiction to terminate as from the date of his own previous decision whereby he awarded a payment of 9*s.* a week, there being no change in the condition of the workman. There was not a properly formulated dispute before the tribunal and the order appealed from is wrong.

COZENS-HARDY M.R. In this case there was a second application to review by a workman upon the ground that he had only been able to get odd jobs since July 24, 1913, and the respondents replied that the man was neither totally nor partially incapacitated in consequence of the accident. The county court judge held that the respondents had proved their case and that the workman so far from being entitled to review and to receive increased compensation was not entitled to receive any compensation at all. Now was there jurisdiction to do that? I think that the decision in *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (1) would carry the employers through here, and moreover in the recent case of *Gibson* v. *Wishart* (2) the House of Lords seems to me to have adopted the view of Buckley L.J. in *Charing Cross, Euston and Hampstead Ry. Co.* v. *Boots* (1), which was somewhat more in favour of the employer than that of Kennedy L.J. and myself. Buckley L.J.'s view was that when once you find that the issue presented to the tribunal is whether the incapacity has ceased and when it ceased the judge may go back to a date earlier than the application to review. In this case the workman rests his application to review on inability to get work, except odd jobs, since July 24, 1913, and the issue is therefore raised, what has been his condition since

(1) [1909] 2 K. B. 640. (2) [1914] W. N. 232; 7 B. W. C. C. 348.

then? The employers moreover reply that he is not totally or partially incapacitated, and that he is not therefore entitled to anything. There was ample evidence to justify the finding of the county court judge and I see no reason to doubt that his decision was perfectly correct. The appeal must be dismissed.

SWINFEN EADY L.J. I agree, because both the application and the answer raise the whole question of incapacity as from the antecedent date, July 24, 1913. The Lord Chancellor in *Gibson* v. *Wishart* (1) says: "It appears to me that the words 'on such review may be ended, diminished or increased'"—those are the words in Sched. I., clause 16—"must having regard to the provisions of Sched. I., clause 1, be read as enabling a review to be made retrospectively." In this case the whole question of incapacity has been raised as from the antecedent date, and the decision of the county court judge was right.

PICKFORD L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *J. Scott Duckers.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis.*

(1) 7 B. W. C. C. 348.

G. A. S.

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1914
June 26.

[IN THE COURT OF APPEAL.]

NASH *v.* OWNERS OF S.S. RANGATIRA.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Intoxicated Sailor—Shore Leave—Returning to Duty—Fall from Ship's Gangway—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

While the appellants' ship was lying in harbour at the quayside, one of the sailors in their employment on board the ship went ashore with leave. He returned in a drunken condition late at night. In order to get on board he had to go up a gangway from the quay to the ship. The gangway was properly fixed and lighted. In going up it he let go his hold of the hand ropes and fell on the quay, receiving injuries from which he died. On the application of the widow of the deceased, the county court judge held that the accident arose out of and in the course of the employment, and awarded compensation under the Workmen's Compensation Act, 1906 :—

Held, on appeal, by Cozens-Hardy M.R. and Swinfen Eady L.J., Pickford L.J. dissenting, that the accident arose entirely through the man's drunkenness, and that the case could not be distinguished in principle from *Frith* v. *Owners of S.S. Louisianian* [1912] 2 K. B. 155.

Appeal from an award of the judge of the Brentford County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The arbitration was requested by the widow of a man named Nash, who while employed as a sailor on board the respondents' vessel, the steamship *Rangatira*, met with an accident which resulted in his death.

The accident happened under the following circumstances. On March 20, 1913, while the ship was lying by the quay in Sydney Harbour, Nash went on shore with leave. He returned at about 11.15 p.m., and according to the evidence of the quartermaster, named Jenkins, who was in charge of the gangway, he came along the quay evidently under the influence of drink. The gangway, which was used by everybody for the purpose of getting on board, was a solid step gangway having stanchions through which ropes were run on either side. It was firmly fixed and well lighted. It rose and fell with the tide and at the time

in question it was at a rather steep angle. When Nash arrived at the gangway he commenced to mount it slowly, taking hold of the ropes one in each hand. When rather more than half-way up he let go with one hand and swinging round fell over the other rope on to the quay. When Jenkins saw him fall he went to him and fetched the ship's doctor, but Nash was so badly injured that he died the next day.

At the hearing of the arbitration the county court judge found that the primary and effective cause of the accident was the man's drunkenness, but that it was in fact due to two concurrent causes—(1.) that Nash was subjected to a special risk by reason of his employment, and (2.) that he was so much under the influence of drink that his peril was greatly increased and beyond his power to cope with. The learned judge accordingly held that the accident arose out of and in the course of the employment and he awarded compensation to the applicant.

The employers appealed.

A. Neilson, for the appellants. This award cannot be supported having regard to the authority of *Frith* v. *Owners of S.S. Louisianian* (1), from which this case cannot be distinguished. The county court judge has relied upon a second concurrent cause of the accident, namely, that the man was practically on the ship when it happened. No doubt the accident happened at the place of the man's employment, but that is not enough to warrant the holding that it arose out of the employment.

F. C. Wynn Werninck, for the respondent. The accident in this case was not due solely to the man's drunkenness as in *Frith's Case* (1); there was a concurrent cause arising from the fact that in using the gangway he was exposed to a special risk in the course of his employment. When a workman is carrying out his employment in an improper way he does not thereby lose his right to compensation: *Robertson* v. *Allan Brothers & Co.* (2); *Watkins* v. *Guest, Keen & Co.* (3)

A. Neilson in reply.

(1) [1912] 2 K. B. 155. (2) (1908) 1 B. W. C. C. 172.
(3) (1912) 5 B. W. C. C. 307.

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COZENS-HARDY M.R. This is an appeal by the employers against an award of the county court judge in favour of the dependants of a sailor who met with his death by falling from a gangway when going on board his ship, and it raises, no doubt, a somewhat important question. He went on shore with leave, his vessel having been berthed at the quay for some time. The mode of access to the ship was by a gangway which was perfectly well constructed and lighted and, so far as the evidence goes, did not admit of any complaint whatever. It was used by both the crew and the passengers, including some women. Of course it rose and fell with the tide, but there were ropes on each side of it, and steps up it, and although it was steep at the time the accident happened it is unreasonable to suggest that for a sober person of either sex there was any risk in mounting it and getting on board. The sailor having been on shore returned between 11 and 12 at night, and we have a circumstance here, which is not usual in cases like this, that evidence was given by a witness who saw the accident happen. This witness said that he saw the man coming along the quay and that he was walking unsteadily and was staggering. The man got to the point where the gangway was fixed and began to mount it, holding on to the ropes on either side; but when part of the way up he let go one of the ropes, twisted suddenly round, and fell on to the quay, with the result that he was killed. The evidence is that he was smelling strongly of spirits, and the county court judge finds as a fact that he was very drunk. I say that he found that the man was very drunk because his language is strong on that point. The witness Jenkins, who was the quartermaster, said, and he satisfied the county court judge, that the man was more or less drunk and that the accident was due to that fact. The county court judge says in the course of his judgment that "Nash was at least so much under the influence of drink that he was unsteady on his feet and had not such control over his movements as a sober man would have had. Further I think that the right inference from Jenkins' evidence is that in all probability the accident would not have happened but for Nash being under the influence of drink, and, in that sense, the accident was due to that fact." Again lower down he

says: "I find therefore as a fact that the accident and the death which resulted from it would not have happened but for the fact that Nash was under the influence of drink"; and subsequently he expresses his opinion that "drunkenness was the primary and effective cause of this accident"; and I think he repeats the same thing again further on in his judgment.

But the county court judge further says that the accident was due to two concurrent causes. He says that, drunk as the man was and unable to walk steadily and like a reasonable man, there was a special peril incident to his employment as a sailor, and that but for the fact that the sailor was on the gangway, which is part of the ship for the purposes of the Workmen's Compensation Act, 1906, the accident would not have happened. Therefore he holds that, while drunkenness was primarily and effectively the cause of the accident, there was a concurrent cause, namely, that he was on the ship with an extra peril attached to it. Is that right? With great respect to the learned judge I do not think it is. This is not a case in which the section of the Act as to serious and wilful misconduct can be relied on. It was admitted by counsel for the respondents that this was so, and he only sought to refer to that provision by way of analogy and to shew that there may be cases where a workman or his dependants may claim compensation in respect of injury by accident although the accident does not arise solely from the employment but is also due to wilful misconduct on the part of the workman. In my view it would be wrong to take that exceptional section, which it is difficult to justify logically, as throwing light on the scheme and policy of the Act. This is not a case where the accident happened to the man through his wilfully doing in a wrong manner something which it was his duty to do, but the man's drunkenness was primarily the cause of the accident, and it would not be right to hold that the accident was one which entitled the man's dependants to compensation under the Act.

I do not wish to repeat what I said in *Frith* v. *Owners of S.S. Louisianian* (1), but there is not one word of my judgment that I wish to modify or alter. That was the case of a

(1) [1912] 2 K. B. 155.

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sailor who had gone ashore without leave and was still on shore when his ship was about to start. He was in a hopeless state of drunkenness and was brought along the shore by a negro and pitched like a sack on the vessel. The vessel was just starting, and when it had gone a few yards and before the ship's rail had been replaced after taking in the gangway the man got up, so drunk that he could scarcely stand, and then fell down and rolled off the ship through the open space and was drowned. We held that the accident had been occasioned by and was due to the man's hopeless drunkenness, and that although the accident occurred through his being on the ship in that state and being exposed to an extra risk through the rail not being in its place, yet the accident was not brought within the Act. I should personally greatly regret if any other view were taken. To say that if a drunken man went in the course of his employment to a place where there was dangerous machinery or some other risk of that kind, and put his hands in the machinery owing to his drunken state, that would be an accident arising out of his employment, would be to my mind very shocking. I do not wish to refer to my own judgment in *Frith* v. *Owners of S.S. Louisianian* (1), but Fletcher Moulton L.J. put the matter very clearly in his judgment. There the learned county court judge had held that the accident arose out of the sailor's employment and awarded compensation, and Fletcher Moulton L.J. said: "The learned judge appears to have thought that if the sailor was on the ship, anything that happened by reason of his being there would bring him within the purview of the Act. That is not so. The accident must arise out of his employment. In my opinion this accident had nothing whatever to do with the employment except that it occurred more or less in the place of employment, that is on board the ship." The case reminds one of Dr. Johnson's definition of a ship as a prison with an extra chance of being drowned; but in view of the finding that the effective cause of the accident was drunkenness, it would be wrong to say that this case can be distinguished from the principle laid down in *Frith* v. *Owners of S.S. Louisianian.* (1) I hold, therefore, that this appeal ought to be allowed on the ground that

(1) [1912] 2 K. B. 155.

the sailor's death was not due to an accident arising out of his employment.

SWINFEN EADY L.J. I am of the same opinion. The facts in this case are not in dispute and the county court judge bore testimony to the excellent way in which Jenkins, the quartermaster who was in charge of the gangway and saw the accident, gave his evidence. The ship had arrived on the day of the accident in Sydney Harbour and the gangway had been fixed. It was a solid step gangway with stanchions and the ropes passed on each side through the stanchions. It was well fixed and steady and well lighted by two electric clusters. It was fixed fore and aft with the ship. Between 8 A.M. and 10 P.M. passengers, crew, and stevedores were constantly using it, and among the passengers were ladies. After 10 P.M. everything was quiet. The deceased returned to the ship smelling strongly of drink and in a drunken condition at 11.15 P.M. He was seen by the quartermaster Jenkins to come towards the gangway and proceed up it, holding on to the ropes on either side until he reached a point about two-thirds of the way up. He then stopped suddenly, let go with his left hand on the side of the gangway towards the ship, and instantly swung round, overbalanced, and fell right over on to the quay. The quartermaster started to go to his assistance as soon as he saw him let go the rope, but he was too late. He went to him on the wharf and then fetched the ship's doctor. The man died the next day.

It was not disputed that the man was in a state of drink or that its degree was such that he was able to reach the ship's side and practically mount the gangway, though not so far as to get on to the deck.

The learned judge found, after referring to Jenkins' evidence, that the man was drunk, and that the accident was due to that. Then he went on to say that the evidence pointed to the conclusion that "Nash was at least so much under the influence of drink that he was unsteady on his feet and had not such control over his movements as a sober man would have had. Further I think that the right inference from Jenkins' evidence is that in all probability the accident would not have happened but for

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Swinfen Eady L.J.

Nash being under the influence of drink, and, in that sense, the accident was due to that fact."

Therefore the learned judge finds as a fact "that the accident and the death which resulted from it would not have happened but for the fact that Nash was under the influence of drink." A little later on the judge says that drunkenness was the primary and effective cause of the accident; but he also finds that the accident and death "would not have happened but for the fact that Nash was at the time mounting the gangway, in doing which he was exposed to a certain peril peculiar to his employment." That was the risk involved in mounting the gangway in order to regain the ship. The man had clearly returned and was in the sphere or ambit of his employment. For this purpose I treat the gangway as part of the ship. The question is, did the accident arise out of the employment? There is no suggestion from beginning to end of the case that there was any other cause for the accident than the man's drunkenness. The gangway was fit and proper. It was firmly fixed and well lighted and in a condition as to which no complaint was made. There is no suggestion from beginning to end of anything which conduced to the accident except that the man fell from the gangway because he was drunk. Is the case then in principle distinguishable from *Frith* v. *Owners of S.S. Louisianian*? (1) There the sailor Frith had rejoined his ship in a state of drunkenness and was more drunk than Nash. He was lying on the ship, having been put on board just as the ship started. The gangway had been withdrawn before he was put on board, but the ship's rail had not been replaced, the man staggered and fell, and in doing so fell into the water through the space where the rail had not been replaced. The man was on the ship and in the ambit of his employment, and the question was whether the accident arose out of his employment. Fletcher Moulton L.J. put the matter in this way: "The learned judge appears to have thought that if the sailor was on the ship, anything that happened by reason of his being there would bring him within the purview of the Act. That is not so. The accident must arise out of his employment. In my opinion this accident had nothing

(1) [1912] 2 K. B. 155.

whatever to do with the employment except that it occurred more or less in the place of employment." There of course if the man had not been on a ship with an open rail he would not have been drowned. Then Buckley L.J. said: "He was within the ambit of the employment in the sense that he was on board the ship; but the accident did not arise out of his employment but out of the fact that he was so drunk that he could neither stand nor see."

So here the place where the accident happened was part of the ship, but the accident did not arise out of the man's employment, but out of his drunken condition. In one sense, whenever there is an accident to a drunken man whilst he is in the ambit of his employment it may be said that the accident arose out of the employment because but for his being in the place where the accident occurred the man's drunken condition might have been immaterial. Take for instance the case where a man's work causes him to be close to machinery in motion or in any other dangerous place, it may be said that his employment took him there, and that if he had been at home drunk he would, if he had fallen, have been able to lie on the floor till he was sober. In this way it may be said that this was an additional risk, but in my opinion the accident does not arise out of the employment in such circumstances. It is not sufficient that a drunken man should meet with an accident in the ambit of his employment. In the present case the accident did not arise out of the deceased man's employment. No reliance was placed on the section as to serious and wilful misconduct, so I do not think it necessary to comment on it. In my opinion the appeal should be allowed.

PICKFORD L.J. I have the misfortune to differ from the view taken by the Master of the Rolls and Swinfen Eady L.J.

I do not differ as to the importance of upholding the principle of *Frith* v. *Owners of S.S. Louisianian* (1), which as stated by Fletcher Moulton L.J. is that where an accident arises entirely through a man's drunkenness and has nothing to do with his employment neither he nor his dependants can recover compensation. The difference between us is that I take a different view

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of the learned county court judge's finding of fact in this case. I agree also that if a man's accident is due solely to his drunkenness, the degree of that drunkenness is immaterial. It is only material as a test whether the accident did in fact arise solely out of the drunkenness.

Here the deceased man had taken drink, and when the accident happened he was going up a gangway not dangerous to a sober man, but in going up the gangway he was doing something which had a risk additional to the ordinary dangers incurred by a man in going about the streets. He was sufficiently conscious of what he was doing, for he started up the gangway slowly, holding on to the ropes on either side; then when he was more than halfway up he for some reason let go of the rope on one side, and being drunk he overbalanced and fell on to the quay and was killed. Those being the facts, the county court judge has not found that the accident was solely due to the man's drunkenness. His findings so far as they are important were expressed as follows: "I have no doubt that Nash's death was due to an accident. I also find that the accident arose in the course of his employment, for he was returning, after an authorized absence, to the place, namely, the ship, where it was his duty to be and which he had actually reached. The only question in doubt was whether such accident arose 'out of' his employment."

Then he deals with the evidence of Jenkins and says this: "The observed facts on which Jenkins formed his opinion do seem to me to point strongly to this conclusion, namely, that Nash was at least so much under the influence of drink that he was unsteady on his feet and had not such control over his movements as a sober man would have had. Further, I think that the right inference from Jenkins' evidence is that in all probability the accident would not have happened but for Nash being under the influence of drink, and, in that sense, the accident was due to that fact."

It is clear that in this passage he did not intend to find that the accident was due solely to the man's drunken condition. Later on he says again: "I find, therefore, as a fact, that the accident and the death which resulted from it would not have

happened but for the fact that Nash was under the influence of drink. But I also find that they would not have happened but for the fact that Nash was at the time mounting the gangway, in doing which he was exposed to a certain peril peculiar and incidental to his employment, namely, the risk of slipping or losing his balance, and the risk, if he did so, of falling on the quay. To a sober man, using ordinary care, these risks were probably in the circumstances which existed very slight, but still they were risks different from and greater than the ordinary risks which every one runs in the course of everyday life, and which cannot be considered peculiar to any given employment, e.g. the risk involved in mounting an ordinary staircase in a house."

Those are his findings, and then he says: "Ought I to hold that because the drunkenness (I use the word for brevity and not as denoting any particular stage of intoxication) was the primary and effective cause, as I think it was, of the accident and of the resultant death, therefore the accident did not arise 'out of' the employment, although the accident and resultant death would not have happened but for the perilous nature of the act which Nash was doing?" I think that sometimes perhaps the words "primary and effective cause" are used without an understanding of their exact meaning, but here the meaning in which the learned judge used them is shewn by the previous passages that I have read. Then he comes to what he decides and says: "Or is the proper result this—that the accident and the resultant death were due to the concurrent operation of two causes, namely, (1.) that Nash was put in a position of peril by reason of his employment and (2.) that he was so much under the influence of drink that the peril was to him greatly increased and beyond his power to cope with? It seems to me, upon a careful consideration of this most difficult Act and of a large number of the vast quantity of decisions upon it, that the proper result which I ought to arrive at . . . . is that this accident and the resultant death arose 'out of' the man's employment because they were due to the two concurrent causes which I have mentioned."

That is his finding as to how the accident happened, and therefore it is clear that he does not hold that it was solely due to the man's drunkenness, but to the two causes working together:

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first that his employment put him in a position where he was subject to perils peculiar to that employment and additional to the ordinary perils of a man in the street, and secondly that he was in a state of drunkenness sufficient to make him less competent to deal successfully with those perils. At the time of the accident the man was going up the steps of the gangway for the purpose of resuming his employment, and the view I take is that that is a state of things where the man was doing what he was employed to do but was doing it improperly.

If that be so, the authorities shew that the accident must be treated as arising out of the employment. I should compare this case to that put in *Frith* v. *Owners of S.S. Louisianian* (1), where the Master of the Rolls says: "If this man had been ordered to go aloft, or anything of that kind, when in a state of intoxication, and met with an accident, it might very well be that that would have been an accident arising out of the employment notwithstanding his drunkenness." There no doubt an order would have been given for the man to go up the mast, but probably the same finding would have been arrived at there as here, namely, that there would have been no accident but for the man's drunkenness. Here no order was given to the man, but he was returning on board in the ordinary course of his duty in order to resume his work. It is because of that circumstance that this case is distinguishable from *Frith* v. *Owners of S.S. Louisianian* (1), for there Frith did not know what he was doing. He was not consciously doing his duty, but was pitched on board like a sack of sand, and his case is different to the case where a man is consciously doing his duty but does it wrongly or carelessly through being in a state of drunkenness.

I do not in the least dissent from the proposition that it is not enough to shew that a workman meets with an accident when in the ambit of his employment, but in this case it seems to me that the deceased met with the accident while he was engaged on his employment, but was doing his work wrongly and badly through being in a state of drunkenness. I think the decision of the learned judge was right and that the accident to the deceased did arise out of his employment. In my opinion,

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therefore, the appeal should be dismissed, but as the other members of the Court are of a contrary opinion it will be allowed.

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Appeal allowed.

Solicitors: *Botterell & Roche; Alexander Smith.*

G. A. S.

[IN THE COURT OF APPEAL.]

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TAYLOR *v.* CRIPPS.

Employer and Workman—Compensation—Practice—Evidence—Examination of Witness before Registrar—Delegation of Authority—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-s.* 3; *Sched. II., par.* 4—*Consolidated Workmen's Compensation Rules*, 1913, *rr.* 29 (1.), 33, 96.

In a claim under the Workmen's Compensation Act, 1906, it appeared that the applicant was employed by the respondent as an errand boy and was injured by an accident, as a result of which his leg had to be amputated. He filed a request for arbitration and applied for an order that he should be examined forthwith before an officer of the Court at the hospital in which he was being treated. The county court judge made an order that he should be examined before the registrar on notice to the respondent, and that a copy of the examination should be used as evidence at the trial of the arbitration. The examination was taken accordingly, but, owing to a misunderstanding, the respondent was not represented at it:—

Held, following *Moss* v. *Great Eastern Ry. Co.* [1909] 2 K. B. 274, that the Court of Appeal had jurisdiction to entertain an appeal from the order; that the reasoning of the decision in *Sutton* v. *Great Northern Ry. Co.* [1909] 2 K. B. 791, following *Mountain* v. *Parr* [1899] 1 Q. B. 805, applied; that the judge was sitting as arbitrator and had not all the powers which he exercised as county court judge; and that he had no power to order evidence to be taken by commission.

APPEAL from an order of the judge of the Reading County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant Tom Taylor was employed by the respondent as an errand boy, and on March 5, 1913, was injured by an accident, as a result of which his right leg had to be amputated at the hip. He was taken to a hospital on March 10, 1913, and

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had remained there ever since. On January 14, 1914, a request for arbitration was filed by his stepfather and next friend, and February 26 was appointed for the hearing of the arbitration. Shortly before that day the applicant underwent an operation for the removal of his leg, and the proceedings were adjourned in consequence of his inability to attend the Court. His condition became serious, and notice was given on his behalf to the registrar and the employer that an application would be made on March 26 for an order that the applicant should be examined forthwith before an officer of the Court at the hospital. The application was made and was opposed by the respondent, and it stood over to enable the hospital doctor to be present. Later in the day he attended, when the respondent admitted that the applicant was in a serious condition, but objected to the order on the ground that the judge had no power to make it. The judge however, made an order that the applicant "be examined viva voce on oath or affirmation before the registrar of this Court, the applicant or his solicitor, or the agent of such solicitor, giving to the respondent or his solicitor, or the agent of such solicitor, notice in writing of the time and place where the examination is to take place. And it is further ordered that the examination so taken be filed with the registrar of this Court at his office . . . . and that an office copy thereof may be read and given in evidence on the trial of this arbitration, saving all just exceptions, on proof to the satisfaction of the judge that the deponent is dead, or out of England and Wales, or unable from sickness or infirmity to attend the trial, and that the costs of this application be costs in the cause." This order was subsequently proceeded with and the examination of the applicant taken at the hospital, but, owing to a misunderstanding, the respondent was not represented at the time of taking the applicant's evidence.

The respondent appealed on the grounds that the judge had no jurisdiction to make the order, or to delegate to the registrar the duty of taking the applicant's evidence.

Stuart Bevan and *J. N. Buchanan*, for the appellant.

Eric Dunbar and *A. Brian Ashby*, for the applicant. There is a preliminary objection, that the learned county court judge was

not sitting as arbitrator but as judge, and that the appeal does not lie to the Court of Appeal. He acted under Order XVIII., r. 18, of the County Court Rules, 1903 and 1904, which is made applicable by r. 96 of the Workmen's Compensation Rules, 1913 : *In re Mysore West Gold Mining Co.* (1)

Stuart Bevan and *J. N. Buchanan* referred to Sched. II., paragraph 4, of the Workmen's Compensation Act, 1906, and *Moss* v. *Great Eastern Ry. Co.* (2) The order itself says that the deposition is to be read " on the trial of this arbitration."

COZENS-HARDY M.R. said that if authority were wanted it was clear from the decision in *Moss* v. *Great Eastern Ry. Co.* (2) that the Court had jurisdiction under Sched. II., paragraph 4, to hear an appeal from any decision or order made by the judge sitting as arbitrator under the Act of 1906, and in this case he was sitting in that capacity. The objection failed.

Stuart Bevan and *J. N. Buchanan*, for the appellant on the merits. The learned judge had no power to order the applicant's evidence to be taken before anybody but himself. Arbitrations are to be held in the county court: r. 14 (2.), (3.) of the Workmen's Compensation Rules, 1913. All questions under the Act are to be settled by arbitration: s. 1, sub-s. 3, and Sched. II., paragraph 2, of the Act of 1906. By Sched. II., paragraph 4, the Arbitration Act, 1889, is not to apply, and the arbitrator is to have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court. The County Court Rules only apply so far as they are applicable to proceedings by way of arbitration : r. 96 of the Workmen's Compensation Rules, 1913.

The procedure in arbitrations is stated in rr. 29 and 33. Rule 96 does not say that such an application as this was not an application in the arbitration which was actually pending. No doubt the judge might have made this order if he had been sitting as county court judge, but such a power would be inconsistent with his position as arbitrator. He had no power to delegate any part of his duties or to make such an order as

(1) (1889) 42 Ch. D. 535. (2) [1909] 2 K. B. 274.

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this: *Mountain* v. *Parr* (1); *Sutton* v. *Great Northern Ry. Co.* (2); *Edmunds* v. *Owners of Ship Peterston.* (3)

Eric Dunbar and *A. Brian Ashby*, for the applicant. This Court will not interfere except in the interests of justice. The learned judge had power to make this order as judge if not as arbitrator. The Act contemplates that a man may be too much injured to attend the Court and give evidence; and the matter was left open to the judge to take the necessary steps. Rule 96 read with r. 1 (6.) shews that the County Court Rules must be resorted to. Sched. II., paragraph 4, allows the arbitrator to have evidence taken before him; and in this case the only proper course for the judge to take was to make this order. He could not be asked to go to the hospital himself, and it was necessary to take the evidence at once. The Court always endeavours to aid a compulsory arbitration imposed by Act of Parliament. An arbitrator under this Act is distinguished from an ordinary lay arbitrator by having various powers given to him—rr. 20, 25, 26, 31 of the Workmen's Compensation Rules, 1913—including power to command the attendance of witnesses. There has been no delegation of any judicial power or function.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from an interlocutory order of the learned judge which raises a question whether on an application in an arbitration it was competent to him to order the evidence of the workman to be taken by commission or by a special examiner, the circumstances being such as to justify such an order if there was jurisdiction to make it. There was an alleged accident arising out of and in the course of the employment of the applicant, and the applicant has since been in hospital and is there now. The judge was asked to make an order for the evidence of the applicant to be taken before an officer of the Court at the hospital. It was objected that he had no power to make such an order for examination, and, in my opinion, that objection is sound. In *Sutton* v. *Great Northern Ry. Co.* (2) I stated my views on a similar question as to

(1) [1899] 1 Q. B. 805. (2) [1909] 2 K. B. 791.
(3) (1911) 28 Times L. R. 18.

interrogatories. I do not propose to repeat what I said there, but it is impossible seriously to suggest any reason why the principle of that decision should not cover this case. This is an arbitration, not an action. An arbitrator has certain special powers under Sched. II., paragraph 4, of the Workmen's Compensation Act, 1906, one of which is to issue a subpœna for the purpose of obtaining the assistance of a witness or the production of documents to the Court. *Sutton* v. *Great Northern Ry. Co.* (1), following *Mountain* v. *Parr* (2), which is clearly applicable to the present case, laid it down in terms that the judge sitting as arbitrator is not justified in doing everything that could be done in proceedings in which he is sitting not as arbitrator, but as judge. The Arbitration Act, 1889, is expressly excluded from applying to arbitration under the Workmen's Compensation Act, 1906, by Sched. II., paragraph 4. So that we cannot look at the County Court Rules relating to arbitration, and it cannot be said that the judge can do in an arbitration under the Workmen's Compensation Act, 1906, everything that he could do if he were sitting as county court judge.

The objection is fatal. The judge might have been asked to go to the hospital himself and take the evidence of the lad. I do not know whether he was asked to do so, or that that is a step which cannot or ought not to be taken, but in my opinion an arbitrator has no power to order the taking of evidence by commission, and it would be legislation if we held that an arbitrator under the Workmen's Compensation Act, 1906, has power to take evidence on commission. *Edmunds* v. *Owners of Ship Peterston* (3) was referred to, but this objection was not taken in that case. There is no authority in support of the proposition that an arbitrator can make such an order, and the contrary has been settled by this Court since 1899, reaffirmed in 1909.

The appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion. The case is covered by *Sutton* v. *Great Northern Ry. Co.* (1), which followed *Mountain* v. *Parr.* (2) It is expressly stated that when sitting

(1) [1909] 2 K. B. 791. (2) [1899] 1 Q. B. 805.
(3) 28 Times L. R. 18.

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under the Workmen's Compensation Act the judge is an arbitrator only, and r. 96 of the Consolidated Workmen's Compensation Rules, July, 1913, which provides "Where any matter or thing is not specially provided for under these Rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act," is limited to "in so far as such procedure and provisions are applicable to proceedings by way of arbitration."

PICKFORD L.J. I agree. The point is covered by *Sutton* v. *Great Northern Ry. Co.* (1) and is not open to us.

Appeal allowed.

Solicitors: *Watson, Sons & Room; G. Archibald Whigham.*

H. C. R.

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June 18, 29.

[IN THE COURT OF APPEAL.]

PEPPER *v.* SAYER.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Act in Course of Duty independently done—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A farm bailiff, whose practice was to go round the farm buildings every evening at about 8 o'clock when his day's work was finished in order to see that all was secure, on one occasion after doing so, as usual, went to a neighbouring town for the purpose of shopping, and returned to his home at about 11 o'clock, when he again went round the premises. Being desirous of obtaining the key of one of the buildings, which he had earlier left inside a cowshed, he remembered that the key of the cowshed was in his own house, which was distant about three minutes' walk. In order to avoid the walk he vaulted on to the window sill of the cowshed and, leaning through the window, endeavoured to reach the key which he required. In so doing he overbalanced himself and fell upon the floor of the shed, sustaining injuries from which he died:—

Held, that the accident arose out of and in the course of the deceased's employment. The obtaining of the key was part of his

(1) [1909] 2 K. B. 791.

duty, and the fact that he endeavoured to discharge that duty by imprudently taking a short cut did not deprive his dependants of the right to compensation under the Workmen's Compensation Act.

APPEAL from an award of the judge of the Hastings County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of Edward William Pepper, who met his death while in the employment of the Reverend W. C. Sayer-Milward, at Fairlight Place, near Hastings. The employer had died since the date of the accident, and his personal representatives were the respondents to the present appeal.

The deceased man, Pepper, was employed as cowman and under-gardener, his duties being to milk and attend to the cows, to feed and attend to the pigs and poultry, and also to make acetylene gas for the illumination of his master's house. He occupied a farmhouse which was on the property. His work was usually finished at about 8 P.M., when it was his custom to make a round of the premises and see that all was safe. He had charge of the keys of the buildings, which comprised a cowshed, the acetylene gas shed, and some poultry houses. After locking up in the evening he used to take the keys to his own house and keep them there until the morning.

On Saturday, September 20, 1913, he appeared to have finished his work at about 6 P.M., and at 8 P.M. he went with his wife and children to Hastings to do some shopping. He returned home at about 11 o'clock, when he proceeded to make a final round of inspection. After visiting the gas-house he went to the cow-shed, intending to get therefrom the key of the poultry house which he had left upon the window ledge inside the cowshed. He found the door of the cowshed locked and then remembered that he had left the key of that door in the pocket of his trousers which he had changed before starting for Hastings. His house being three minutes' walk from the cowshed, he determined to try to get the required key by vaulting on to the sill of the cowshed window, which was about five feet from the ground, and from that position to reach the key. In doing this he overbalanced himself and fell through the window on to the floor of the cowshed, sustaining injuries from which he died. The

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widow applied on behalf of herself and her children for compensation under the Act.

The learned county court judge in making his award for the respondents said that the applicant had not established that the accident arose out of and in the course of the man's employment. His work was over at about 8, when he went to Hastings with his family. On his return he took it into his head to go round the buildings again, perhaps from a laudable excess of zeal, but that was not required from him as any part of his duty. If it was any part of his duty to enter the cow-shed at that time of night, it was his duty to enter through the door, and if it was locked to open it with the key with which he was entrusted. He, however, took the short cut of vaulting on to or through the window, and so occasioned the accident for which he, the learned judge, could not hold that the Act of Parliament rendered the employer liable.

The applicant appealed.

Rayner Goddard, for the appellant. The learned county court judge has wrongly held that the accident did not arise out of the employment. This is one of those cases in which it has been held that the fact that the workman was doing the right thing in the wrong way does not deprive him of his right to compensation under the Act: *Kearon* v. *Kearon*. (1)

In *Barnes* v. *Nunnery Colliery Co.* (2) there was evidence that the workman was distinctly breaking the rules.

[SWINFEN EADY L.J. Is not the test this: was the risk incurred a class of risk incidental to the employment?]

Not quite. No case of serious and wilful misconduct could ever be incidental to the employment. This case is like *Richard Evans & Co.* v. *Astley*. (3) Here the man was doing something clearly in the course of his employment, but perhaps in a rash and careless way.

[PICKFORD L.J. referred to *Martin* v. *Fullerton*. (4)]

E. F. Lever, for the respondents. There is no evidence to justify the finding that the accident arose out of the employment.

(1) (1911) 4 B. W. C. C. 435.
(2) [1912] A. C. 44.
(3) [1911] A. C. 674.
(4) 1908 S. C. 1030.

The deceased neglected the ordinary means of access to the cowshed, and his death was caused by an added peril to which by his own conduct he exposed himself.

Rayner Goddard in reply. The test is not to consider the act which the man was doing at the time of his death, but what was his object in doing it. It is not right to say that when the man is doing something within the scope of his employment in the wrong way he is necessarily outside the Act.

Cur. adv. vult.

June 29. COZENS-HARDY M.R. I concur in the judgments about to be delivered by the Lords Justices.

SWINFEN EADY L.J. In this case the bailiff late at night wished to obtain the key of the poultry house, which he had left in the cowshed earlier in the day. The cowshed was locked, and he had left the key in his cottage. Without waiting to return to his cottage for the key he drew back the window of the cowshed and jumped upon the sill, some five feet from the ground, in order to reach the place where the key which he wanted had been placed. He overbalanced, fell to the ground, struck his head, and sustained injuries which caused his death.

The learned judge held that the bailiff's work for the day was completed at about 8 P.M. on the Saturday night, when he left his master's premises, and went into Hastings with his wife and family for the purpose of shopping, and that his round of the buildings to see that everything was safe after his return late at night was "from a perhaps laudable excess of zeal," and that it was not required from him as any part of his duty. He further held that if it was the man's duty to enter the cowshed at that time of night, it was his duty to enter it through the door by means of the key entrusted to him for that purpose, and that for the accident caused by taking the short cut of vaulting in through the window the Act of Parliament did not make the employer liable.

I am unable to take this view. The bailiff was the responsible servant in charge of the gas plant, animals, poultry, and premises,

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and he was acting in the discharge of his duty in making a final round to see that everything was safe before retiring to rest. His master was ill, and the house required a supply of acetylene gas during the night, and his first visit was to the gas plant to see that there was a sufficient supply. His usual practice was to look round the premises after his return from shopping at Hastings on Saturday nights; it was a reasonable and proper course to take, and was the ordinary course of his employment. The key of the poultry house was ordinarily kept by the deceased in his house at night, and it was part of his duty thus to take charge of it. If the deceased had strained or injured himself in reaching through the window to obtain the key, the accident would have arisen out of his employment, and, in my opinion, it arose none the less so because he endeavoured to get the key while resting on the window sill. It would certainly have been more prudent to obtain the key of the cowshed and enter by the door, but persons will take short cuts, or what they consider to be short cuts.

In *Barnes* v. *Nunnery Colliery Co.* (1) Lord Loreburn said: "An arbitrator has to ask himself was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman, liable like other men to be careless and take short cuts, might be exposed in doing what he had to do?" Putting that question in the present case, the answer can only be in the affirmative. Obtaining the key was part of the duty which he was expected to do, and the injuries which arose from the imprudent manner in which he was discharging this duty arose out of and in the course of the employment. In my judgment this appeal should be allowed.

PICKFORD L.J. In this case an application for compensation for the death of Edward William Pepper was made by his widow on behalf of herself and her children.

Pepper was a farm bailiff in the service of Mr. Sayer-Milward. His employer was in bad health at the time of the accident. He has since died, and the present respondents are his executors. Pepper's duties were to attend to the animals and farm buildings

(1) [1912] A. C. 44.

and to the gas plant. He lived in the farmhouse and had general charge of matters as a farm bailiff has. According to the evidence his practice was to shut up the buildings somewhere about 8 P.M., but he often had a look round the last thing at night. On Saturdays he and his wife went to shop at Hastings, and on their return he looked round to see that all was right. The keys of the buildings were kept during the day on the window sill of the cowhouse, but at night they were brought into the house and put on a table in the kitchen. They were generally brought in early in the evening, but on the night of the accident they had been left in the cowhouse. On Saturday, September 20, Pepper and his wife had been to Hastings as usual and back about 11.15 P.M. When they got back he went to the gas shed and also to the pigstyes and other of the farm buildings. After that he went to the cowshed to get the keys which had been left there. He tried the door, but it was locked, and on putting his hand into his pocket for the key he found it was not there, as he had left it in the pocket of his other trousers when he changed his clothes. The house was about three minutes' walk away, and instead of going back there to get the key he opened the window a little wider, jumped up to a sideways sitting position on the sill, and reached out to get the keys. The window was about five feet from the ground, and Pepper was about 5 feet 10 inches in height. He had got the keys in this way before. As he was reaching out to get the keys he unfortunately overbalanced himself and fell, striking his head on something in a way which caused his death.

The learned county court judge has decided that this accident did not arise in the course of or out of his employment on two grounds: (1.) that Pepper's duties were over when he locked up about 8 P.M., and that anything he did after that was as a volunteer and was no part of his employment; (2.) that even if that be not so he was not acting in the course of his employment when he tried to get the keys by reaching through the window instead of getting the key of the shed and going in through the door.

On the first point I think the learned county court judge has taken too narrow a view of the employment of a man in the

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position of a farm bailiff. He was in a position of trust, especially during his master's illness. His duties were not confined to any particular hour, but extended to a general supervision and care to see that all was right, and in my opinion anything which was reasonably done with that object was part of his employment. In my opinion it was a very reasonable thing to go round the farm buildings on coming back after an absence of three hours, even though he had left everything safe at 8 P.M., and as he had omitted to get the keys and put them in their proper place at the usual time, I think it was reasonable for him to get them when he came back later at night. I think therefore that the first point fails.

The second point is perhaps not so clear. The learned county court judge has held that in getting upon the window sill and reaching for the keys Pepper was not acting in the course of his employment, and that, assuming that getting the keys was a part of his employment, such employment was limited to doing so by going into the cowhouse through the door, and that at the time of the accident he was doing something outside the sphere of his employment.

The test to determine whether this be right was expressed by Lord Moulton in *Barnes* v. *Nunnery Colliery Co.* (1) in this way: "Was this out of the scope of his employment or only a piece of misconduct in his employment?" That was approved in *Plumb* v. *Cobden Flour Mills Co.* (2), and, substituting for misconduct the word imprudence, applies to this case. It seems to me that this was not more than a case of doing something within the scope of his employment in an imprudent manner.

It is possible to imagine cases in which the workman has acted in such an unreasonable way that even though he were doing something within his employment the manner of doing it would be so far removed from anything contemplated by either party that it would not be held to be within the employment at all, but I do not think this is a case of that kind. To get keys lying on a window sill by putting the hand through the window is not uncommon. To go further and jump up in a sitting position on the sill in order to reach them may be imprudent, but it is

(1) (1910) 4 W. C. C. 43; [1912] A. C. 44. (2) [1914] A. C. 62.

not so unreasonable as to make it more than an imprudent way of carrying out his employment if, as I hold, the getting of the keys was within the scope of his employment.

For these reasons I think the appeal should be allowed and the case remitted to the county court to assess compensation.

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Appeal allowed.

Solicitors: *Field, Roscoe & Co., for Chalinder & Herington, Hastings; Robinson & Blaber.*

G. A. S.

[IN THE COURT OF APPEAL.]

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GOODSELL *v.* OWNERS OF SAILING BARGE LLOYDS.

Employer and Workman—Compensation—Agreement to pay Weekly Sum—Record of Memorandum—Doubt whether Injured Man is a "Workman"—"Settled by agreement"—Refusal of Registration—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-s.* 3; *Sched. II., par.* 9.

The applicant met with an accident whilst in the employment of the respondents. For some time he received 1*l.* a week compensation from the respondents' agents, and an agreement was then come to in the form of a receipt as follows: "Received this 16th day of March 1912 from the Shipping Federation Limited on behalf of the owners of the '*Lloyds*' the sum of 5*l.* being weekly compensation at the rate of 20/- per week from 10/2/12 to 16/3/12 inclusive under the Workmen's Compensation Act 1906 under which Act I elect to claim for personal injury by accident sustained by me on or about the 6th day of December 1911. This weekly payment is to be continued during my total disablement resulting from the accident in accordance with the provisions of the above mentioned Act, the amount of any payment due during partial disablement to be settled hereafter." This was signed by the applicant (described as a "bargemaster") and sealed by the federation, and bore a sixpenny agreement stamp as well as a penny receipt stamp. The federation stopped payment on the ground that the applicant was not a "workman" within the Act. The applicant applied to the registrar to record a memorandum of the agreement, but the latter refused to do so on the ground that the applicant was not a workman:—

Held, that, as the genuineness of the agreement was not questioned, no fraud or mutual mistake was alleged, and it was settled by the

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agreement, within s. 1, sub-s. 3, that the applicant was a workman within the Act, the learned judge had no jurisdiction to refuse to record the agreement.

APPEAL from an order of the judge of the Rochester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

James Goodsell, the applicant, was employed by the respondents as captain of a sailing barge to take three freights from and to different places on what were said to be the usual terms. There were three hands on board, and the captain had an interest in the freight, control of the ship, and some liberty of action. The applicant met with an accident on December 6, 1911, and was ruptured. For some time he received 1*l.* a week compensation from the Shipping Federation, Limited, who acted as agents for the respondents, and on March 16, 1912, an agreement was signed on a printed form as follows: "Received this 16th day of March 1912 from the Shipping Federation Limited on behalf of the owners of the '*Lloyds*' the sum of 5*l.* being weekly compensation at the rate of 20/- per week from 10/2/12 to 16/3/12 inclusive under the Workmen's Compensation Act 1906 under which Act I elect to claim for personal injury by accident sustained by me on or about the 6th day of December 1911. This weekly payment is to be continued during my total disablement resulting from the accident in accordance with the provisions of the above mentioned Act, the amount of any payment due during partial disablement to be settled hereafter. Signature James Goodsell. Occupation, Barge Master. Address, Herne Street Rochester." This document was sealed by the Shipping Federation and bore a sixpenny agreement stamp as well as a penny receipt stamp.

The federation came to the conclusion that the applicant was not a workman within the Act of 1906 and they stopped payment of the 1*l.* a week. The applicant applied to the registrar of the county court under Sched. II., paragraph 9, of the Act to record a memorandum of the agreement. The respondents opposed the application and the registrar refused it on the ground that the applicant was not a workman within the Act. The

county court judge refused to order registration of the memorandum, and the applicant appealed.

Scott-Fox, K.C., and *V. M. Coutts-Trotter*, for the appellant. The appellant is entitled to have this agreement recorded and the learned judge had no power to refuse registration. The question whether the appellant was a workman within the Act did not confer any jurisdiction on the judge; he had no right to entertain such a question. It is expressly enacted by s. 1, sub-s. 3 (1), that the question "whether the person injured is a workman to whom this Act applies" may be settled by agreement. It is not disputed that the agreement is genuine, therefore the registrar was bound to record a memorandum of it under Sched. II., paragraph 9. The point that the appellant was not a workman was probably suggested by *Smith* v. *Horlock* (2), but it does not arise here. He has taken the proper course and made a valid agreement in reliance on the Act, and the case of *Standing* v. *Eastwood & Co.* (3), in which the workman abandoned his agreement and asked for arbitration, does not affect him. *Fox* v. *Battersea Borough Council* (4) and *Macdonald* v. *Fairfield Shipbuilding, &c. Co.* (5) are in favour of the appellant. In *M'Lean* v. *Allan Line Steamship Co.* (6) the memorandum was inconsistent with the agreement, and in *Popple* v. *Frodingham Iron and Steel*

(1) Workmen's Compensation Act, 1906, s. 1, sub-s. 3: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

Sched. II. (9.): "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment."

(2) (1913) 6 B. W. C. C. 638.
(3) (1912) 5 B. W. C. C. 268.
(4) (1911) 4 B. W. C. C. 261.
(5) (1905) 43 S. L. R. 1.
(6) (1911) 5 B. W. C. C. 527.

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Co. (1) the incapacity had ceased, so that in both those cases it was held that the memorandum ought not to be recorded. Here the appellant has acted regularly throughout and the judge has no power to refuse to record the memorandum.

L. Sanderson, K.C., and *H. M. Robertson*, for the respondents. The agreement was made without authority from the respondents and ought to be investigated.

[SWINFEN EADY L.J. You have not disputed the genuineness of the agreement as you ought to have done under r. 45 of the Workmen's Compensation Rules, 1913.]

If a man is in fact not a workman none of those provisions apply to him; the Act has nothing to do with him and the judge has no jurisdiction.

[PICKFORD L.J. The parties have agreed that he is a workman. It is only where there is no agreement that the judge has jurisdiction.]

The judge has authority to refuse to record a memorandum. The whole thing depends on the injured person being a workman: s. 1, sub-s. 1. An agreement is good only if he is a workman.

[PICKFORD L.J. You cannot upset it except on the ground of mutual mistake, and that is not suggested.]

In *Standing* v. *Eastwood & Co.* (2) the point was argued although there was an agreement. The judge was bound to consider and decide the point: *Niddrie and Benhar Coal Co.* v. *Hanley.* (3)

No reply was called for.

COZENS-HARDY M.R. read the agreement and continued. It is in terms an agreement made between the agents for the owners and the workman. Payments were made for a certain time and then they ceased to be made, and the workman under those circumstances applied to record this agreement. The answer to the application does not challenge the genuineness of the agreement, in fact it does not raise that point at all, and it is not now, in my opinion, open to the respondents to raise such a point. But what they say is, "Now that we know the facts and have

(1) [1912] 2 K. B. 141. (2) 5 B. W. C. C. 268
(3) (1910) 47 S. L. R. 726.

considered some recent decisions we think it is the fact that the applicant was not a workman within the definition of the Workmen's Compensation Act, and, therefore, the Court has no jurisdiction to record the agreement."

Now it is not alleged, and there is no foundation for the suggestion, that there was any mutual mistake in this matter. It is not alleged that the "total disablement," which are the words used in the agreement, is not genuine. It is admitted that the total disablement continues, that there has been no fraud connected with it, and there has been no common mistake. But it is urged that the county court judge had no jurisdiction to do anything in the matter of recording the agreement if the respondents shew, as they were entitled to do at any time, that the applicant was not a workman within the Act. Now is that so? I have listened to the arguments and I have come to the conclusion that it is not. The provisions of the Act are, so far as material for this point of the case, to be found in s. 1 and its sub-sections. The first sub-section says: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation," and so on. There is a definition of "workman" in the Act which is to be found in s. 13, which says that certain classes of persons are not included and others are. Then we come to sub-s. 3 of s. 1: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

Now what is the effect of these sections taken together? It seems to me to be this: that there is a definition in s. 13 of what is a workman within the meaning of the Act. It is also contemplated by the Legislature that there may frequently be questions and difficulties as to whether a particular workman in a particular occupation is or is not a workman to whom this Act

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applies, and then jurisdiction is given to the county court judge to decide it, but only if it has not been settled by agreement. If it has been settled by agreement, the county court judge has no jurisdiction in the matter, the question is concluded between the parties, and it is outside the jurisdiction of the county court judge. He cannot, as arbitrator, deal with this question on an application by a workman who has, by agreement between the parties, been stated to have been a workman within the Act. The other view leads to rather startling consequences. What is the use of having this particular point, which is expressly mentioned in s. 1, sub-s. 3, settled by agreement, if it is always to be open afterwards when any further application is made? I think it would be altogether contrary to the spirit of the Act to say that an agreement, fairly entered into, with no suggestion of fraud and no suggestion of mutual mistake or anything of the kind, for the settlement of a point which may be, and probably is, a very doubtful one, is not to be binding between the parties. It would be altogether contrary to the policy of the Act. But then it is said that this Court has held in the case of *Standing* v. *Eastwood & Co.* (1) that there was no such thing as an estoppel applicable to these agreements. But *Standing* v. *Eastwood & Co.* (1) was not an application to record an agreement which had been made between the parties. There never had been any agreement made between the parties. What was done was this. The employers had insured the mate of a barge, the workman in that case, with an insurance society. The insurance society had made certain payments of 8*s.* a week and there was certain correspondence, and it was sought to make out (and the learned county court judge took this view) that there was an estoppel by reason of these transactions between the insurance company and the employers in effecting the insurance, and between the insurance company and the workman in making the payments, which prevented the employers from raising the point and contending at that stage, when the original application was made for compensation, that he was not a workman within the Act. This Court held that there was no estoppel. It seems to me that that s no application whatever to the present appeal. In point of fact

(1) 5 B. W. C. C. 268.

genuineness, which is the point which was raised, is not pleaded here. All that is said is that the applicant was not a workman within the meaning of the Act. Genuineness has been interpreted by this Court and also by the Scotch Courts to mean not merely an agreement which was not de facto made by fraud or anything of that kind, but, amongst other things, an agreement which is operative at the date when the application is made. One illustration which I gave in *Popple* v. *Frodingham Iron and Steel Co.* (1) is that an agreement to pay compensation till December 31 cannot be recorded on an application made in the following January. It is spent and done with. It is not an operative agreement at that moment. So an agreement to pay during total incapacity cannot be recorded if it is found out that total incapacity is at an end and the agreement therefore is no longer operative. In the present case no such point is raised. The only argument we have heard is that it is open to the employer at any time, notwithstanding the recorded agreement, to raise the point that in truth and in fact, having regard to a recent decision, the workman is not a workman within the meaning of the Act. In my opinion the learned county court judge in so far as he thought the case was governed by *Standing* v. *Eastwood & Co.* (2) was wrong; the view taken by the appellant in the present case is right; and the appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion. It is a workman's application to record an agreement. The agreement is an agreement in writing signed by the workman and under the seal of the agent of the employers, the Shipping Federation on behalf of the owners of the "*Lloyds*," of the one part, and James Goodsell, who had met with an accident, of the other part. By the terms of that agreement the workman elected to claim under the Act for personal injury by accident sustained by him on December 6, 1911. He was paid weekly compensation at the rate of 1*l.* a week for five weeks. Then the agreement provides that this weekly payment is to be continued during his total disablement resulting from the accident in accordance with the provisions of the Act, the amount of any payment due during

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partial disablement to be settled thereafter. So that the agreement settles that the man is a "workman" within the meaning of the Act and it settles the amount of compensation to which he is entitled during the time of total incapacity, and if and when any question shall arise with regard to partial incapacity his compensation is not settled, but is left at large. There is no dispute that at present the condition of total incapacity continues, and the agreement therefore is in full force, and there has been no question raised as to either the validity or construction of the agreement. Prima facie therefore it is an agreement that ought to be recorded. Sect. 1, sub-s. 3, of the Act provides: [His Lordship read the sub-section and continued:] Now it will be observed that the arbitration is only to proceed in respect of questions arising in proceedings as to liability to pay compensation "if not settled by agreement." In the present case there is an agreement settling a point that might otherwise be open to question, as to whether the man was a workman or not, and providing for the amount of his compensation—again a question that might be open to dispute. So that prima facie there is an agreement, and the rules provide for its being recorded where an application is made to record it. Rule 47 of the Workmen's Compensation Rules, 1913, is this: "If any party interested disputes the genuineness of the memorandum, or if, where a workman seeks to record a memorandum of agreement between his employer and himself, the employer alleges that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of the memorandum," then certain provisions are to apply. There is no suggestion here that the man has returned to work, so that that provision of r. 47 under which the employer can object to the recording of the memorandum on that ground does not apply, and we are thrown back upon the earlier provision of r. 47, which is the only one, if any, that is applicable: "If any party interested disputes the genuineness of the memorandum." It is open on that ground to either the employer or workman to object to the memorandum being recorded. The workman here filed his application to record the memorandum, but the answer of the employers did not dispute the genuineness of

the memorandum. The answer was not in the statutory form attached to the Rules; it was a variation upon it because it did not dispute the genuineness of the memorandum but merely said this: "We object to the memorandum presented now for registration being recorded on the following grounds: it has been ascertained that James Goodsell is not a workman within the definition of the Workmen's Compensation Act, 1906, and is therefore not legally entitled to any compensation under that Act." Now it will be observed that that plea or notice of defence does not allege that the agreement was entered into under any mistake of fact. It does not set up any ground for saying that the agreement is not valid and binding upon both parties, but it comes to this: "Since we agreed that Goodsell is a workman within the meaning of the Act, we have ascertained something which leads us to the conclusion that he is not, and therefore we desire to plead that objection." Of course the answer is, first, you are concluded by your contract or bargain; you have agreed that he is to be treated as a workman; and, secondly, that contract or bargain standing, there being no plea of mistake or other plea affecting the genuineness of the memorandum, the agreement stands. Then it was said there were several cases in which it had been held that although there was no plea that the memorandum was not genuine, nevertheless it ought not to be recorded. That depends entirely upon what is the true construction of the word "genuine." The material object of recording the memorandum is that it may be enforced as a judgment. It is with a view to its being enforced that it has to be recorded. It has been held that if the agreement is at an end, if it is spent or exhausted or according to its terms has come to an end, and there remains nothing to enforce, then it is not an agreement to be recorded, and in that sense it is no longer a genuine agreement. In *Popple* v. *Frodingham Iron and Steel Co.* (1) Buckley L.J. said: "The word 'genuine' is not to be confined to 'admitted' or 'proved' in fact. It extends to the meaning of 'existing as evidencing an obligation enforceable either presently or at a future date'"; that is to say, if the agreement has come to an end, and if there is no present liability

(1) [1912] 2 K. B. 141, 149.

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under it and there can be no future liability under it, in that sense it is not genuine, and therefore there is nothing to be recorded. That explains, I think, the conclusion come to in *Niddrie and Benhar Coal Co.* v. *Hanley.*(1) There is no plea of that sort raised here. All that is said is, "The man is not a workman, and the employers ought to be allowed to raise that question before the county court judge." It seems to me it is a sufficient answer to say there is no longer any question as to that, and you are not entitled to raise that point before the arbitrator, because it is a point which has been settled by agreement, and that being so the agreement ought to be recorded.

For these reasons in my judgment the appeal ought to be allowed.

PICKFORD L.J. I am of the same opinion. This was an application by a workman to record a memorandum of an agreement made between himself and his employers through their agents the Shipping Federation. The learned county court judge has declined to allow it to be recorded because he has said the applicant was not a workman. The question is whether he was entitled to enter upon that question and to consider the point of whether the applicant was a workman or whether he was not. The agreement was an agreement, in my opinion, by which the employers did agree through their agents that he was a workman and was to be treated as a workman. It has not been disputed that that is the effect of the agreement. Then it also settled by agreement the amount of compensation and the duration of compensation, namely, during total incapacity, which is still existing. Therefore all the elements about which there might have been disputes were settled by this agreement. Prima facie, therefore, it should be recorded. The duty of the registrar in the first instance is ministerial, but there are certain grounds upon which he himself, or the county court judge upon reference by him, may refuse to record the agreement. The only one which applies to the circumstances of this case is that the agreement is not genuine, and that has been construed to mean

(1) 47 S. L. R. 726.

something more than perhaps would be ordinarily connoted by the word "genuine." It has also been construed to mean a subsisting and valid and real agreement which can be enforced at the present moment. The employers here did not say that this was not genuine in any sense in which that word has ever been applied; but what they said was "We object to this being recorded because this man was not in fact a workman at all." They wished to say, we are told by Mr. Sanderson, although that does not appear on the note, "We agreed that he was a workman by mistake." They do not pretend that it was a mutual mistake and that the memorandum did not represent the real agreement. Possibly that might be raised under a plea that it was not genuine because it was not the real agreement at all; but the employers here do not pretend that there was any mutual mistake. What they say is he was not in fact a workman. They wished, as I have said, to say "We agreed, but it was under a mistake," but they say "Whether we agreed it or whether we did not, the county court judge is entitled to consider that matter as the foundation of his jurisdiction. If the man be not a workman at all, then the county court judge has no jurisdiction at all," and for that they refer to a passage from Fletcher Moulton L.J.'s judgment in the case of *Standing* v. *Eastwood & Co.* (1) No doubt in that case, as in probably most cases, if we take certain words and dissociate them altogether from the context, they may support propositions that they were never intended to support. But I think that argument is a fallacy, and for this reason. By s. 1, sub-s. 3, of the Workmen's Compensation Act the question whether the applicant is a workman or not is expressly left as one of the things which may be settled by agreement. [His Lordship read the sub-section and continued:] Therefore it is expressly provided that this question as to whether he is a workman or not may be settled by agreement, and when it has been settled by agreement and the other matters have been settled by agreement, there is a complete agreement, under the terms of the Act, made under the jurisdiction given by the Act, which may be recorded under the jurisdiction given by the Act. When that point has once

(1) 5 B. W. C. C. 268.

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been settled by agreement it is not open to the county court judge to say, "The parties have settled this by agreement, as the Act says they may, but I will unsettle it. I will see whether he is a workman or not. I will find exactly opposite to what the parties have settled by agreement, and having found it I will say that I will not record the agreement." The agreement, having settled the amount of the compensation and the duration of it, has settled all the matters upon which disputes could arise. That being so and that having been done under the jurisdiction of the Act, in my opinion the applicant is entitled to have it recorded, and the county court judge cannot inquire into matters which the parties have properly and rightly decided by agreement.

I think, therefore, that the county court judge was wrong and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Arthur C. Kent; J. A. & H. E. Farnfield.*

H. C. R.

[IN THE COURT OF APPEAL.]

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HOCKLEY *v.* WEST LONDON TIMBER AND JOINERY COMPANY.

Employer and Workman—Compensation—Sub-contracting—Work undertaken by the Principal—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4.

Where in a claim for compensation under the Workmen's Compensation Act, 1906, it is sought to make an employer liable as principal for an accident to a workman employed by a contractor, it is not enough that the work contracted for is necessary for the purposes of the principal's business; it must be work undertaken by the principal, either for himself or under a contract. Whether the work is undertaken by the principal is in each case a question of fact.

Principals, whose business was manufacturing mouldings of wood, imported large quantities of timber and contracted with R., a deal porter, to stack it in their yard for the purpose of seasoning it. A workman employed by R. was injured by an accident while engaged in stacking the timber. There was evidence that the principals never stacked the wood themselves:—

Held, that the work of stacking wood was not part of the work undertaken by the principals, and they were not liable to compensate the workman.

Decision of the county court judge affirmed.

In this case the respondents, the West London Timber and Joinery Company, carried on the business of manufacturing mouldings at Strand on the Green, Chiswick. They were in the habit of purchasing timber to be used as raw material in their business. They usually purchased this timber abroad, and had it delivered at the Commercial Dock to a lighterage contractor with whom they contracted to take it on barges to one of their wharves. They had separate contracts with carmen to cart the timber from their wharf to their yard, and with deal porters to unload from barge to van, and from the van to a pile in their yard. The respondents never themselves undertook the work of unloading and stacking the timber, nor was it customary in the trade for manufacturers of mouldings or joiners to undertake it. Their own workmen would not be capable of doing the work, which required considerable strength and some nerve and skill, as the

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workmen had to carry timber along narrow planks often at a considerable angle. It was done by the workmen employed by the deal porters and paid and controlled by them. They earned wages of 2*l.* 10*s.* a week. In this case the respondents contracted with Roberts, a deal porter, to unload timber and stack it in their yard at Strand on the Green, Chiswick. He employed the applicant, Hockley, in this work. Hockley while piling the timber in the respondents' yard slipped from a plank, fell 14 feet, and injured his leg. He was totally incapacitated for eighteen weeks and partially incapacitated for thirteen weeks more. He claimed compensation against the respondents as principals under s. 4 of the Workmen's Compensation Act, 1906. (1)

The county court judge decided that the respondents were not liable.

The workman appealed.

Douglas Knocker and *E. T. Dale*, for the appellant. The respondents say that the work in question was not undertaken by them; but the timber belonged to them before it was unloaded, and

(1) Sect. 4. "(1.) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed:

"Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work.

"(4.) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

they are liable to the appellant as principals under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906: *Dittmar* v. *Owners of Ship V* 593. (1) The unloading and stacking were done for the purposes of the respondents' business. It was necessary work and formed part of work undertaken by the principal. The test to be applied is whether or not it was part of the work of the respondents in particular, not whether it was part of the work of moulding merchants in general: *Bush* v. *Hawes*. (2) The authorities on this question turn on their special facts and are not very helpful, for instance *Waites* v. *Franco-British Exhibition* (3); *Spiers* v. *Elderslie Steamship Co.* (4); *Skates* v. *Jones & Co.* (5); *Luckwill* v. *Auchen Steam Shipping Co.* (6); *Hayes* v. *S. J. Thompson & Co.* (7)

Graham Mould, for the respondents. The stacking of timber is not a work undertaken by the respondents. They never do it, and it is not the custom of the trade that manufacturers of mouldings should do it. Stacking timber is a separate business requiring workmen of unusual strength and considerable skill. It is not enough that the work should be necessary for the purposes of the principal's trade, it must be undertaken by him: see *Hayes* v. *S. J. Thompson & Co.* (7), where the owners of steamers were held not liable for an accident which occurred in the cleaning of the boilers by a contractor. It is quite as necessary for the owners of steamships to keep their boilers clean as it is for manufacturers of mouldings to have dry wood. And it is not necessary for the latter to dry their wood by stacking, they might buy it dry and seasoned. The Irish case of *Walsh* v. *Hayes* (8) is distinguishable.

[LORD COZENS-HARDY M.R. That case cannot be correctly reported. The principal need not be under any obligation to do the work.]

Skates v. *Jones & Co.* (9) is a decision of this Court in the respondents' favour, and Farwell L.J. mentions three possible interpretations of "undertaken by the principal" in this section.

(1) [1909] 1 K. B. 389.
(2) [1902] 1 K. B. 216.
(3) (1909) 2 B. W. C. C. 199.
(4) (1909) 2 B. W. C. C. 205.
(5) [1910] 2 K. B. 903.
(6) (1913) 108 L. T. 52.
(7) (1913) 6 B. W. C. C. 130.
(8) (1909) 2 B. W. C. C. 202.
(9) [1910] 2 K. B. 903, 909.

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Only the third, "that it includes all work undertaken by any person in the course of or for the purpose of his trade or business," would include the work in this case, and that Farwell L.J. says is impossible. In *Dittmar* v. *Owners of Ship V* 593 (1) it was part of the owners' regular business to undertake lighterage; in this case the county court judge has found that it was no part of the respondents' business to stack wood.

Douglas Knocker in reply.

LORD COZENS-HARDY M.R. This appeal raises a question under s. 4 of the Workmen's Compensation Act, 1906. I am disposed to think that that is one of the most difficult sections, if not the most difficult, in this very difficult Act. It says so far as it is relevant to this case: "Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business,"—the section has no effect at all, unless the work is for the purposes of his trade or business—"contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." Then there are some subsequent provisions to which I need not refer. It has been held by this Court, and also by Courts in Scotland and Ireland, that the section is not limited to a case where there is strictly a contract and a sub-contract, but in each case you have to consider this. First there is the principal; he must do something in the course of, or for the purposes of, his trade or business, and there must be some sub-contract with regard to some of it relating to work undertaken by the principal. The words "undertaken by the principal" are undoubtedly difficult words to construe where there is no contract by the principal himself, but they have been interpreted by this Court in the manner which I shall have to indicate.

The present case is a case where mouldings are manufactured

(1) [1909] 1 K. B. 389.

by the respondents. For that purpose they buy large quantities of wood which would be delivered to them at the wharf, and then they have to be carried to their yard, and at their yard the wood is stacked in order that it may be matured and hardened and less likely to bend, and thus be effective. In the present case the applicant was a man who was employed by Roberts, and had been employed for some years by Roberts to stack wood, which was brought in carts to the respondents' business premises. Stacking this wood is undoubtedly difficult and requires more or less skilled work, and very strong men. In the course of stacking the applicant met with an accident, the particulars of which I need not refer to—undoubtedly an accident arising out of and in the course of his employment by Roberts. But it is said—and this is the forcible argument which we have listened to—that the employers, the moulding manufacturers, the respondents to this application, are, as principals, liable to pay compensation to the workman as though he had been their servant, and it is said that this dealing with the timber, stacking it, was done undoubtedly for the purposes of the respondents' trade or business. It was work, it is true, which was not habitually or, as far as I know, ever done by the principals themselves, but it was, it is said, within the meaning of this Act, work undertaken by the principals, because without stacking the timber they could not, with any advantage, carry on their business. I think there is a fallacy in that. Whatever else may be said about this section, I feel that it is impossible seriously to suggest that everything which is reasonably necessary to be done for the purpose of a trade or business is "work undertaken by the principal" within the meaning of this section. It is very easy to give an illustration. In one of the cases which has been called to our attention, I instanced the case of a cotton mill owner, who has periodically to have painting done on his premises. Can it be said that the painting, which he employs somebody to do, is work undertaken by the principal? It seems to me not. Let us go one step further, which is not, perhaps, quite, but, I think, nearly as easy. Is every cotton mill owner in Lancashire, when undertaking the delivery of bales of cotton from the wharf to his own mill, which is habitually done not

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by the cotton mill-owner himself, but by some other people who are employed and paid for that purpose, doing work undertaken by the principal? Take another instance. Is the ordinary corn mill owner liable in respect of an accident occurring to the farmer's men when they are delivering the wheat to the mill? In my opinion, plainly not. There may be cases in which an accident happens in the course of one step in the process of manufacture. As to that I say nothing; that does not arise here. This stacking was not a step in the process of manufacture; it was something incidental and reasonably necessary for the purpose, at a later stage of the manufacture, but was not, as it seems to me, anything undertaken by the principal within the meaning of this section.

Now we have had our attention called to all the relevant authorities. It seems to me that there is not one of them which in any way supports the present appeal, or prevents us from saying that this stacking of timber, which, it was quite true, was the property of the respondents, and which, it is quite true, they required for the benefit of their business, was not work undertaken by the principal within the meaning of this section. That being so, without going through the authorities again, which have been very carefully brought to our notice, I think the decision of the learned judge was right. He has found as a fact—and there is ample evidence for it—that this was done for the purposes of the principal's trade, but he has found that it was not any part of the work undertaken by the principal. Those two conditions must co-exist in order to impose any liability under this section. It is not sufficient to say that it was for the purposes of the business; it must also be a part of the work undertaken by the principal. For these reasons, I think there was ample evidence for the learned judge to arrive at the conclusion at which he did arrive, and that we should be straining the language of the section if we held in this case that there was any liability on the respondents. For that reason the appeal fails and must be dismissed.

SWINFEN EADY L.J. I am of the same opinion. In order to bring the case within s. 4, there must be work undertaken by the principal; secondly, it must be in the course of, or for the

purpose of, his trade or business; and, thirdly, he must contract with another person for the execution of the whole, or some part, of the work. In the present case the question turns upon whether the work in question was work undertaken by the principal. The county court judge has found that it was not work undertaken by the principal, and it is not work of a class that traders in a similar line of business to the employers here do undertake. It is a custom of the trade that this work should not be undertaken by the moulding manufacturers, but should be done by special skilled persons. I am of opinion that there is no ground for disturbing the judgment of the learned county court judge.

PICKFORD L.J. I am of the same opinion. It is necessary in order to support this appeal that the work which was being done by Roberts, namely, the stacking of the timber, should be shewn to be the work, or part of the work, undertaken by the respondents. Now they have been found to be moulding manufacturers; that is their sole business. In order to do their business of moulding manufacturers they must have timber, and they must have seasoned timber. Therefore the timber is stacked, and it is stacked for the purpose of being seasoned, but the stacking and seasoning are not parts of the actual operation of moulding manufacture, and it is a thing that has been always done by this firm, and by other firms in the same business, by means of contractors, and not by means of their own men or by themselves at all. The authorities make it quite clear that it is not enough that the work that is being done should be incidental to, or even necessary for, the preparation for the work which is actually done by the principal. In this case the learned county court judge has found that this stacking was not a part of the work which was undertaken by the respondents. I think there was ample evidence upon which he could find that. I think it is a question of fact, if there is any evidence, and I think there was plenty of evidence on which he could find it. He has found it, and therefore I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Pattinson & Brewer; Ellis & Co.*

J. R. B.

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1914
Feb. 28.
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1914
July 8.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

POTTER *v.* JOHN WELCH & SONS, LIMITED.

[1913 P. 2144.]

Employer and Workmen—Death of Workman due to Accident—Failure to give Notice of Accident—"Reasonable Cause"—Action by Widow against Employers under Fatal Accidents Act, 1846 (*Lord Campbell's Act*) (9 & 10 *Vict.* c. 93)—*Verdict for Defendants—Assessment of Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 4; *s.* 2.

By s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906, "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation . . . .":—

Held (affirming the decision of Channell J.), that an action under the Fatal Accidents Act, 1846 (Lord Campbell's Act), was an action "for injury caused by any accident" within the meaning of sub-s. 4 of s. 1 of the Act of 1906.

On January 7, 1913, a workman met with an accident through a door falling on his head and causing him to bite his tongue. He immediately reported the matter verbally to the foreman of the works, but stated that he was not severely injured. The accident was also reported to one of the employers who happened to be present at the works at the time. On January 11 the workman was attended by his own doctor, who found that he was suffering from an open discharging wound in the tongue. The doctor continued to attend the workman from time to time. The difficulty of taking food increased, but the workman continued to work until July 14. On July 22 he died of cancer of the tongue resulting from the original injury. No notice of the accident beyond that above stated was given by the workman to the employers. His widow subsequently brought an action against the employers under the Fatal Accidents Act, 1846, for the benefit of herself and her children. At the trial the jury returned a verdict for the employers on the ground that the deceased man had been guilty of contributory negligence. Application was thereupon made to the judge to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906:—

Held (reversing the decision of Channell J.), that no "reasonable cause" within the meaning of s. 2 of the Act of 1906 had been shewn for the failure of the workman to give notice of the accident to his

employers, and that the widow was therefore not entitled to compensation under the Act.

Semble. The only two grounds which the Court will accept as evidencing a "reasonable cause" for failure to give the notice of the accident to the employer as required by s. 2 of the Act of 1906 are either that the injury from the accident was latent or that the accident was of so trivial a nature that it would be unreasonable to expect the workman to give notice of it.

Webster v. *Cohen Brothers* (1913) 6 B. W. C. C. 92 and *Clapp* v. *Carter* (1914) 7 B. W. C. C. 28 followed.

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FURTHER CONSIDERATION of an action tried by Channell J. with a special jury at the Derby Assizes.

On January 7, 1913, John Potter whilst employed by the defendants at their works at Chinley in the county of Derby met with an accident through a door falling on his head and causing him to bite his tongue. He immediately reported the matter verbally to the foreman, but stated that he was not severely injured. The accident was also reported by some of his fellow workmen to one of the directors of the defendant company who happened to be present at the works at the time.

On January 11 he was attended by his own doctor, who found that he was suffering from an open discharging wound in the tongue. The doctor continued to attend the workman from time to time. The wound in the tongue never entirely healed, and the difficulty of taking food increased, but the workman nevertheless continued to work until July 14.

On July 22 the workman died of cancer of the tongue resulting from the original injury.

No notice was given by the workman of the accident to the employers except as above stated.

On August 2 a letter was written on behalf of the workman's widow claiming compensation.

On August 8 the employers in reply wrote denying liability.

On October 27 the workman's widow commenced the present action under the Fatal Accidents Act, 1846 (Lord Campbell's Act) (1), for the benefit of herself and her children, the cause of

(1) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 1: "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another

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action alleged being that the accident was due to the negligence of the defendants or their servants.

The action was tried before Channell J. with a special jury at the Derby Assizes on February 17, 1914. At the trial the jury returned a verdict for the defendants on the ground that the deceased man had been guilty of contributory negligence. Application was then made on behalf of the plaintiff to Channell J. to assess compensation under the Workmen's Compensation Act, 1906, s. 1, sub-s. 4. (1)

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person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted . . . . that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

(1) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 4: "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act . . . ."

Sect. 2: "(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

"Provided always that—

"(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be pre-

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The further consideration of the action took place before Channell J. in London on February 28, 1914.

Maddocks, for the plaintiff. An action under Lord Campbell's Act is an action brought to recover damages for injury caused by an accident within the meaning of s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906. Lord Campbell's Act in s. 1 recites in express terms that it is expedient that a wrong-doer who has caused death shall be answerable in damages "for the injury so caused by him"; and by s. 2 the jury may give such damages as they may think proportioned "to the injury" resulting from the death. It is clear, therefore, that the basis of the cause of action is the injury which has been caused to the dependants of the deceased man. [He referred to *Smith's Dock Co.* v. *John Readhead & Sons.* (1)] The plaintiff is therefore entitled to have compensation assessed under the Act of 1906.

McCurdy, for the defendants. An action under Lord Campbell's Act is not within s. 1, sub-s. 4. Lord Campbell's Act did not "merely remove the operation of the maxim actio personalis moritur cum persona": *Seward* v. "*Vera Cruz*," per Lord Selborne (2); it created an entirely new statutory cause of action, the gist of which is not injury caused by an accident, but pecuniary damage suffered by the family of a deceased man where his death has been caused by some wrongful act of another person. The right to claim compensation given by the Workmen's Compensation Act to the dependants of a deceased workman (who are not the same class as those specified in Lord Campbell's Act) is an entirely separate and independent right from that which the workman would have had if he had not died: *Williams* v. *Vauxhall Colliery Co.* (3) [He also contended that the plaintiff

judiced in his defence by the want, defect, or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

"(*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

(1) [1912] 2 K. B. 323.
(2) (1884) 10 App. Cas. 59, at p. 67.
(3) [1907] 2 K. B. 433.

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was not entitled to compensation under the Act of 1906 because notice of the accident had not been given as required by s. 2 and the defendants had been prejudiced by the want of notice, which was not occasioned by mistake or other reasonable cause. On this point the following authorities were cited: *Bramley* v. *Evans & Sons* (1); *Hancock* v. *British Westinghouse Electric Co.* (2); *Burrell* v. *Holloway Brothers (London)* (3); *Hoare* v. *Arding & Hobbs* (4); *Eaton* v. *Evans* (5); *Egerton* v. *Moore* (6); *Refuge Assurance Co.* v. *Millar* (7); *Webster* v. *Cohen Brothers* (8); *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (9); *Hewitt* v. *Stanley Brothers* (10); *Snelling* v. *Norton Hill Colliery Co.* (11)]

Maddocks replied.

CHANNELL J. I am very much obliged to counsel on both sides for their very clear arguments. The first question is whether this action which was brought under Lord Campbell's Act comes within the language of sub-s. 4 of s. 1 of the Workmen's Compensation Act, 1906. Sub-s. 1 of s. 1 gives to every workman who suffers personal injury by any accident arising out of and in the course of his employment a right to claim compensation from his employer, and s. 12 provides that, where the injured workman is dead, any reference in the Act to a workman shall include his dependants. The right of the dependants to claim compensation is not a right which they get through or as representing the workman but is in the nature of an independent claim in their own right. [The learned judge read sub-s. 4 of s. 1 and continued:] The question which I have to determine is whether an action under Lord Campbell's Act is an action "to recover damages . . . . for injury caused by any accident" within the meaning of sub-s. 4 of s. 1. The scheme of the Workmen's Compensation Act, 1906, is to give compensation to workmen, and in case of death to their dependants, for

(1) (1909) 3 B. W. C. C. 34.
(2) (1910) 3 B. W. C. C. 210.
(3) (1911) 4 B. W. C. C. 239.
(4) (1911) 5 B. W. C. C. 36.
(5) (1911) 5 B. W. C. C. 82.
(6) [1912] 2 K. B. 308.
(7) (1911) 49 S. L. R. 67.
(8) (1913) 108 L. T. 197; 6 B. W. C. C. 92.
(9) (1912) 50 S. L. R. 137.
(10) (1913) 6 B. W. C. C. 501.
(11) (1913) 6 B. W. C. C. 506.

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injury caused by accident. The basis of the scheme is that the compensation is to be in the nature of insurance, and not by way of damages against the employer for negligence. Before the Act was passed a workman had in certain cases a common law remedy against his employer for negligence, but difficulties often arose by reason of the doctrine of common employment, though that difficulty was to a certain extent got rid of by the Employers' Liability Act. In addition, under Lord Campbell's Act certain dependants of a deceased man, but not the same dependants as those defined in the Workmen's Compensation Act, 1906, had a right of action for the pecuniary damage which they had suffered by the death, when the death was caused by such a wrongful act, neglect, or default as would, if death had not occurred, have entitled the party injured to maintain an action and recover damages in respect thereof. These remedies were all in existence at the time of the passing of the Act of 1906 and they would all result in the person who had been injured by an act of negligence, or his dependants, obtaining compensation, but the scheme of the Act as shewn by s. 1, sub-s. 4, was that the same person should not be paid compensation both under the Act and outside the Act. As a rule the amount recoverable at common law, and probably also under the Employers' Liability Act, would be larger than the compensation payable under the Act, which the employer is liable to pay although he may not have been guilty of negligence or any other default, and sub-s. 4 of s. 1 appears to me clearly to mean that if a workman, including in that term his dependants, elects to try and get what would in ordinary circumstances be the larger amount at common law, or under the Employers' Liability Act, and for some reason fails to do so, then he is not to be precluded from obtaining compensation under the Act, but as he is not entitled to obtain compensation in both ways he may not pursue both remedies at the same time. That is, I think, confirmed by the provision in sub-s. 4 of s. 1 as to the action being brought within the time limited by the Act for taking proceedings for compensation. If this is the true view, I think it must have been intended that the word "action" in sub-s. 4 of s. 1 should include an action under Lord Campbell's Act, for

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that is the only method by which the dependants of a man who has died as a result of an act of negligence can obtain compensation, independently of the Workmen's Compensation Act; for, whatever the precise nature of an action under Lord Campbell's Act may be, and it is no doubt difficult to say what its proper technical description is, it is to my mind quite clear that it is an action to recover damages for injury caused by accident. I think, therefore, that the present case is one in which the plaintiff, having failed to succeed in her action under Lord Campbell's Act, is entitled under sub-s. 4 of s. 1 to ask the Court to assess compensation under the Act of 1906.

[The learned judge then dealt with the question as to the want of notice of the accident, and, after reviewing the evidence, he came to the conclusion that the employers had been prejudiced in their defence by the want of notice, but that the want of notice was occasioned by a reasonable cause, and he accordingly made an award under the Act in favour of the plaintiff.]

F. O. R.

The defendants appealed.

1914. July 8. *McCurdy*, for the appellants. There is a preliminary objection to the respondent's application, namely, that an action under Lord Campbell's Act is not an action to recover damages for "injury caused by an accident" within the meaning of s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906. An action under Lord Campbell's Act is, as was stated by Lord Selborne in "*The Vera Cruz*" (1), "a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the Common Law Courts, if the death had not ensued."

[PICKFORD L.J. The words in that passage are very much like the words in s. 1, sub-s. 4, of the Act of 1906.]

The right to compensation given by the Act of 1906 to the dependants of a workman (who are not necessarily the same persons as those under Lord Campbell's Act) in the case of his

(1) 10 App. Cas. 59, 67.

death is an entirely separate and independent right to that given by the Act to the workman in respect of an injury.

Assuming, however, that this contention is wrong, then it is submitted that under s. 2 of the Act of 1906 the respondent has failed to discharge the onus upon her of proving that the appellants were not prejudiced in their defence by the failure of the workman to give notice of the accident, and further she has not shewn that such failure to give notice was occasioned by "reasonable cause." The only two grounds which the Court accepts as evidencing reasonable cause for failure to give notice are (1.) that the injury from the accident was latent and (2.) that the accident was so trivial that it would be absurd to expect the workman to give notice of it: *Webster* v. *Cohen Brothers* (1); *Snelling* v. *Norton Hill Colliery Co.* (2); *Clapp* v. *Carter.* (3) In the present case the injury did not fall within either category It certainly was not latent. Neither was it trivial. The workman suffered from a wound in his tongue which made it difficult for him to swallow, and the pain and discomfort occasioned by it was such that for six months prior to death he was unable to partake of solid food.

Maddocks, for the respondent.

[LORD COZENS-HARDY M.R. We will not call upon you on the preliminary point.]

The question whether or not there was "reasonable cause" for failure to give notice of the accident is one of fact. In the present case there was no occasion on which the workman could have given an effective notice, as he was receiving full wages up to within a few days before his death. Although he was suffering from a swollen tongue he did not think the matter of sufficient importance to give notice of the accident. It did not prevent him from doing his work. The cancer did not manifest itself until a later date. The case comes within the remarks of Cozens-Hardy M.R. in *Clapp* v. *Carter.* (3) [He also referred to *Eke* v. *Hart-Dyke* (4) and *Haward* v. *Rowsell & Matthews.* (5)]

McCurdy was not called upon to reply.

(1) 6 B. W. C. C. 92.
(2) 6 B. W. C. C. 506.
(3) 7 B. W. C. C. 28, 33.
(4) [1910] 2 K. B. 677, 681.
(5) (1914) 137 L. T. Newsp. 238.

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LORD COZENS-HARDY M.R. This is a case which raises in substance a question under the Workmen's Compensation Act, 1906, although in a very unusual form. The man Potter was in the employment of the defendants, and he met with an accident while moving a trolley. A sliding door through which the trolley had to go somehow or other did not work properly or slipped—I do not know what the nature of the accident was; at all events there was an accident, and the man's head was cut on one side and his tongue was bitten through by a jagged tooth as the result of the accident. The accident happened in January, 1913, but the man did not die until the July following. His widow on behalf of herself and her children, as dependants, commenced an action under what was formerly called Lord Campbell's Act, but which is now called the Fatal Accidents Act, 1846. That was a common law action. It was tried before Channell J. with a special jury. The learned judge having ruled, in answer to a question put by the jury, that if they found there was contributory negligence on the part of the man they could find for the defendants, they so found. That being so, the plaintiff relies upon sub-s. 4 of s. 1 of the Workmen's Compensation Act, 1906. I will read it as far as is necessary. [His Lordship read the sub-section and continued:] This action was brought within six months from the time of the death, so that the first part of sub-s. 4 applies. Was the action under Lord Campbell's Act an action brought to recover damages for injury caused by an accident? It seems to me plainly that it was, and I so entirely agree with the judgment of Channell J. on this part of the case that I do not propose to add a word to it. His reasoning seems to me to be conclusive. The case, therefore, is one in which the learned judge, having heard the evidence in the action, was quite right in considering whether it was a case in which compensation ought to be awarded and could be awarded to the dependants.

Now these facts are not in dispute. The accident happened on January 11, and the defendants' foreman was immediately told of it. He knew that there was the wound in the workman's head, and that there was the wound in his tongue. A director of the defendant company also was informed of the accident, not

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by the man himself but by some of the other workmen. I assume, although I am not quite satisfied on that point, that the director was also told of something more than the injury to the head—that there was the injury to the tongue. But no other notice of the accident was given nor was there any notice of claim until August 2, a few days after the man's death. That brings one to the consideration of s. 2 of the Act of 1906, a section with which this Court is exceedingly familiar. Sub-s. 1 of that section, after providing that notice of the accident must be given as soon as practicable and that the claim for compensation must be made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death, contains a double proviso on which the plaintiff relies. [His Lordship read clauses (*a*) and (*b*) of the sub-section and continued:] Now dealing with that sub-section, the first question to be considered in this case is, Were the employers prejudiced? The learned judge has found as a fact that they were prejudiced. That point is therefore not open to Mr. Maddocks, who has put every point that could be urged in favour of the plaintiff. We therefore start with this, that the employers were prejudiced by not having notice of the claim, because if they had had an opportunity of having the injured man examined they might have secured for him highly skilled medical advice and proper attention to this dangerous wound, all of which might, and I think very probably would, have resulted in the preservation of the man's life. But although the employers were prejudiced, the workman or his dependants may still recover compensation if reasonable cause is shewn for not having given the notice. What was the reasonable cause in this case? There is no evidence of any reasonable cause, and further I think the circumstances of the case really do not admit of an argument that there was. The state of the man's tongue, according to the wife, caused bleeding. It is true that the man went back to work and continued to work until within about a week or fortnight of his death, but what was his condition during all that period? A fellow workman stated that although the workman did not complain of his tongue very much at the time of the accident (I daresay the blow on the head was what distressed him more),

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yet he did so after about a fortnight or three weeks. I will read his actual words: "About a fortnight or three weeks after the accident he found he could hardly eat. Did not say anything after the accident." The workman said that the deceased could hardly eat anything about a fortnight after the accident. The wife said "Never after the accident did he eat anything solid, but only a little soft food." There is a slight discrepancy in the evidence as to whether the deceased may not have eaten some solid food at the works certainly before the fortnight or three weeks elapsed, possibly occasionally afterwards. But that is not all. He consulted his doctor on January 11 or 13, shortly after the accident; he consulted him not once but went to him—we are not told how often but frequently, whether periodically or not I do not know. The doctor did not discover at first the existence of cancer from which the man ultimately died, but he did so before the man's death, from symptoms which he then saw, that the mischief caused by the jagged tooth going through the tongue had so irritated it and produced such inflammation in the region of it as ultimately to cause the man's death.

In those circumstances, what was the "reasonable cause" for the failure to give notice of the accident? I daresay the man was ignorant of the law, but that is no excuse. It is not a case in which a man suffers from a trifling abrasion or anything of that kind, and I have no desire to depart from anything I said in *Snelling* v. *Norton Hill Colliery Co.* (1) on that point, that it would be wholly unreasonable to suppose that every man in a colliery who meets with a slight scratch to his hand is at once to go and give notice that he has a claim. In the present case the matter was not one which the man knew was trivial; he knew that the wound in his tongue was getting worse, although I suppose, and I should quite agree, he did not think it would prove fatal as it in fact did. I do not think it is possible for us to allow this claim unless we are prepared to overrule what was said last year by this Court in *Webster* v. *Cohen Brothers* (2), or what was said in the present year by this Court in *Clapp* v. *Carter*. (3) I do not think I can do better than read a few lines

(1) 6 B. W. C. C. 506, 507. (2) 6 B. W. C. C. 92.
(3) 7 B. W. C. C. 28, 33.

of what I said as to "reasonable cause" in the latter case: "Speaking for myself, I think the safer ground is to say that unless you can come within either of these two classes of cases, namely, that you can make out that the injury from the accident is latent—not at first apparent"—that cannot apply here, because there was not only a wound to the head but there was an actual hole through the man's tongue caused by the jagged tooth—"—or that the accident is apparently so trivial that it would be absurd to expect the workman to give notice of it, I think it is not 'reasonable cause' for not giving notice."

In my opinion, with the greatest possible respect to Channell J., there was no evidence in this case to justify the finding that there was "reasonable cause" for not giving notice within the meaning which has been given to those words by this Court in many cases. I think therefore the appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion. The workman in this case met with the accident which ultimately caused his death on January 7, 1913. Whilst he was engaged with a trolley at a door, the door fell down and he received a severe blow. The blow was on the head, and the account given by the doctor who was called in four days later was that he found that the man had a jagged wound in the tongue, that a tooth had been forced through it and had set up inflammation. The wound bled a good deal at the time and afterwards gave the man a considerable amount of pain. After an interval of about three weeks after the accident he was unable or scarcely able to eat. The doctor who was called in and saw him on January 11, four days after the accident, advised him to go on his club; he was a member of the Foresters, and the doctor thought that he was then sufficiently injured to go on his club. The man, however, declined to do that, and continued to work although suffering pain. Cancer in the tongue supervened; the man ceased work on July 14 and died on July 22. An action was brought under Lord Campbell's Act and that action failed on the ground of contributory negligence. The jury found for the defendants. The question then arose whether compensation

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could be awarded under sub-s. 4 of s. 1 of the Workmen's Compensation Act, 1906. That sub-section provides: [The Lord Justice read the sub-section and continued:]

The question was raised whether an action under Lord Campbell's Act is an action brought to recover damages independently of this Act—of course it is independently of this Act—for injury caused by an accident. Lord Campbell's Act, which is intituled "An Act for compensating the families of persons killed by accidents," recites that "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him." Then it provides: [The Lord Justice read s. 1 of the Act and continued:] Then the statute (s. 2) specifies the persons for whose benefit and the persons by whom the action shall be brought. In my opinion, it is clear that an action under Lord Campbell's Act is an action that is brought to recover damages for an injury caused by an accident. It is within the language of the statute, and under those circumstances I am of opinion that the case comes within sub-s. 4 of s. 1 of the Workmen's Compensation Act, 1906.

Then that being the opinion of Channell J., he proceeded to assess compensation under the Act of 1906. He has found as a fact that the employers were prejudiced by want of notice, but that fact in itself is not sufficient to bar the claim if the want of notice was occasioned by mistake or other reasonable cause. The question therefore remaining is whether the want of notice—because there was no notice here till after the death—was occasioned by mistake or other reasonable cause. The only reasonable cause which has been suggested is that the injured man himself thought that the injury that he had received was too trivial to be taken notice of, and therefore he did not give notice. The injury was a serious one and could not be regarded as trivial. The authorities have determined it clearly that the fact that a man may hope to get better and that he will not have to make any claim is not a sufficient ground for abstaining from giving notice, and that in such case the

want of notice will not be occasioned by a reasonable cause. In *Webster* v. *Cohen Brothers* (1) the workman met with the accident on April 3, but continued to work until June 1. The notice was given on June 3, and the county court judge found that there was reasonable cause for the want of notice, and when it came to be examined the "reasonable cause" was that the man hoped that he would get better and that he would not have to make any claim. On those grounds, the county court judge found that the want of notice was due to a "reasonable cause," but on appeal, this Court took a different view. The Master of the Rolls pointed out that he could not agree that that was a ground to enable the workman to escape from the consequences of his failure to give notice of the accident. He says with regard to the reasonable cause suggested by the county court judge, namely, that the workman never intended to make a claim, "That again was never stated by the workman. But even if it had been, if a man abstains from giving notice of an accident which is daily causing him pain and which is well known to him—if he deliberately abstains from giving notice of the accident because he does not intend to make a claim, that is not a reasonable cause for the failure to give notice." The same view was taken in the subsequent case of *Clapp* v. *Carter*. (2) Having regard to these authorities, there was in the present case no sufficient ground for the view taken by Channell J. that there was reasonable cause to abstain from giving notice or that the want of notice was occasioned by any reasonable cause. Under those circumstances, I am of opinion that the plaintiff cannot recover.

PICKFORD L.J. I am of the same opinion. I agree entirely with Channell J. that the action under Lord Campbell's Act comes within the words of sub-s. 4 of s. 1 of the Workmen's Compensation Act, 1906. I do not think it is necessary to add anything more to what has been said on the matter.

With regard to the second point I am wholly unable to distinguish this case from *Webster* v. *Cohen Brothers*. (3) It

(1) 6 B. W. C. C. 92, 96. (2) 7 B. W. C. C. 28.
(3) 6 B. W. C. C. 92.

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seems to me that that case is on all fours with the present case and governs it, and therefore that this appeal must be allowed.

Appeal allowed.

Solicitors: *Indermaur & Brown, for Chambers & Chambers, Denton; Jacques & Co., for Sutcliffe & Trenholme, Bradford.*

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[IN THE COURT OF APPEAL.]

WOODHOUSE *v.* MIDLAND RAILWAY COMPANY.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Incapacity for Work—Light Work given by Employers at old Rate of Wages—Temporary Cessation of Work owing to Strike—Absence of Right to Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1 (*b*) *and* 3.

The applicant, a goods porter in the service of a railway company, was injured by an accident arising out of and in the course of his employment and for a time totally incapacitated for work. The company paid him the full compensation required by the Workmen's Compensation Act until he partially recovered, when they gave him light work as a mess-room attendant at his former rate of wages. Owing to a labour strike the company were temporarily unable to find work for all their staff, and for four unconsecutive days the applicant was unemployed and received no wages. He claimed compensation under the Act in respect of the four days:—

Held, that his non-employment did not arise from incapacity to work owing to his injuries from the accident and that he was consequently not entitled to compensation.

APPEAL from a decision of the deputy judge of the Lancaster County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant Thomas Woodhouse was a goods porter employed by the Midland Railway Company at Heysham Harbour at 23*s.* 6*d.* a week. On November 20, 1911, he met with an accident while slinging goods on a crane and sustained injuries by which he was at first totally incapacitated for work. The company admitted liability and paid him compensation at the rate

of 11*s.* 9*d.* per week, being 50 per cent. of his average weekly earnings, up to December 20, 1912, when, as he was able to do light work, they again took him into their employment as a mess-room attendant at Heysham Harbour, paying him 23*s.* 6*d.* per week, his former rate of wages. In November, 1913, owing to a labour strike at Dublin, the sailings of steamships between that port and Heysham Harbour were temporarily cancelled and the company were not able to find regular work for all their staff. They were not able to find work for the applicant on November 21, 25, 29, and December 6, and he was accordingly, though fit to do his work, unemployed on each of those days and received no wages in respect of them. The applicant then applied for an arbitration under the Act, claiming compensation at the rate of 11*s.* 9*d.* a week or 1*s.* 11½*d.* per day, i.e., 7*s.* 10*d.* for the four days.

The railway company answered that the applicant was not on those dates incapacitated for work as a result of the accident and was well able if they had been able to find him work to earn 23*s.* 6*d.* a week wages. They therefore disputed his right to any compensation in respect of the four days in question.

The deputy county court judge held that the applicant was not entitled to compensation in respect of the four days on the ground that he was not incapacitated for work owing to the injuries caused by the accident, and that his non-employment on those days had nothing to do with the accident.

The applicant appealed.

Rigby Swift, K.C., and *F. B. Merriman*, for the appellant. On the four days in question the applicant was still incapacitated for doing his usual work as a goods porter; therefore during those days he was unable to earn wages owing to the accident. It is true that he was able to do light work, or cripples' work, but he was in fact practically reduced to the condition of an "odd lot" in the labour market. The onus is upon the employers to shew that there is light work for the man to do. Here there was no such work. With regard to the four days the applicant is entitled to compensation as an incapacitated goods porter. The respondents are not entitled to stop the light work

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whenever labour trouble arises and so pay neither wages nor compensation: *Cory* v. *Hughes*. (1)

[LORD COZENS-HARDY M.R. There the employers wished to terminate the weekly payments.]

The principle is the same in this case.

The county court judge ought to have found on the evidence that the applicant was still incapacitated from the effects of the accident of 1911 and to have assessed compensation in respect of the four days: *Harwood* v. *Wyken Colliery Co.* (2); *Wilkinson* v. *Frodingham* (3); *Macnally* v. *Furness, Withy & Co.* (4)

J. D. Crawford and *W. O. Hodges*, for the respondents. The appellant was not deprived of his work because he was incapacitated, but in consequence of the strike which also prevented others of his fellow workmen from working. The county court judge has found that the man's wage-earning capacity is no less than it was before the accident, and he rightly held that he was not incapacitated owing to the accident. The man in fact passed from one class of employment into another. It is not the case of an "odd lot" in the labour market. If in point of fact the wages are the same after as before the accident his wage-earning capacity is not decreased. The principle is laid down in *Cardiff Corporation* v. *Hall*. (5)

Rigby Swift, K.C., in reply.

Cur. adv. vult.

July 13. LORD COZENS-HARDY M.R. This appeal relates only to a sum of 7*s.* 10*d.*, but it is said by counsel for the appellant to raise an important question of principle, namely, the effect of a strike upon a workman to whom his employers have given light work. For the reasons I shall state, the facts in my opinion do not enable us to decide any such general principle.

Woodhouse was a goods porter at Heysham Harbour. On November 20, 1911, he met with a serious accident while slinging goods on a crane. This has disabled him from resuming his heavy work as a goods porter. His average weekly earnings as

(1) [1911] 2 K. B. 738.
(2) [1913] 2 K. B. 158.
(3) (1913) 6 B. W. C. C. 200.
(4) [1913] 3 K. B. 605.
(5) [1911] 1 K. B. 1009.

a goods porter were 23*s.* 6*d.* He has been treated generously by the railway company. He resumed work with the company in December, 1912, as a mess-room attendant, that being light work which he is able to perform, and he still occupies that position. He is receiving the same wages as before, that is to say 23*s.* 6*d.* from first to last, with the exception I must mention. During four days in November and December, 1913, not being consecutive days, in consequence of the strike at Dublin, there was no work for him at Heysham Harbour. He was not exceptionally treated. Other mess-room attendants and goods porters lost a few days. This was not due to any fault on the part of the men, and the railway company were helpless.

Woodhouse claims 7*s.* 10*d.* for these four days. In his application he alleges that the 23*s.* 6*d.* was as to 11*s.* 9*d.* compensation, and as to 11*s.* 9*d.* wages for doing light work as mess-room attendant. This allegation has not been supported by counsel, and it is plainly untenable.

There is no evidence as to the terms of his engagement, either as goods porter or as mess-room attendant. But it has been assumed that, though his wages were paid weekly, he could be told on any day that he would not be wanted to-morrow.

There is no evidence as to his ability to do every kind of light work, or whether he is what has been called an "odd lot" in the labour market, and able only to do the special work of a mess-room attendant. There is no evidence that he sought and failed to obtain light work from any other employers on any one of the four days.

In these circumstances, he asserts that his right to compensation automatically springs up whenever there is no work for him at a rate of, or rather I should say not exceeding, 11*s.* 9*d.* a week, or 1*s.* 11½*d.* a day. He claims to be in a better position than all his mates.

Put in this broad way, I think the claim cannot be supported. It is inconsistent with the provisions of the First Schedule, ss. 1 (*b*) and 3. Assuming everything in favour of the man, the compensation could not exceed 11*s.* 9*d.* a week. But where the incapacity is "partial"—which is the present case—"the weekly payment shall in no case exceed the difference between the

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amount of the average weekly earnings of the workman before the accident" (that is 23*s.* 6*d.*) "and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident" (that is 23*s.* 6*d.*) "but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." "Average weekly earnings" do not mean a full week of six days as compared with a week of five days. You must take an average of twelve months, if you can (in which twelve months there will probably be some lost time), under s. 1 (*b*), and you ought to do the same under s. 3. To be strictly accurate, under the most favourable circumstances, his average earnings under s. 1 (*b*) would be 23*s.* 6*d.* minus 15*s.* 8*d.* divided by 52, or 23*s.* 6*d.* minus 3½*d.*, that is 23*s.* 2½*d.* This really shews the triviality of the present application. I conceive that no judge would deem it "proper" to award anything in these circumstances.

In my opinion it is of no moment that the light work was obtained from the employers and not from a stranger.

This is not a case where there has been a long continuance of lack of employment. When such a case arises it will be considered. This man has been and at this moment is employed as a mess-room attendant. The relation of employers and workman has continued ever since December, 1912, with only the loss of four days. Such an interruption, if it can fairly be called an interruption, is of no moment.

The learned deputy judge has decided against the application. Although I am not prepared to accept all his reasoning, I think the conclusion at which he arrived is correct, and that the appeal should be dismissed with costs.

This is the judgment of the Court. (1)

Appeal dismissed.

Solicitors: *W. P. Ellen, for R. Knight, Morecambe; Beale & Co.*

(1) Lord Cozens-Hardy M.R., Swinfen Eady L.J., and Pickford L.J.

G. A. S.

[IN THE COURT OF APPEAL.]

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June 11, 23; *July* 6, 13.

BURMAN *v.* ZODIAC STEAM FISHING COMPANY.

WILLIAMS *v.* OWNERS OF STEAM TRAWLER DUNCAN.

McCORD *v.* OWNERS OF STEAM TRAWLER CITY OF LIVERPOOL.

Employer and Workman — Compensation — Workman — Seaman — Fishing Vessel—Share of Stocker Money—Remuneration by Share in Gross Earnings—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2—*Running Agreement—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 400.

By s. 7 of the Workmen's Compensation Act, 1906, the Act applies to seamen, but by sub-s. 2 "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

A fisherman who receives liver money and stocker money in addition to his wages receives them from the owners of the vessel out of her gross earnings, and they form part of his remuneration although wages are the only things mentioned in his running agreement. He is therefore remunerated by a share in the gross earnings within s. 7, sub-s. 2, of the Act of 1906 and is not entitled to compensation under that Act.

In cases where the stocker money and liver money are so small as to be of no importance it is open to the county court judge to find that the fisherman was not remunerated by a share of gross earnings.

THESE were three appeals which raised the question whether members of the crew of a fishing vessel who received besides their wages money for "stocker" and "liver money" were "remunerated by shares in the profits of the gross earnings of the working of such vessel" within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, so as to disentitle them to compensation under the Act.

BURMAN *v.* ZODIAC STEAM FISHING COMPANY.

June 11, 23. This was an appeal from an award of the county court judge of Blackpool and Fleetwood sitting as arbitrator under the Workmen's Compensation Act, 1906.

T. C. S. Burman was employed on the steam trawler *Zodiac*,

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and on November 9, 1913, he met with a serious accident. The employer disputed liability on the ground that he was not a workman to whom the Act applied because he was remunerated by a share in the profits or the gross earnings of the working of the vessel. The facts are more fully stated in the judgment. The learned judge held on the evidence that the applicant was a member of the crew of the *Zodiac* and employed as a cook and was not remunerated by shares in the profits or gross earnings of the vessel, and that the employers were liable to pay an agreed compensation.

The employers appealed.

Gordon Hewart, K.C., and *Greaves Lord*, for the appellants. The question arises under s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, which excepts from the Act "such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." The applicant in this case was a cook. According to the agreement entered in the log-book he was not entitled to any share in the profits, for in the column headed share of profits a line was drawn opposite his name. He was, however, by agreement with the captain and crew entitled to a share in stocker and in consideration of his working on deck. There is no doubt that stocker is a share in profits, and if that is so it makes no difference that the share is small in proportion to the wages he also receives. The case is covered by *Costello* v. *Owners of Ship Pigeon* (1) and the applicant is excluded. [He also referred to *Gill* v. *Aberdeen Steam Trawling and Fishing Co.* (2)]

Addington Willis, for the respondent workman. The system here is quite different from that in *Costello* v. *Owners of Ship Pigeon*. (1) There there was a contract with the owners that the men should share in profits; here the applicant only gets a share by arrangement with the crew for helping them outside his work; it is no part of his remuneration as cook. Lord Parker's judgment shews that to bring the case within the section there must be a contract and a joint adventure. Sect. 400 of the Merchant Shipping Act requires the contract to be in writing and in the statutory

(1) [1913] A. C. 407. (2) 1908 S. C. 328.

form. Here the statutory contract in the log-book expressly excludes share of profits.

To exclude the respondent from the benefits of the Act it must be proved that he comes within s. 7, sub-s. 2. The burden of proof is on the employers and they have not made out their case. By s. 400 of the Merchant Shipping Act a fisherman's agreement has to be in a certain form, and the employers cannot go beyond the four corners of the running agreement to shew that he received a share of the profits. Nothing which is not stated in that agreement can be taken to be part of his remuneration. Evidence on that point is inadmissible. Whether he was entitled to profits was purely a question of fact for the learned judge to decide. Even if the respondent was remunerated by stocker there is nothing to shew that it ever belonged to the owners.

Gordon Hewart, K.C., in reply. "Earnings" need not always come from the employer: *Penn* v. *Spiers & Pond* (1); and "remuneration" is the same as earnings: *Skailes* v. *Blue Anchor Line* (2); *Brandy* v. *Owners of S.S. Raphael.* (3)

Cur. adv. vult.

WILLIAMS *v.* OWNERS OF STEAM TRAWLER DUNCAN.

June 23. Appeal from an award of the judge of the Blackpool and Fleetwood County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On December 2, 1913, Charles Williams, whilst in the employment of Messrs. Morley & Price on board the steam trawler *Duncan*, met with an accident resulting in permanent incapacity. He claimed compensation and his employers resisted the claim on the ground, inter alia, that his employment was not one to which the Act applied inasmuch as he was a member of the crew of the *Duncan* and was remunerated by a share of the profits or gross earnings of the working of the vessel. The facts are more fully stated in the judgment. The learned judge found on the evidence that the applicant was not remunerated by

(1) [1908] 1 K. B. 766. (2) [1911] 1 K. B. 360.
(3) [1911] 1 K. B. 776.

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shares in the profits or gross earnings of the vessel and awarded compensation to him.

The employers appealed.

A. Neilson and *Greaves Lord*, for the appellants.

H. C. Davenport, for the respondent.

Cur. adv. vult.

McCORD *v.* OWNERS OF STEAM TRAWLER CITY OF LIVERPOOL.

July 6. This was an appeal from an award of the judge of the Liverpool and Fleetwood County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

J. H. McCord was employed as a deck hand on the steam trawler *City of Liverpool*, and on June 2, 1913, he met with an accident by which he was wholly incapacitated for work for some time and was still partially incapacitated. The employers denied their liability on the ground, inter alia, that he was not a workman to whom the Act applied inasmuch as he was remunerated by a share of the profits or the gross earnings of the working of the vessel. The facts are fully set out in the judgment. The learned judge held that the applicant was not remunerated out of the profits or gross earnings of the vessel and made an award in his favour.

The employers appealed.

Greaves Lord, for the appellants.

H. C. Davenport, for the respondent.

Cur. adv. vult.

July 13. The judgment of the COURT (Lord Cozens-Hardy M.R., Swinfen Eady L.J., and Pickford L.J.) was read by

PICKFORD L.J. as follows. In *Burman* v. *Zodiac Steam Fishing Company* the applicant was employed on board the appellants' steam trawler as a cook, and also helped the crew in their work on deck. While so employed he met with an accident which would entitle him to compensation if he were a workman entitled to compensation like others.

The only question is whether he is excluded from the rights

given by the Act, because he comes under s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, as a member of the crew of a fishing vessel remunerated by shares in the profits or the gross earnings of the working of such vessel.

The applicant was asked to join the *Zodiac* by the mate and then saw the skipper, who engaged him at wages of 24*s*. a week, and also promised him a share of what is called stocker if he did work on deck with the rest of the deck hands. It was also arranged that he should receive liver money, i.e., a share in the proceeds of the livers cleaned from the fish, and trip money, i.e., a payment per trip of the vessel if his conduct was satisfactory. Stocker is explained as being money received from the sale of the tails of a fish called the monk, roes, shell fish, &c.

A running agreement such as is required by the Merchant Shipping Act, 1894, s. 400, was made between the skipper on behalf of the owners and the crew. In that agreement the only remuneration mentioned as payable to the applicant was 20*s*. per week; and the column in the agreement headed "Share of fishing profits" was struck through in the space opposite the applicant's name to shew that it did not apply to him. The only persons mentioned as taking a share of fishing profits were the skipper and the second hand.

It was, however, stated by the applicant that he in fact received 24*s*. and also a share of stocker, liver, and trip money. No evidence was given of the origin of stocker, but we had the books of the owners before us, from which it appeared that it was sold by the owners, and, after deduction of expenses of sale, the proceeds were handed to the skipper, or another member of the crew, and divided by him amongst the crew. A stocker account was kept in their books, but no part of the proceeds was taken by them in this case. The proceeds were substantial.

The applicant contended that he was not remunerated by a share of the profits or gross earnings of the working of the vessel on the grounds that (1.) his remuneration must be taken to be only that mentioned in the running agreement; (2.) he was not paid the share of stocker or of liver money by the owners, but only by the crew as a private arrangement. He

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also contended that if he were wrong on these points, stocker was not a part of the earnings of the working of the vessel.

The first point does not seem to be tenable. The running agreement clearly did not contain all the terms of the agreement for remuneration. The applicant received 24*s.* and not 20*s.*; he received trip money and a share of stocker and liver money, and if he in fact received more than appears in the running agreement for his services he cannot be heard to say that the whole sum is not remuneration. It may have been an offence not to put the whole terms in the running agreement, but that cannot make anything received for his services any the less remuneration.

On the second point it seems to us that he did receive the proceeds of stocker from the owners. Everything that was taken up by the trawl belonged to the owners, the monks' tails, roes, &c., no less than the rest of the fish, and, whether it be said to arise from custom or contract, the only way in which the crew could be entitled to the proceeds was by consent of the owners. They took the stocker, they sold it, and they handed the proceeds to some member of the crew for division between himself and the other members entitled to it. It may be that the decision as to the number entitled to a share was left to the skipper and others to settle, but it was none the less handed over by the owners as remuneration to the crew. There was evidence that a cook was not entitled to a share in the stocker unless he did deck work, but that if he did deck work he received his share with the others, and it was by virtue of this custom that the applicant received his stocker. The share of stocker therefore did come from the owners.

The only remaining point is whether it was part of the gross earnings of the working of the vessel. It is difficult to see why it is not. As stated before, everything taken up by the trawl belongs to the owners and would be part of their profit if they did not hand it over as remuneration to the crew. If they did not hand it over the crew would require higher wages, as is the case in sole-catching vessels where the stocker is a negligible quantity. In this case it was not negligible, the owners applied it in payment of the crew after selling it and deducting the expenses of sale, and it is just as much part of the gross earnings of the

working of the vessel as any other part of the catch out of the proceeds of which the crew are paid before arriving at the profit.

It may well be that the share of profits taken by the master and second hand was the matter most prominent in the minds of the framers of the section, but if payment by receipt of stocker is remuneration out of the gross earnings of the working of the vessel, it is equally within the provisions of the Act. Trip money is admitted not to be paid out of earnings. Liver money stands on the same footing as stocker unless it be so small and negligible as to come within the doctrine of de minimis.

The appeal should therefore be allowed as the applicant comes within the terms of s. 7, sub-s. 2, and the Act does not apply to him.

WILLIAMS *v.* OWNERS OF STEAM TRAWLER DUNCAN.

In this case the applicant was admitted to be entitled to compensation for an accident, unless he was excluded by s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906. He was employed on board the steam trawler *Duncan* at wages of 20*s.* for the first trip, and on that trip he would have received stocker and liver money as explained in *Burman* v. *Zodiac Steam Fishing Company* if there had been any. He also received trip money, but that was admittedly not paid out of earnings.

The running agreement under s. 400 of the Merchant Shipping Act, 1894, stated his wages at 20*s.*, and the column as to share of fishing profits was left blank. The facts, however, in this case were different. The *Duncan* was a sole-catching vessel, and in such vessels there is a very small amount of either stocker or liver money. In consequence, on the second trip the crew asked for more wages, and they were raised to 24*s.*, because the stocker and liver money were considered so small as to be not worth considering. There was evidence that the liver was often thrown overboard, but that the crew kept it if they wished, and that the applicant received no stocker at all.

In this case it seems to us that there was evidence on which the county court judge could find that the stocker and liver money were considered as matter of no importance, and not part of the earnings of the working of the vessel, and that there was

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no agreement by which the applicant was to be remunerated by a share of the earnings.

The appeal should therefore be dismissed.

McCORD *v.* OWNERS OF STEAM TRAWLER CITY OF LIVERPOOL.

The applicant in this case was a member of the crew of the steam trawler *City of Liverpool* and is entitled to compensation for an accident, unless he was remunerated by a share in the profits or the gross earnings of the working.

The *City of Liverpool* was a sole-catching vessel, and in such trawlers the stocker or liver money, as explained in the previous case, is so small as to be negligible. In consequence the applicant shipped at a wage of 24*s.* instead of 20*s.*, which is the ordinary wage on trawlers not engaged in sole catching.

There was evidence that under such circumstances the crew are not entitled to stocker or liver money, and also from the cashier and secretary of the owners that in sole-catching vessels stocker has nothing to do with the earnings of the vessel. The applicant did, however, receive some small sum on one trip from this source. The explanation of this, probably, is that the amount is so small that it is considered of no importance to any one, and that the owners do not consider it of sufficient importance to notice at all, and leave it to the crew to throw away or keep as they wish.

There was also evidence that the higher rate of wages is paid because there is no stocker.

There was evidence on which the county court judge could find that the applicant was not remunerated by a share in the earnings of the working of the vessel, and that what he got was merely something that was not considered worth notice as earnings of the vessel, or of any use to any one.

The appeal should be dismissed.

Solicitors in the first case: *Pitman & Sons, for Roland W. Robinson, Blackpool; Williamson, Hill & Co., for C. W. Callis, Blackpool.*

Solicitors in the second and third cases: *Pritchard & Co., for Weightman, Pedder & Co., Liverpool; Indermaur & Brown, for C. W. Callis, Blackpool.*

H. C. R.

[IN THE COURT OF APPEAL.]

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June 26, 29; *July* 13.

MARSHALL, SONS & CO., LIMITED *v.* PRINCE.

Employer and Workman—Compensation—Weekly Payment—Redemption—Where the Incapacity is permanent—Stability—Basis of Computation—Infant—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 17.

By Sched. I., par. 17, of the Workmen's Compensation Act, 1906, "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum."

On an application to redeem under par. 17 the fact that the injured man's wages would have increased but for the injury ought not to be taken into consideration in determining whether his incapacity is permanent. The question to be decided is whether his physical condition is stable.

Sched. I., par. 17, deals solely with the actual weekly payment which has continued for six months at the date of the application.

Under Sched. I., par. 17, an infant is in no better position than an adult, and cannot take advantage of par. 16, which applies to reviews of weekly payments only.

Appeal from an award of the judge of the Gainsborough County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Swinfen Eady L.J.:—Arthur Prince, the workman, a lad eighteen years of age, was employed as engineer's turner, earning an average wage of 8*s.* a week. On July 2, 1912, he was injured by the breaking of a tool, a portion of which struck him on the left eye. This eye was so damaged that it had to

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be removed; the right eye became affected, and he has almost entirely lost the sight of this eye also, and is practically blind.

The employers paid him his full wages, 8*s*. per week, as from the date of the accident, and on December 31, 1912, an agreement was come to whereby the employers agreed to pay and Prince agreed to accept compensation at the rate of 8*s*. per week, being 100 per cent. of his average weekly earnings, to be paid during the total or partial incapacity of Arthur Prince for work, or until it should be diminished, increased, or redeemed in accordance with the provisions of the Act.

On January 17, 1914, the employers applied to redeem the weekly payments to Arthur Prince. In their application they state that the lad's "right eye is affected but at present it is impossible to say what will be the result to this eye." Before or at the hearing the employers admitted that the boy was an infant; that he was blind and always would be blind, that is to say that his injury was permanent; that his wages of 8*s*. would upon his attaining twenty-one have risen automatically to 24*s*. per week; and that subsequently there would be some further increase, the exact amount of which was not admitted but would probably increase the wages to about 28*s*. a week.

There had been some correspondence between the respective solicitors before the hearing before the county court judge; on January 31, 1914, the employers' solicitors had offered to admit that the applicant was totally and permanently incapacitated, but in answer the boy's solicitors said that they only asked for an admission that the injury was permanent and not that the incapacity was total and permanent. The boy's solicitors never admitted in fact that the incapacity was permanent, although they alleged that the injury was permanent. Nor was any admission of permanent incapacity made by counsel on behalf of the boy at the hearing.

The employers alleged at the hearing that the incapacity was permanent, and claimed to redeem under Sched. I., par. 17, on the footing of paying the value of an immediate life annuity of 75 per cent. of the annual value of the weekly payment of 8*s*., and they disputed that the county court judge had any discretion to award any other or different sum.

The learned judge held (1.) that the injury was permanent; (2.) that the incapacity was not permanent, a condition of stability had not been arrived at. He might become more capable for work than he was now or less capable. At present he was only twenty years of age, but he would soon be of full age, when it was admitted he ought to be able to earn 24*s.* per week, i.e., 12*s.* compensation. He assessed the sum for redemption at 534*l.* and ordered the applicants to pay the same to the respondent.

The employers appealed.

Bairstow, K.C., and *Wingate Saul*, for the appellants. There is nothing under par. 17 or elsewhere in the Act to import the consideration as to probable earnings as in the proviso to par. 16. It may be admitted that both the injury and the incapacity are permanent. The claimant alleged that his incapacity was permanent, but did not adduce evidence in support of this allegation. The county court judge treated the case on the footing that the permanency of the incapacity was a question of law, and held that the incapacity was not permanent, and that he was not therefore bound to award 75 per cent. of the actuarial value of 8*s.* a week, but was entitled to award a larger sum. It is submitted that he was wrong in so deciding: *Calico Printers' Association* v. *Higham*. (1) It is a condition precedent to the application of the section that the Court should decide the issue whether the incapacity is permanent. The learned county court judge has misconstrued the section. It contains no special provisions with regard to the case of an infant workman, and it is submitted that its construction must be regulated by the same considerations as apply to the case of an adult. The basis of the redemption is the existing weekly payment at the date of the accident. The county court judge was therefore wrong in considering probable future earnings. There were sound reasons for the Legislature not extending to cases of redemption the privileges given to infants by the proviso to par. 16: *Vickers, Sons & Maxim* v. *Evans*. (2) There is nothing in the Act to warrant the construction put upon par. 17 by the county court

(1) [1912] 1 K. B. 93. (2) [1910] A. C. 444.

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judge. [They also referred to *Pomphrey* v. *Southwark Press* (1) and *Calico Printers' Association* v. *Booth*. (2)]

This application was made in accordance with r. 8 of the Workmen's Compensation Rules, 1913, and Form 5 was followed. The respondent answered under r. 18 and Form 14. The learned judge held that there was no stability of wages because the wages varied, but the point to be considered was the stability of the man's condition.

Ellis Hill, for the respondent. The question is whether the incapacity was permanent at the date of the hearing. Incapacity means incapacity for earning wages. The learned judge was bound to speculate as to the future condition of the applicant: *Calico Printers' Association* v. *Higham*. (3) This boy was an infant with an earning capacity of 8*s*. a week. It is admitted that some day it will be 24*s*. a week; and the Act gives power to award compensation on the basis of these future wages. The judge was right in saying that if the wages would rise the incapacity was not permanent. The Act contemplates that an infant will become more valuable. His incapacity varies with his age. In this case it has not been proved that the incapacity is permanent, and the question of the amount to be awarded was in the discretion of the learned judge. If the application for redemption had been made the next month after the infant had attained twenty-one the employers could not have said that his earning capacity was 8*s*. a week. It cannot have been intended that the liability with regard to an infant should be redeemed on an unfair basis.

Bairstow, K.C., in reply.

Cur. adv. vult.

July 13. LORD COZENS-HARDY M.R. stated the facts and continued: The learned judge has found that the injury is permanent but that the incapacity is not permanent, and has therefore held himself not bound to award 75 per cent. of the actuarial value of 8*s*. a week, but has held himself entitled to award a larger sum, and to consider the fact that Prince's earnings would, but for the accident, have been increased when

(1) [1901] 1 K. B. 86. (2) [1913] 3 K. B. 652.
(3) [1912] 1 K. B. 93, 97.

he attained twenty-one to at least 24*s.* a week, and that the recorded agreement might have been reviewed under the express terms of Sched. I., par. 16. This Court in *Calico Printers' Association* v. *Higham* (1) attempted to explain the meaning of the words used in Sched. I., par. 17. I do not propose to read those judgments through, but I may just refer to one or two passages which indicate the views which were taken by all the members of the Court. On p. 97 in my own judgment I say "The great difficulty is as to the meaning of the word 'permanent.' In reviewing a weekly payment under clause 16 the arbitrator must deal only with existing facts, and must not prophesy or speculate as to the workman's future condition. But in redeeming under clause 17 he is bound to speculate. He must not rest content with finding that the weekly payment which has been continued for six months is at the moment the proper sum. He must start with the assumption that the existing weekly payment is proper; but he must go further, and ascertain as best he can whether that payment is likely to be proper during the rest of the man's life. Is his condition stable; or is there a probability that he will get better or worse? If his condition is stable, the incapacity is 'permanent' within the meaning of the clause." I emphasize, for the purpose of to-day, the words "is his condition stable"—"is his physical condition stable"? Fletcher Moulton L.J. took precisely the same view. He says on p. 100 that "incapacity" means "incapacity" for work, and the compensation to be given depends on the effect of that incapacity on the power to earn wages, and varies with it. And lower down he says "It will be seen, therefore, that in my opinion incapacity is not permanent if there is a practical possibility of the weekly payment being increased or diminished." And Farwell L.J. on p. 105 takes exactly the same view: "If the man has been paralysed beyond hope of recovery, it may well be that the incapacity is permanent, but in any other case it appears to me to be very difficult to say with certainty that this is the case."

The learned judge has not found that which is the important fact, namely, whether the incapacity is permanent in the sense in

(1) [1912] 1 K. B. 93.

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which that word ought to be construed. He has proceeded upon the assumption that the incapacity is not permanent unless the Court is satisfied that the earnings of the man after the accident would not vary but would be fixed. For example, take the case of a workman whose wages are by contract to be increased 2*s.* a week each year. Is that a circumstance which ought to be taken into consideration in considering whether incapacity is permanent? In my opinion it ought not. Given a chance of undoubted permanent incapacity, such as the loss of hands and feet, or paralysis, Sched. I., par. 17, deals solely with the actual weekly payment at the date of the application.

In the case of an adult it seems to me there can be no doubt. It remains to consider whether the fact that the workman is an infant makes any difference. In my opinion it does not. An infant is not confined to 50 per cent. of his weekly earnings, but may be awarded up to 100 per cent., subject to certain limitations which need not be mentioned. The infant, under par. 16, may apply to review twelve months after the accident but not sooner, and may claim increase in his weekly payment to an amount not exceeding 50 per cent. of his probable earnings at the date of the review if he had remained uninjured. The employer under par. 17 may apply to redeem if the weekly payment has continued for six months. The actual weekly payment which has continued for six months is the basis. I can see no ground for holding that an infant is, under par. 17, in any better position than an adult. It has been argued that it is a great hardship that an infant should be liable to be redeemed on what is obviously an unfair basis. This, however, is a matter not for the consideration of this Court but of the Legislature. It is not open to us to consider such an argument.

I have indicated what in my view are the principles which ought to be applied, but the proceedings have been so confused that I am afraid the case must go down to the county court judge to be retried. The employers by their application state "loss of left eye, and right eye affected but at present it is impossible to say what will be the result to this eye." That is an assertion that the incapacity is not permanent. The workman by his answer states that he will "probably be eventually blind

in both eyes." When the matter came before the county court judge the employers alleged that the incapacity was permanent. No evidence was adduced in support of this contention. Reliance was attempted to be placed upon the admission, not supported by any evidence medical or otherwise, that the incapacity was permanent. The learned judge moreover misdirected himself as to the meaning of the term "incapacity being permanent." I think therefore the order under appeal must be discharged and the matter must go down to be reheard in order that there may be a proper finding based upon evidence as to the condition of the man. If the incapacity is "permanent," as explained by this Court, 75 per cent. of the actuarial value of the weekly payment is the sum to be awarded. If it is not "permanent," the matter is in the discretion of the learned judge. I abstain from considering what may be the result if there should be an application for review by the infant before the matter is reheard.

The costs of the original application and of the new trial should be dealt with by the county court judge. There should be no costs of the appeal.

SWINFEN EADY L.J. stated the facts and continued: The employers did not call any evidence to shew that the incapacity was permanent. As they alleged it, and claimed to redeem the weekly payments on that footing, the burden of proving it lay upon them. Ei qui affirmat, non ei qui negat, incumbit probatio. See *Wakelin* v. *London and South Western Ry. Co.* (1) In *Calico Printers' Association* v. *Higham* (2) Farwell L.J. said: "The employer is the only person who can apply, and it is for him to state to the Court the basis on which he applies; but the onus of proving permanent incapacity is on the person alleging it, because the form of the paragraph makes permanent incapacity an exception from the general class." In the absence of evidence proving permanent incapacity, the county court judge would have been entitled to come to the conclusion that permanent incapacity had not been established and that he had

(1) (1886) 12 App. Cas. 41, per Lord Halsbury, at p. 45.
(2) [1912] 1 K. B. 93, at p. 104.

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a discretion with regard to the lump sum to be awarded. He did not, however, proceed on this basis. He misdirected himself on the meaning of "permanent incapacity." His view was that the incapacity was not permanent because "a condition of stability" in wages had not been arrived at, seeing that when the boy became older he would, if uninjured, have been in receipt of higher wages. He said: "At present, he is only twenty years of age, but he will soon be of full age, when it is admitted he ought to have been able to earn 24*s.* a week, i.e., 12*s.* a week compensation." By "a condition of stability" the judge was referring to the probability of wages being increased or not, irrespective of the condition of the injured workman, and not to the probability of the weekly payments altering, and going up or down as a consequence of some change in the condition of the injured man. But the question "is his condition stable" means "is his physical condition likely to remain as at present, or is there a probability that he will get better or worse"? If his condition is stable, the incapacity is permanent within the meaning of the clause, and the 75 per cent. basis must be applied. See *Calico Printers' Association* v. *Higham*. (1) The incapacity referred to is the incapacity to earn full wages, and the condition of the workman may be stable, and his incapacity to earn full wages may be permanent, although, if uninjured, he would at some future time in the ordinary course of his employment have become entitled to be paid higher wages.

It was urged that the employer ought not to be allowed to redeem, under Sched. I., par. 17, the liability for weekly payments to an infant, as under par. 17 the right to redeem arises where any weekly payment has been continued for not less than six months, whereas under par. 16, in the case of an injury to an infant, it is only where the review takes place more than twelve months after the accident that the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review, if he had remained uninjured. But the statute does not contain any provision for making a difference between redemption in the case of infants

(1) [1912] 1 K. B. at p. 97.

and redemption in the case of adults, and the right to redeem given by par. 17 is an absolute right in cases coming within that paragraph.

Having regard to the misdirection, the judge having proceeded upon a wrong footing in point of law, there must be a new trial. There should be no costs of the appeal on either side, the costs of the application below to be dealt with by the judge on the further hearing.

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PICKFORD L.J. I agree and have nothing to add.

Case remitted.

Solicitors: *J. B. Somerville, for F. G. & H. E. Smith, Bradford; Jacques & Co., for Ratcliffe & Greenwood, Bradford.*

H. C. R.

[IN THE COURT OF APPEAL.]

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[1912 C. 733.]

Employer and Workman—Workmen's Compensation—Death of Workman—Claim by Children—Payment of Compensation—Action by Widow for Negligence—Option—Election—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93)—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*).

The plaintiff, who was the widow of a workman killed by accident arising out of and in the course of his employment, brought an action under the Fatal Accidents Act, 1846, against the defendants, who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants the plaintiff and six children; that all the dependants except the plaintiff had claimed under the Workmen's Compensation Act, 1906, against the defendants, and that an award had been made apportioning the total sum of 300*l.* equally between the children. The defendants by their defence, after denying the alleged negligence, pleaded that the plaintiff had by letters from her solicitor made a claim on them on behalf of herself and her children for compensation in respect of the death of her husband; that the defendants, having by letter admitted liability under the Workmen's Compensation Act, 1906, had paid into the county court the maximum amount payable under the Act, namely, 300*l.*; that the children by their next friend

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had applied to the county court for an order for the investment and allotment of the sum of 300*l.* between the dependants, and that the county court judge by his award had allotted 50*l.* to each of the children and directed that 45*l.* out of each sum of 50*l.* should be invested, and that out of the residue the sum of 18 shillings a week together with the interest on the invested money should be paid to the plaintiff for the benefit of the children; that the plaintiff throughout was cognizant of the facts and approved of and concurred in the application and attended the hearing and thereat renounced her rights and interest in the sum of 300*l.* in favour of her children, and that the award was made with her consent. The defence stated that the defendants would therefore contend that this action was barred and was not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906. It appeared that in the application for allotment the next friend named the plaintiff as a dependant, but applied for a division among the children only and expressly stated that the plaintiff did not claim under the Act of 1906.

An order having been made in chambers for the decision in the first instance of the point of law raised on the pleadings:—

Held, that on the facts as stated the plaintiff had made herself a party to the claim for compensation under the Workmen's Compensation Act, 1906, and was therefore precluded by s. 1, sub-s. 2 (*b*), from claiming damages against the defendants independently of the Act.

Judgment of Atkin J. [1914] 2 K. B. 61 affirmed.

APPEAL from the judgment of Atkin J. upon a point of law arising upon the pleadings; reported [1914] 2 K. B. 61.

The writ was issued on March 8, 1912. The statement of claim was delivered as amended on June 21, 1912. The plaintiff claimed damages against the defendants under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), alleging that in consequence of the defendants' negligence the plaintiff's husband, William Codling, was killed on December 21, 1911.

Paragraph 5 of the amended statement of claim was as follows: "At the time of his death the deceased left as dependants wholly dependent upon his earnings the plaintiff and six infant children, but all the said dependants except the plaintiff have claimed under the Workmen's Compensation Act, 1906, against the defendants and an award apportioning a total sum of 300*l.* equally between the said six infant children was made in the City of London Court on February 29, 1912. This action is brought by the plaintiff for her own benefit as the widow of the deceased. The nature of the claim in respect of which damages

are sought is that the said William Codling was a miner and was earning on an average 3*l.* 15*s.* a week, and was the sole support of his said wife who has sustained pecuniary loss from his death."

The defendants by their defence delivered on July 8, 1912, after traversing the plaintiff's allegations as to negligence and setting up a defence based on the doctrine of common employment, the deceased having been in their employment, proceeded to allege as follows:

"5. Alternatively they say that by letters written by the plaintiff's solicitor and dated respectively December 29, 1911, and February 14, 1912 (1), the plaintiff made a claim upon the defendants on behalf of herself and her children for compensation in respect of the death of the said William Codling, and the defendants having by letter dated January 5, 1912, admitted liability under the Workmen's Compensation Act, 1906, they on February 21, 1912, paid into the City of London Court, which in the circumstances was the proper Court having jurisdiction under the said Act, and the registrar of such Court duly accepted, the sum of 300*l.* which is the maximum amount payable under the said Act. By notice in writing dated February 21, 1912, and by letter of even date they duly notified to the said registrar that the plaintiff and the said six children of the said William Codling deceased were interested in the said sum of 300*l.*

"6. By notice in writing dated February 27, 1912, one Charles Codling acting as next friend to the said children of the said William Codling deceased applied to the learned judge of the said Court for an order for the investment and allotment of the said sum of 300*l.* between the dependants of the said William Codling deceased (2), and pursuant thereto Sir John Paget,

(1) In the letter of December 29, 1911, the plaintiff's solicitor made a claim on behalf of the plaintiff for damages by reason of the death of her husband caused by the alleged negligence of the defendants, and in the letter of February 14, 1912, the solicitor claimed on behalf of the six infant children compensation under the Workmen's Compensation Act, 1906, and suggested payment of the money into the City of London Court.

(2) The plaintiff was named in the application as a dependant, but it was stated that she "has not claimed and does not claim under the Workmen's Compensation Act."

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Baronet, K.C., the deputy judge of the said Court, by his award dated February 29, 1912, allotted the sum of 50*l.* to each of the plaintiff's said children and directed that 45*l.* out of each sum of 50*l.* should be invested, and that out of the residue the sum of 18 shillings per week should be paid to the plaintiff and also that the interest of the said invested moneys should be paid to the plaintiff to be applied by her for the benefit of the said children.

"7. The plaintiff was throughout cognizant of the facts and documents mentioned in the two last preceding paragraphs, and she approved of and concurred in the said application of the said Charles Codling and attended the hearing of the same and thereat renounced her rights and interest in the said sum of 300*l.* in favour of her said children, and the said award of the said deputy judge was made with her consent.

"8. The defendants will therefore contend that this action is barred and is not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, (6 Edw. 7, c. 58)." (1)

(1) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1:

"(1.) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

"(2.) Provided that .... (*b*) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

Sect. 13: "In this Act, unless the context otherwise requires,— ....

"Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable;

"'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death," and includes an illegitimate child so dependent on his earnings.

In this state of the pleadings a Master in chambers made an order in the following terms:—"It is ordered that the point of law as raised by the above named plaintiff in paragraph No. 5 of her amended statement of claim and by the above named defendants in paragraphs numbered 5, 6, and 7 of their defence—viz. whether by reason of the premises this action is barred, and is not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, (6 Edw. 7, c. 58), may be set down for argument before a judge in Court."

Atkin J. declined to hold as a matter of law that the plaintiff had elected to pursue her remedy under the Workmen's Compensation Act, 1906, the question of election being principally one of fact; but he held that the defendants having paid compensation under the Act of 1906 were not liable to pay damages independently of that Act, and he accordingly decided the point of law in favour of the defendants. (1)

The plaintiff appealed.

A. J. David, K.C., and *Horace Fenton*, for the plaintiff. The learned judge was wrong in holding that the defendants were not liable to the plaintiff because the other dependants had recovered compensation under the Workmen's Compensation Act, 1906. He declined to find that the plaintiff had elected to take her remedy under the Act, and he was right in so declining. The fact as stated in the defence that the plaintiff attended the hearing of the application in the City of London Court and renounced her rights and interest in the 300*l.* does not shew an election by her to be bound by the award under the Act. The plaintiff did not claim under the Act. There is no express provision in the Act dealing with the case where some of the dependants claim compensation under the Act and some claim damages independently of the Act. The rights of the dependants under the Fatal Accidents Act, 1846, are distinct from the right which the workman himself would have had if he had lived, and he could not by any election on his part have deprived the dependants of their rights under the Act of 1846. The right

(1) [1914] 2 K. B. 61.

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of each dependant to proceed under the Act of 1906 or under the Act of 1846 is a separate and distinct right, and that right cannot be affected by another dependant making a claim and receiving compensation under the Act of 1906. By s. 1, sub-s. 2 (*b*), of the Act of 1906, "nothing in this Act shall affect any civil liability of the employer," and it gives an option to the workman either to claim compensation under the Act or to take proceedings independently of the Act; and by s. 13 any reference to a workman, who is dead, includes a reference to his legal personal representative, or to his dependants or other person to whom or for whose benefit compensation is payable. The dependants have therefore that option, and it is a separate and distinct option in each dependant. Sect. 1, sub-s. 2 (*b*), does not mean that an employer's liability is limited to 300*l.* if any dependant recovers or is paid compensation under the Act. An illegitimate child may be a "dependant" and can claim compensation under the Act, but cannot claim under the Fatal Accidents Act, 1846. It cannot be that payment of compensation under the Act of 1906 to an illegitimate child would deprive the other dependants of taking proceedings independently of the Act. Nor can it be that payment by the employer of 10*l.* for the expenses of the deceased workman's medical attendance and burial, under paragraph 1 (*a*) (iii.) in the First Schedule to the Act (described therein as "compensation under this Act"), where he leaves no dependants, would prevent the personal representative from bringing an action under the Fatal Accidents Act, 1846, for the benefit of persons who are not "dependants." The provision in s. 1, sub-s. 2 (*b*), that "the employer shall not be liable to pay compensation for injury to a workman . . . . both independently of and also under this Act," is only intended to prevent a workman or any dependant getting double compensation. The decisions in *Blain* v. *Greenock Foundry Co.* (1) and *Gill* v. *Fortescue* (2) shew that the plaintiff can claim damages under the Fatal Accidents Act, 1846, notwithstanding that some of the dependants have received compensation under the Workmen's Compensation Act, 1906.

W. Ellis Hill, for the defendants, was not called upon.

(1) (1903) 5 F. 893.

(2) (1913) 6 B. W. C. C. 577.

BUCKLEY L.J. By s. 13 of the Workmen's Compensation Act, 1906, "any reference to a workman who has been injured shall, where the workman is dead, include a reference to," amongst others, his dependants. The workman here is dead, and I am, in those circumstances, bound to read s. 1, sub-s. 2 (*b*), as if the word "dependants" were substituted for "workman." Reading it thus, it runs in this way: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the dependants may, at their option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." I recognize, as has been suggested during the course of the argument, that many difficult questions might arise under that clause. For instance, if there are, as here, seven dependants, what is meant by the words "may at their option"? Do the words mean that the dependants must be unanimous in the exercise of their option, or is the majority to prevail; or has each one of the dependants individually an option? Inasmuch as the option is to do one of two things, the exercise of the option one way must exclude its exercise the other way. If some of the dependants take one course and some the other, there is no option exercised by the dependants as a body at all. Those are difficulties which will have to be faced when they arise. They do not arise in this case.

In the present case the deceased workman left a widow and six children dependent upon his earnings. A number of letters were written which are summarized in paragraphs 5 and 6 of the defence. The widow wrote in the first instance that she intended taking proceedings against the defendants to recover damages for negligence. Subsequently a claim for compensation was made under the Workmen's Compensation Act, 1906, on

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Buckley L.J.

behalf of the six children by their next friend, the widow not being made a claimant, and that claim was dealt with in the manner detailed in the defence. The defence then states: "The plaintiff"—that is, the widow—"was throughout cognizant of the facts and documents mentioned in the two last preceding paragraphs, and she approved of and concurred in the said application of the said Charles Codling"—that is, the application of the next friend on behalf of the six children—"and attended the hearing of the same, and thereat renounced her rights and interest in the said sum of 300*l.* in favour of her said children, and the said award of the said deputy judge was made with her consent." There is nothing to the contrary of that in the statement of claim. The defendants, after pleading that as a matter of fact, say that they "will therefore contend that this action is barred and is not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906," which I have just read. An order was made, unfortunately as I think, to determine in the first instance the point of law raised by paragraph 5 of the statement of claim and paragraphs 5, 6, and 7 of the defence, namely, "whether by reason of the premises this action is barred and is not maintainable by reason of the provisions of" the section. We must assume the facts there stated to be true—that of the seven dependants six claimed under the Act, that the seventh had notice of those proceedings, and that she attended and renounced her rights in the 300*l.*, which was the maximum sum under the Act, and consented to the award apportioning it among the six children. In these circumstances there has been an adjudication in the presence of the seven dependants, in which the seventh, who now wishes to take proceedings independently of the Act, admitted that she had a right in respect of the 300*l.*, and renounced it in favour of the other dependants. She thereby gave up her share in the sum; she consented that that which would or might otherwise have been hers should be appropriated to others. It seems to me that there has been a proceeding in her presence, which was a complete adjudication under the Act of 1906, and she cannot now say that she is entitled to proceed independently of that Act. This is in accordance with the view taken by the learned judge

in the Court below. There is, however, one sentence in his judgment upon this part of the case with which I do not agree. He says this: "It seems to me immaterial whether such liability was imposed and payment made with the knowledge and consent of the plaintiff or not." As at present advised, I doubt whether that is so. If it had been made without her knowledge and consent a very different question would have arisen. It is not, in my opinion, immaterial whether she knew and consented. The learned judge, however, goes on to say: "But in this case the plaintiff both knew and consented." And upon the facts alleged it is obvious that that is so. She is therefore in the position of having been a party to a claim for compensation under the Act of 1906 and was present at the hearing as alleged in the defence, and cannot now say that she can take proceedings independently of the Act. That would be contrary to the express language of s. 1, sub-s. 2 (*b*), of the Act, which says that "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act." The plaintiff was a party to a proceeding under the Act, and she cannot claim independently of the Act.

For these reasons I think that the appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. I come to this conclusion with some regret that time has been taken up both in this Court and in the Court below upon a point which may have very little purpose so far as the ultimate rights of the parties are concerned. It is one more instance of the difficulty of trying to eliminate from a case everything except the law. It shews what extraordinary care should be taken before this is attempted. There are very few cases which do not depend upon the facts. To admit statements in pleadings may, in certain cases, be both advisable and a saving of expense. But it is very rare that it is possible, with success as regards saving expense to the parties, to have the issues so settled. In the present case we are told by Mr. Ellis Hill, with, no doubt, absolute correctness, that he only agreed to this case being stated on certain facts being taken as admitted. I agree entirely with what my Lord has said upon

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Kennedy L.J.

this, and I give my judgment upon a certain assumption of fact. The misfortune, I think, is that the learned judge's decision in the Court below is expressly given upon a view that it is immaterial whether the liability was imposed and payment made with the knowledge and consent of the plaintiff. I base my judgment on the fact that it is not immaterial. The learned judge, however, went on to find that the plaintiff both knew and consented. He took the view that, reading ss. 1 and 13 together, if there has been a payment by the employer to the dependants under the Act, that is fatal to the right of any particular dependant, although he does not know of and consent to the payment, to sue the employer independently of the Act. I am not prepared to affirm that proposition. It is not necessary to do so. It may be right. I say nothing about it. It is sufficient to say that, on the facts which we have to deal with in this case, the plaintiff, being one of the dependants, and knowing that the sum had been paid into Court, appeared there and consented to that sum being divided among the other dependants. I think that in those circumstances my brother Atkin's decision on the point of law submitted to him was right, and the appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. With regard to one matter which has been mentioned, my mind rather goes contrary to the prevailing opinion. I am not unwilling to decide questions of law upon agreed statements of fact or upon the facts stated in the pleadings. I wish that there were more demurrers or what now takes the place of demurrers. I think that, if parties would only be a little more careful and set down their facts, many cases might be tried without further discussion upon agreed statements of fact. But, be that as it may, the parties here have agreed that we should determine the point of law raised upon the allegations made in the several paragraphs of the defence. I am of opinion that the plaintiff is not entitled to succeed for the reasons given by my brethren.

I have nothing further to add except that, like the other members of the Court, I reserve the right of dealing with the point as to whether or not it was material that the liability was

imposed and payment was made under the Act of 1906 with the knowledge and consent of the plaintiff. I do not wish to say anything different in that respect from what the other members of the Court have said. I think that it was unnecessary for the learned judge's decision, because there is the distinct allegation here that it was done with the knowledge and consent of the plaintiff.

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Appeal dismissed.

Solicitor for plaintiff: *J. Scott Duckers.*
Solicitors for defendants: *Mackrell, Maton, Godlee & Quincey.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A. 1914 *July* 28, 30.

ALLEN *v.* FRANCIS.

Employer and Workman — Compensation — Accident — Right of Approved Society to take Proceedings in Workman's Name — Obligation to state whether Application is made by Workman or by Society—National Insurance Act, 1911 (1 *& 2 Geo. 5, c. 55*), *s.* 11, *sub-s.* 2.

On the hearing of an application for compensation under the Workmen's Compensation Act, 1906, the county court judge is not entitled, as a condition precedent to hearing the application, to ascertain from counsel whether he appears for the applicant or for an approved society. He should hear the evidence and ascertain in that way whether it is really the workman's application.

APPEAL from an award of the judge of the Southend County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Lord Cozens-Hardy M.R. This appeal raises an important question. Allen met with an accident which may, or may not, have arisen out of and in the course of his employment by Francis. He applied for and obtained 10*s.* a week sick pay from the Prudential, an approved society. The Prudential then, by letter of January 31, 1914, wrote to Francis, threatening proceedings. This was

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apparently done without any authority from Allen. They instructed their local solicitors, who, on February 11, wrote to Francis' solicitors, saying they were instructed to act for Allen. The only instructions apparently were from the Prudential. On March 26 a retainer was signed by Allen instructing the local solicitors of the Prudential to act for him in proceedings against Francis; and on March 31 proceedings were commenced in the name of Allen against Francis. When the matter came on before the county court judge, he asked counsel whether he was instructed by the approved society, and for whom he appeared. Counsel in his discretion did not answer the question, and the county court judge thereupon dismissed the application with costs. No evidence was before the judge except a bundle of correspondence and the written retainer, but Allen was ready to be called.

The applicant appealed.

Holman Gregory, K.C., and *Knocker*, for the appellant. The learned judge had no power to dismiss the application in this summary way, and he misunderstood the decision of this Court in *Rushton* v. *Skey & Co.* (1) He ought to have heard the evidence and decided whether the applicant was Allen or the Prudential Society; and he might then have proceeded to apply *Rushton* v. *Skey & Co.* (1) The society has an interest in getting as much as possible from the employer, so no question of maintenance is involved. Possibly if, after investigation, the judge had found that these were not the bona fide proceedings of the workman the society would have been in the wrong. But the application ought not to have been dismissed merely because the society might have been assisting him. This application was made by and at the desire of the workman and was not within s. 11, sub-s. 2, of the National Insurance Act, 1911. The society were justified in assisting him and they have made themselves liable for costs. No application has ever been dismissed on the ground that the workman was supported by a society. Whether it is within s. 11, sub-s. 2, or not is a question of fact which ought to be determined by the county court judge.

(1) [1914] W. N. 281.

Edgar Dale, for the respondent. It is said that this was the application of the workman and that he was anxious to recover compensation from the employer; but the only question for him was whether he should get 10*s.* a week from the society or from his employer, so his anxiety cannot have been very great. This was obviously the application of the society. Under the circumstances there was no course open to the learned judge but to dismiss the application.

Knocker in reply. The 10*s.* from the society was only payable for six weeks, therefore it was essential that the workman should get compensation from the employer.

Cur. adv. vult.

July 30. Lord Cozens-Hardy M.R. stated the facts and proceeded: In our opinion the judge struck too soon. He ought to have heard Allen, and, perhaps, other witnesses, and fully ascertained the facts. If he had then come to the conclusion that it was not really Allen's application and that Allen's name was merely being used by the Prudential, the order dismissing the application would have been proper. Up to a certain point it appears that the Prudential were acting solely in their own interest and were using Allen's name to help them. But on and after March 26 Allen was apparently acting in his own interest. The retainer is not conclusive, but it is prima facie evidence.

There are three points which seem to deserve attention. (1.) A workman desiring to make a claim against his employer may be helped by his trade union, or by his club, or approved society. (2.) An approved society cannot of its own accord use the name of a workman except in the events and upon the terms mentioned in s. 11, sub-s. 2, of the Act of 1911: see *Rushton* v. *Skey*. (1) Perhaps the most important of these terms is that the approved society thereby becomes liable to pay costs to the employer. (3.) The course taken by the Prudential, at least in the early stages, was apparently irregular and might be a means of evading the provisions of s. 11, sub-s. 2, and escaping the liability to costs.

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The award must be set aside and the matter must go back to the county court judge for hearing.

SWINFEN EADY L. J. and PICKFORD L.J. concurred.

Appeal allowed.

Solicitors: *A. E. Pratt, for E. Houghton Fry & Young, Southend-on-Sea; Dennes, Lamb & Pearce Gould, for Dennes, Lamb & Drysdale, Southend-on-Sea.*

H. C. R.

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July 23.

LEAF *v.* FURZE.

Employer and Workman—Compensation for Injury—Contracting-out Scheme—Injury by "Accident"—Industrial Disease—Miners' Nystagmus—Date of Disablement—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 3, 8.

By s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, where it is certified that a workman is suffering from a disease mentioned in one of the schedules to the Act and is disabled from earning his full wages and the disease is due to the nature of any employment in which he was employed within twelve months before the date of disablement, he is entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment. The disablement is to be treated as the happening of an accident. Compensation is recoverable from the employer who last employed the workman during the twelve months before disablement in the employment to the nature of which the disease was due. The date of the disablement is the certified date of its commencement.

For more than a year before January 5, 1912, a miner had been in the employment of a firm of colliery owners. He was a member of a scheme the provisions of which were under s. 3 of the Workmen's Compensation Act, 1906, substituted for the provisions of that Act. The scheme was by its terms intended to be in substitution for the Act and to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of the member's employment.

On January 5, 1912, the miner left the employment of the firm. Subsequently he was certified as disabled from earning full wages from a disease of the class described in s. 8, sub-s. 1, of the Act, January 6, 1912, being certified as the date of disablement:—

Held, that the word "accident" in the scheme had the same meaning

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as in the Act and included disablement from disease described in s. 8, sub-s. 1, of the Act.

Held, also, that the provisions of the scheme were to be read with those of s. 8 of the Act, and that the firm were liable to pay compensation, notwithstanding that on the date of disablement the miner had left their employment.

APPEAL from the county court of Yorkshire holden at Leeds.

The plaintiff was a miner who for many years up to January 5, 1912, had been in the employment of Messrs. J. & J. Charlesworth, Limited, colliery owners in West Yorkshire.

The defendant was the general secretary of and represented the board of management of a scheme of compensation established under s. 3, sub-s. 1, of the Workmen's Compensation Act, 1906, which was in force at certain of the collieries of Messrs. J. & J. Charlesworth, Limited, and is hereinafter more particularly mentioned.

The plaintiff claimed 100*l.* alleged to be due under the scheme, or alternatively the same sum as damages for breach of contract. In his particulars of claim he alleged that from January 6, 1912, he had been entitled to receive compensation under the scheme in respect of his incapacity to work owing to miners' nystagmus; but that the defendant and the board of management wrongfully and in breach of the rules of the scheme refused to pay anything or to consider his case under the scheme or to appoint arbitrators thereunder. He therefore claimed 100*l.* as the amount to which he would be entitled under the scheme.

Alternatively, he claimed the like sum as damages against the defendant for refusing to carry out the scheme or for breach of the contract with the plaintiff contained in the scheme to submit to arbitration in accordance with the rules of the scheme the liability for and the amount of compensation to be paid to him by the defendant.

By s. 3, sub-s. 1, of the Workmen's Compensation Act, 1906, if the Registrar of Friendly Societies certifies that any scheme of compensation for the workmen of an employer provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in the Act, and that a majority of the workmen to whom the scheme is

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applicable are in favour of the scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, the Act shall apply notwithstanding any contract to the contrary.

By s. 8, sub-s. 1, where—(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to the Act and is thereby disabled from earning full wages at the work at which he was employed and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, whether under one or more employers, he or his dependants shall be entitled to compensation under the Act as if the disease were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

"(*a*) the disablement . . . . shall be treated as the happening of the accident . . . .

"(*c*) the compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due."

There follow provisions for ascertaining in whose employment the disease was contracted. An employer as described in (*c*) who proves that the disease was contracted while the workman was in the employment of some one else is not to be liable to pay compensation.

The employer to whom notice of disablement is to be given is "the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment."

By sub-s. 2, if a workman at or immediately before the date of disablement was employed in any process mentioned in the second column of the Third Schedule to the Act, and the disease contracted is the disease in the first column of that schedule set

opposite the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the employer proves the contrary.

By sub-s. 4, "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate was given, Provided," &c.

By sub-s. 6, the Secretary of State may make orders for extending the provisions of this section to other diseases and other processes.

By an Order made on May 22, 1907 (Parliamentary Accounts and Papers, Cd. No. 3539) there was added to the Third Schedule to the Act in the first column the disease "nystagmus" and in the second column the process "mining."

A scheme of compensation had been duly certified and was in force under s. 3, sub-s. 1, of the Act in certain of the collieries of Messrs. J. & J. Charlesworth. Of this scheme the plaintiff was a member, and the defendant was the general secretary and represented the board of management. It was named "The contracting out scheme of the West Yorkshire Collieries of Messrs. J. & J. Charlesworth, Limited." It was established by mutual agreement between Messrs. J. & J. Charlesworth, Limited, thereinafter referred to as the company, and such of their workmen as should voluntarily become members. It contained the following clauses:—

2. . . . . "The scheme is intended to be and is in substitution for the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1906, and common law liability, and is intended to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of such member's employment and in the event of death resulting from such accident to pay compensation to the dependants of such deceased member or to provide funeral expenses for such deceased member as aforesaid if such member shall die leaving no dependants.

3. "Membership shall be limited to persons employed on, in or about any of the West Yorkshire Collieries of the company

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and any person so employed shall be entitled to become a member of the scheme on expressing his desire to do so on signing the register of members."

12. "Every member who claims to be entitled to receive compensation from the scheme in respect of any accident he may have sustained at any of the collieries of the company shall procure from the doctor to the scheme a certificate certifying that such member is unable to do any work and also a certificate from the managers of the company's collieries certifying that such member is entitled to receive payment of compensation and deliver or cause to be delivered within three days of the accident happening both such certificates to the local secretary of the district within which the injured member was employed at the time of the accident, whereupon he shall commence to receive compensation in accordance with the following scale:—

"(A) For such period of the first twelve months as he is unable to do any work 15*s.* per week;

"(B) For such period of the second twelve months as he is unable to do any work 12*s.* 6*d.* per week;

"(C) And for such period after the second twelve months as he is unable to do any work 10*s.* per week;

"(D) In case of partial disablement the compensation shall be settled by agreement between the member and the board of management (rule 25) or, in case of disagreement, under rule 110.

13. "Compensation shall be paid as from the date of the accident."

25. "The board of management shall have power to settle any claims, either in respect of weekly allowances or amounts payable on the death of any member by payment of a lump sum in full discharge of all claims, such lump sum to be agreed between the person claiming and entitled to receive it and the board of management."

By rule 110 all matters in dispute were to be settled by arbitration.

On January 5, 1912, the plaintiff left the employment of Messrs. J. & J. Charlesworth. He applied for work at another colliery, but failed to obtain an engagement because he was found

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to be suffering from an affection of his eyes. He then returned to Messrs. J. & J. Charlesworth and asked to be employed, but his request was refused. On January 20 he went to the certifying surgeon under s. 8 of the Workmen's Compensation Act, 1906, and obtained a certificate to the effect that he was suffering from nystagmus, that he was thereby disqualified from earning full wages at the work at which he had been employed, and that his disablement commenced on January 6, 1912. The plaintiff thereupon claimed 100*l.* compensation under the scheme. Messrs. J. & J. Charlesworth denied liability on the grounds (1.) that at the date of disablement the plaintiff had ceased to be a member of the scheme and (2.) that the scheme did not purport to give compensation in the case of disablement through industrial disease. The plaintiff thereupon brought this action. The county court judge gave judgment for the plaintiff for 50*l.* 1*s.*

The defendant appealed.

Rigby Swift, *K.C.*, and *W. Valentine Ball*, for the appellant. The plaintiff has no valid claim to compensation, first, because the scheme makes no provision for disablement through industrial disease. When a workman accepts the benefit of a scheme he renounces the benefit of the Workmen's Compensation Act, 1906: *Horn* v. *Lords Commissioners of the Admiralty*.(1) Secondly, assuming that the scheme did provide compensation for disablement through industrial diseases, the plaintiff has no claim because at the date of his disablement, namely, January 6, 1912, he had ceased to be in the employment of Messrs. J. & J. Charlesworth.

Gordon Hewart, *K.C.*, and *W. Shakespeare*, for the plaintiff. The first question is whether the plaintiff has suffered "personal injury caused by accident arising out of or in the course of his employment" within the meaning of clause 2 of the scheme. After eliminating what is admitted there remains the question in dispute, whether miners' nystagmus is an "accident" within the meaning of that clause. The scheme is intended to be in substitution for the Workmen's Compensation Act, 1906. It follows that the meaning of "accident" in the scheme

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must coincide with the meaning of the same word in the Act. Where, as in the present case, the conditions of s. 8 of the Act have been fulfilled, a workman disabled by a disease mentioned in the Third Schedule to the Act is entitled to compensation under the Act as if the disease were a personal injury by accident. By s. 8, sub-s. 6, and the Order of the Secretary of State referred to above miners' nystagmus must be taken to be a disease mentioned in the Third Schedule, and therefore to be included in the meaning of the word "accident" in the Act. It follows that the same disease is included in the meaning of "accident" in the scheme. Secondly, the plaintiff is entitled to recover compensation notwithstanding that the date of his disablement was certified as January 6, the day after he left the employment of Messrs. J. & J. Charlesworth. The provisions of s. 8 of the Act must be read into the scheme. By s. 8, sub-s. 1 (*c*), the compensation is recoverable from the employer who last employed the workman at any time within the twelve months previous to the date of disablement in the employment conducing to the disease; in other words from Messrs. J. & J. Charlesworth, or the defendant as their representative. Sect. 8, sub-s. 4, merely fixes a date by reference to which the employers liable to pay compensation are to be ascertained. Those who employed him during the twelve months preceding that date in an occupation bringing about the disease are liable to pay compensation.

Rigby Swift, K.C., in reply.

HORRIDGE J. In this case the plaintiff left the employment of Messrs. J. & J. Charlesworth on January 5, 1912. On January 20 the certifying surgeon under s. 8 of the Workmen's Compensation Act, 1906, gave a certificate to the effect that the plaintiff was suffering from nystagmus, one of the diseases to which the Workmen's Compensation Act, 1906, applies; that he was thereby disqualified from earning full wages at the work at which he had been employed; and that the disablement commenced on January 6, 1912. The plaintiff brought this action in the county court against the person representing the board of management of the scheme. He claims that he was entitled to the benefit of the scheme which has been refused. The county court judge

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gave judgment for the plaintiff for 50*l.* 1*s.* No question is raised as to the form of the action or as to the amount awarded. The only question is as to the liability of the defendants.

We have to consider whether the plaintiff, having contracted this disease while in the employment of Messrs. Charlesworth, is entitled to compensation under this scheme. That depends on the construction of clause 2 of the scheme, which contains these words: "the scheme is intended to be and is in substitution for the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1906, and common law liability, and is intended to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of such member's employment . . . ." A scheme of this kind can only be sanctioned under s. 3 of the Act of 1906 if the Registrar of Friendly Societies certifies that it provides scales of compensation not less favourable to the workmen than the corresponding scales contained in the Act; and where there are subscriptions or contributions by the workmen they get benefits in addition to the benefits provided by the Act commensurate with their subscriptions. Therefore we start with this; the scheme itself is one which is in place of the Workmen's Compensation Act, 1906. It follows that "accident" must be used in the sense in which it is used in all the provisions of the Act; that is to say, it must include disablement from any one of the industrial diseases included in the Third Schedule with all the concomitant conditions and provisions of s. 8 of the Act. The date of this disablement is by s. 8, sub-s. 4, of the Act that date which the certifying surgeon certifies as the date on which it commenced, which is in the present case January 6, 1912; but the liability in respect of it is by s. 8, sub-s. 1, thrown back upon the employer who within the twelve months previous to the date of disablement, namely, January 6, 1912, last employed the workman in the employment to the nature of which the disabling disease was due. In other words the liability is thrown back upon the defendants. It attached while the plaintiff was still in their employment and a member of the scheme. The judgment of the county court judge was therefore right, and this appeal must be dismissed.

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LUSH J. I am of the same opinion. To my mind it is reasonably clear that the word "accident" in s. 3 of the Act includes those industrial diseases in respect of which a workman is by s. 8 of the Act entitled to compensation "as if the disease . . . . were a personal injury by accident." Sect. 3 provides for the framing of schemes of compensation benefit. Before a scheme can become effective the Registrar of Friendly Societies must certify that it provides scales of compensation not less favourable to the workmen than the corresponding scales contained in the Act. The intention is that the scheme when certified may be substituted for the provisions of the Act. It is a scheme of compensation. Compensation for what? Sect. 3 of the Act does not specify for what. It seems to me clear that it must be for those matters for which the Act itself provides compensation, that is for injury by accident. If this is not so the section has no meaning. The scheme provides different machinery from that provided by the Act for giving compensation in those cases which are provided for by the Act, but the scheme and the Act must be co-extensive as to the injuries which are the subject of compensation, that is to say, compensation must be payable not only for injury by accident in the ordinary sense, but also for disablement by industrial disease which by the Act is treated as if it were an accident. It is impossible to say that when this scheme was formulated and certified as a scheme for compensation for accident the word "accident" in the scheme was used in a different sense from that in which the same word is used in the Act. The subject-matter of the scheme is the same as the subject-matter of the Act and embraces not only compensation for an accident in the ordinary sense, but compensation for disablement by industrial disease against which the Act was intended to insure.

If that be so, the next question is whether the clauses in the Act, particularly s. 8, relating to compensation when an industrial disease has been contracted, apply also to an accident in the sense in which that word is used in the scheme, that is, including disablement from industrial disease. Again, it is impossible to say that s. 8 does not apply, for otherwise there is no way of ascertaining against whom or within what time a claim is to be

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Lush J.

made. If diseases are incorporated in the scheme the sections of the Act providing for recovery of compensation in such cases must be incorporated also. We were referred to *Horn* v. *Lords Commissioners of the Admiralty* (1), the head-note of which at first sight seems to suggest that when once a workman has agreed to accept a scheme of compensation he is outside the provisions of the Act altogether and that the question of liability is to be determined solely by the scheme; but in that case the dependants of the workman endeavoured to avail themselves of the benefit of the Act although the injured workman had come in under a scheme. All that the Court of Appeal held was that when once a workman has come in under a duly certified scheme his rights must be regulated by that scheme and by nothing else. The decision does not mean that the meaning of a scheme is not to be interpreted by the light of the Act. That was not the point before the Court. The case really does not touch the question before us.

Then it was argued that only a member while a member can avail himself of the benefits of the scheme. The answer to that contention was given by Mr. Gordon Hewart, that when an accident has occurred, although the man may have ceased to be a member of the scheme when he claims compensation, he is still for the purpose of claiming it treated as a member; otherwise if a workman met with an accident in the ordinary sense and left his employment before he claimed compensation his right to compensation would be gone. In my view that is not what the scheme means. For these reasons I agree that the judgment of the county court judge was right and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Arthur E. Burton, for Scatcherd & Co., Leeds.*

Solicitors for respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

(1) [1911] 1 K. B. 24.

W. H. G.

K. B. D.
May 25.
C. A.
July 29.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re ARNOLD.
Ex parte HEXT.

Bankruptcy—Practice—Appeal—County Court—When "money involved does not exceed 50l."—Bankruptcy Rules, 1886, *r.* 129.

Rule 129, sub-r. 1, of the Bankruptcy Rules, 1886, provides that "No appeal shall be brought, (*a*) without the leave of the Court, or of the Court of Appeal, ... from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*":—

Held, that the word "involved" in the sub-rule meant "involved in the appeal," but that in considering what was the money or money's worth involved the Court ought to have regard to all the proceedings.

Upon an application by the trustee in bankruptcy for an order that the appellant should pay to the trustee a sum of 126*l.*, the proceeds of the sale of certain goods which had been paid to the appellant, upon the ground that the goods were in the possession, order, and disposition of the bankrupt at the commencement of the bankruptcy or that the payment of a part of that sum to the appellant was a fraudulent preference, the county court judge only made an order declaring that the payment of 13*l.*, part of the sum of 126*l.*, was a fraudulent preference:—

Held (reversing the decision of the Divisional Court), that it was "apparent from the proceedings that the money or money's worth involved" did not exceed 50*l.*, within the meaning of r. 129 of the Bankruptcy Rules, 1886, and that therefore the appellant could not appeal without leave.

In re Everson [1904] 2 K. B. 619 distinguished.

Appeal from the Chelmsford County Court.

The official receiver, as the trustee in the bankruptcy of Arnold, applied for an order that G. H. Hext should pay to the trustee a sum of 126*l.*, the proceeds of the sale of certain goods and chattels which had been paid to G. H. Hext, upon the ground that those goods and chattels were in the possession, order, and disposition of the bankrupt at the commencement of the bankruptcy, and also upon the ground that the payment of a part of that sum of 126*l.* to G. H. Hext was void as against the trustee as a fraudulent preference.

The county court judge made an order declaring that the

goods and chattels in question were not in the possession, order, and disposition of the bankrupt at the commencement of the bankruptcy, and further declaring that, out of the sum of 126*l.*, the sum of 13*l.* was payable by G. H. Hext to the trustee upon the ground that the payment of that sum of 13*l.* was void as against the trustee as a fraudulent preference; and he further ordered that G. H. Hext should pay the costs of a previous application by the trustee. The county court judge in giving judgment said that the trustee, if he insisted on it, had a right to have an account taken. G. H. Hext appealed.

1914. May 25. *Tindale Davis*, for the respondent. There is a preliminary objection to the hearing of this appeal. The appellant has not obtained leave to appeal, and r. 129 of the Bankruptcy Rules, 1886, provides that no appeal shall be brought, without leave, "from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*" (1) The order against which this appeal is brought is that 13*l.* only is payable by the appellant, and that is the amount now involved in these proceedings. The "proceedings" referred to in the rule are the proceedings in respect of which the appeal is brought—that is the order made—and not the original proceedings in the county court.

E. W. Hansell, for the appellant. The "proceedings" to which the rule refers are the proceedings out of which the appeal arises—that is, the proceedings in the Court from which the appeal is brought. Here the proceedings in the county court involved an amount far exceeding 50*l.*, for the trustee applied for an order in respect of a sum of 126*l.*

(1) Bankruptcy Rules, January 5, 1905, r. 1: "No appeal shall be brought,

"(*a*) Without the leave of the Court, or of the Court of Appeal, from any order made by consent or as to costs only, or from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.* . . . "

"2. Rule 129 of the Bankruptcy Rules, 1886, is hereby annulled, and rule 1 of these Rules is hereby substituted for the said annulled rule, and may be cited among the Bankruptcy Rules, 1886, as rule 129."

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HORRIDGE J. In this case a preliminary objection was taken that under r. 129 the appeal cannot be brought without leave. The ground of that objection is this. A motion in the bankruptcy was made by the official receiver asking for a declaration that certain goods and chattels, of a value exceeding 50*l.*, were in the order and disposition of the bankrupt at the commencement of the bankruptcy, and also asking that a part of the proceeds of the sale of those goods, which had been paid to the appellant, should be declared to be the property of the trustee upon the ground that the payment was a fraudulent preference. The county court judge refused the application for a declaration that the goods were in the order and disposition of the bankrupt, but made an order declaring that the payment of a sum of 13*l.*, part of the proceeds of sale, was a fraudulent preference, but he offered an account if the trustee desired it and did not accept the 13*l.* It is quite true that the only amount involved in this appeal is the sum of 13*l.*, and if r. 129 means that the amount involved in the appeal must exceed 50*l.* the objection is good. I think, however, that the meaning of the rule is correctly stated by Bigham J. in *In re Everson* (1), where he says: "I think that this preliminary objection must prevail. It appears that the order of the county court judge, from which this appeal is brought, related to property of the value of less than 50*l.*" In this case I think that it is not apparent from the proceedings that the order of the county court judge related to property of a value not exceeding 50*l.*, although his order was only with regard to the payment of 13*l.* In my opinion the Court has to consider whether it is apparent from the proceedings that the order appealed from is an order relating to property worth less than 50*l.*, and I think that is not the case here. I think, therefore, that we have power to hear this appeal.

ATKIN J. I agree. Upon the first point I think that r. 129 means that no appeal shall be brought from any order relating to property of which the money or money's worth does not exceed 50*l.* One has only to look at the order made in this case to see that it relates to property of the value of at least 126*l.*

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It sets out the notice of motion which asks that the value of the goods and chattels referred to shall be paid over to the trustee. I think, therefore, that there is a right of appeal without leave.

The appeal was then heard on its merits and was allowed with costs.

J. H. W.

The official receiver appealed.

July 29. *Tindale Davis*, for the appellant. The order made by the county court judge only affected 13*l.*, and as no leave to appeal has been obtained by the respondent the Court has no jurisdiction to entertain the appeal: Bankruptcy Rules, 1886, r. 129, which is substituted by the General Rules of January 5, 1905, for the original r. 129 of the Rules of 1886.

[PICKFORD L.J. Was the only question before the Divisional Court whether it was 13*l.* or nothing?]

Yes: the Divisional Court took the view that the word "proceedings" in the rule referred to the proceedings in the county court. But if that were so the words following would have been "did not exceed" and not "does not exceed." The word "involved" in the rule means, it is submitted, "involved in the appeal."

[SWINFEN EADY L.J. The rule was apparently made to meet the case of *In re Everson*. (1)]

In that case Bigham J. stated that the object of the original rule was to prevent appeals in small and insignificant cases. It is admitted here that the amount claimed in the county court exceeded 50*l.*, but the order made was for a less sum, namely, 13*l.* Under the rule there can be no appeal unless leave to appeal is obtained. The appeal ought to be allowed.

E. W. Hansell, for the respondent. The decision of the Divisional Court was right. The object of the original rule was to cut down the right of appeal. After the decision in *Ex parte Foreman, In re Hann* (2), it cannot now be contended that the rule was ultra vires. But a rule which cuts down a right given

(1) [1904] 2 K. B. 619. (2) (1887) 18 Q. B. D. 393.

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by statute must be strictly construed. It is important to compare the original rule with the present rule. There are substantial differences in the wording of the two rules, but it is submitted that the present rule was not intended to overrule *In re Everson*. (1) In that case it was decided on the construction of the original rule that the Court of Appeal had no power to give leave to appeal. The decision of Bigham J. shews that the present rule ought to be construed in the way in which it was construed in this case by the Divisional Court, namely, that the word "proceedings" means proceedings in the county court. There is nothing in the rule to exclude an appellant in a case where, although the amount recovered against him on the judgment is less than 50*l*., yet with the costs it exceeds that amount. The costs ought to be taken into account in estimating the money or money's worth involved. This is not the case of an order for costs only, but of an order for 13*l*. plus costs which together amount to more than 50*l*. It is, it is submitted, impossible in the present case to say that the money or money's worth involved does not exceed 50*l*.

No reply was called for.

LORD COZENS-HARDY M.R. This case raises a point of some interest on the Bankruptcy Rules. An order was made in bankruptcy in the county court on two motions, which raised distinct points, the combined effect of which was that a great deal more than 50*l*.—probably 150*l*.—was involved, and an order might have been made by the county court judge on both motions as to which there would have been no doubt as to its correctness. What took place was this: the county court judge dismissed or did not grant that part of the application which dealt with the major part of the amount in question. He made only an order for payment of 13*l*. odd to the official receiver. From that order there was an appeal by Mr. Hext; he did not of course appeal against that part of the order which was in his favour. The only operative part of the order so far as he was concerned was that with regard to the 13*l*. He did not apply either to the county court judge for leave to appeal to the

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Divisional Court or to the Court of Appeal for leave, but the matter came on before this Court in due course, and thereupon a preliminary objection was taken that the matter was settled by r. 129 of the Bankruptcy Rules. That rule so far as it is applicable is this: "No appeal shall be brought, (*a*) without the leave of the Court or of the Court of Appeal"—neither of which leaves was asked for in this case—"from any order . . . . relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*" I have looked at the order of the county court judge and I see that although the only operative part of the order to which the appeal related was as to a smaller amount, yet in the initiation of the proceedings much more than 50*l.* was involved, and in that view, although in no event was more than 13*l.* recovered under the order, the question has been raised whether the proceedings originally did not involve more than 50*l.* I think the plain meaning of r. 129 is that where in no event more than 50*l.* can be dealt with on the appeal, in that case the leave of the Court to appeal must be obtained. It was contended by Mr. Hansell that there was an observation of Bigham J. in *In re Everson* (1) which was contrary to this, but I quite fail to follow that. In *In re Everson* (1) the appeal was from an order which related to property of the value of 16*l.*, and it was decided that it was the county court judge and not the Court of Appeal whose leave was essential. Bigham J. said that it appeared that the order of the county court judge from which the appeal was brought related to property of the value of less than 50*l.* Of course that was so, it was 16*l.*, neither more nor less. In the present case the only order under appeal is one relating to 13*l.*, and it seems to me that it is idle to say that part of the order which is not under appeal relates to property of a larger amount than 50*l.* Then Mr. Hansell said that the money involved was more than 13*l.* to his client, because the county court judge had ordered him to pay all the costs of the two hearings before him, and that therefore the money or money's worth involved comprised the 13*l.* in question plus the costs, and if I may say so—though perhaps I should not say it—I rather sympathize with Mr. Hext

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on that point, because as at present advised I do not quite see why he should have to pay all the costs of the litigation. But that is a matter we cannot deal with in considering the question now before us. In my opinion r. 129 is imperative, and that being so the appeal must succeed.

SWINFEN EADY L.J. I agree. The question is what is the true construction of r. 129 of the Bankruptcy Rules. In my opinion the true construction is this: when the rule says that no appeal shall be brought without leave from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*, it means first to exclude costs, which do not come into consideration in the amount involved, and secondly by the word "involved" it means involved in and by the appeal—that is to say, that the money or money's worth involved in the appeal does not exceed 50*l.* The rule does not mean that the money or money's worth did not exceed that amount when the proceedings were originally taken in the county court. The language is "when it is apparent from the proceedings," so that one is not restricted to looking only at the order under appeal, but must have regard to all the proceedings. In the present case there is no dispute as to the facts, when the question is asked: what is the amount which is or may be involved in the appeal? The only answer can be 13*l.*, nothing more and nothing less. The appeal does not affect any other sum.

There may, however, be cases where upon the face of the order it would appear that the sum was well under 50*l.*, and yet the amount really involved may be much larger. The trustee in bankruptcy might, for instance, claim to be entitled to periodical payments or to a sum of money only payable by instalments. It may well be that the proceedings relate to payments under 50*l.* in respect of certain real estate, and although the order may be limited to instalments or amounts presently payable, or amounts which have been already received by some one, the amount involved in the order might be much larger because in effect that order would determine the whole of the future periodical payments. I only mention that

because the Court in looking to the money or money's worth involved is, in my opinion, entitled to look at all the proceedings to ascertain what really is the sum dealt with. But here there is nothing involved beyond the 13*l.*, and therefore the amount involved in the appeal does not exceed 50*l.* within the meaning of the rule.

With regard to *In re Everson* (1), it is manifest that the question which we have to consider did not arise in connection with that case at all, because there the whole sum involved in the original dispute in the county court was only 16*l.*

For these reasons I am of opinion that the appeal should be allowed.

PICKFORD L.J. I am of the same opinion. It is admitted that the amount of the property which could be affected by any order made on this appeal is 13*l.* and no more, and the question is whether r. 129 relates to the amount of property involved in the appeal, or the amount of property involved in the original proceedings in the county court. Looking at the rule it seems to me to be quite clear that it refers to the amount involved in the appeal. The rule is that no appeal shall be brought without leave when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.* That must mean that it is apparent to the Court which has to deal with the appeal. The words "when it is apparent that it does not exceed" must mean when it is apparent to the Court which has to deal with the appeal that the amount involved before it does not exceed 50*l.* I agree with what has been said with regard to looking at all the proceedings, because it may very well be that there may be an order for a very small sum of money which nevertheless involves property exceeding that amount. It might be a test case, or a case of the description mentioned by Swinfen Eady L.J., and therefore it would be necessary to look beyond the order, but only to see whether the amount involved before the Court on appeal does or does not exceed 50*l.*

I am therefore of opinion that this appeal should be allowed.

(1) [1904] 2 K. B. 619.

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LORD COZENS-HARDY M.R. The appeal will be allowed with costs, and the order of the county court judge will be restored.

Solicitors: *Wood, Nash & Co., for G. H. Hext, Torquay; Beaumont & Bright, Maldon.*

W. I. C.

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[IN THE COURT OF APPEAL.]

In re BRANSON. *Ex parte* MOORE.

Bankruptcy—Voluntary Settlement—Uncle and Nephew—Gift by Uncle of Chattels to be fixed to Freehold of Hotel leased to Nephew—Reduction of Rent payable by Nephew—Alienation of Gift—"Settlement of property"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A bankrupt, within two years of the date of his bankruptcy, had purchased a valuable clock and caused it to be affixed to the front of an hotel of which his nephew was then about to become the lessee and occupier. The nephew arranged with his lessor that in consideration of the clock being allowed to become part of the freehold the rent to be paid by him for the premises should be reduced by 10*l.* a year. The trustee in bankruptcy contended that the transaction constituted a voluntary settlement which was avoided by s. 47 of the Bankruptcy Act, 1883. Horridge J. held that the nephew was liable to pay to the trustee the value of the clock as at the date of the purchase of the same by the bankrupt:—

Held, on appeal, that the property in the clock was never in the nephew, and there was no transfer of it to him and therefore no settlement upon him within the meaning of the section.

Decision of Horridge J. reversed.

In re Plummer [1900] 2 Q. B. 790 followed.

THIS was an appeal from a decision of Horridge J.

The bankrupt, G. F. Branson, within two years of his bankruptcy, being desirous of assisting his nephew T. Branson, who was about to take a lease of the Old Golden Cross Hotel at Hastings promised his nephew to supply a large clock of elaborate design together with two electric signs to be affixed to the hotel premises. An arrangement was entered into between the nephew and the lessors of the hotel whereby in consideration of the clock and signs being affixed to the freehold and becoming part of the

demised premises the rent to be paid by the nephew should be 90*l.* a year instead of 100*l.* G. F. Branson duly bought and paid for the clock and signs and directed them to be affixed to the hotel, and a lease of the premises was granted to the nephew at a rent of 90*l.* a year for a term of twenty-eight years from September 18, 1912.

On January 6, 1914, G. F. Branson was adjudicated bankrupt. The trustee in bankruptcy, H. J. de Courcy Moore, claimed that the gift of the clock and fittings by the bankrupt to his nephew constituted a voluntary settlement under s. 47 of the Bankruptcy Act, 1883, and was therefore void as against the trustee.

Horridge J. in the course of his judgment found as a fact that the clock and the two electric signs were fixtures. With regard to the clock and signs he thought that not only were they fixtures, but fixtures by agreement between the lessee the nephew and the lessors, who agreed amongst other things to give the lessee a tenancy at a lower rent if he would provide the clock and signs. The bankrupt volunteered to give his nephew the clock and the signs, and the only person who could give consent to their being put on the premises besides the lessors was the nephew, and it was idle to say that the clock and signs were not given to the nephew merely because the actual form the transaction took was that by direction of the bankrupt the makers sent down the clock and signs, and by consent of the nephew they were actually affixed in pursuance of his agreement with the lessors. It was quite clear that there was a transfer of the clock and signs to the nephew and that the transfer was void. The nephew had got rid of the articles by causing them to be fixed in such a position that they could not be restored. The learned judge therefore ordered the nephew to pay to the trustee the value of the clock and signs, less the cost of fixing them up.

From this decision T. Branson appealed.

Clayton, K.C., and *Barrington Ward*, for the appellant. There was never any "settlement" in this case within the meaning of s. 47 of the Bankruptcy Act, 1883. There was no "transfer of

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property" to the nephew. It never came into his possession except as part of the hotel of which he became the lessee.

A gift of money to a son for the purpose of enabling him to commence business on his own account was held not to be a "settlement of property" within the meaning of the section: *In re Player, Ex parte Harvey.* (1) No doubt "settlement" does not necessarily involve a succession. If the property transferred is to be retained, then there may be a settlement: *In re Vansittart.* (2) That was adopted by Lord Alverstone M.R. in *In re Plummer.* (3)

Possibly the trustee may have a claim in respect of the 10*l.* a year reduction in rent of the demised premises, but the learned judge has ordered the appellant to pay the value of the clock, an order which clearly cannot be supported. The section was never intended to apply to a transaction of this kind. At no time did the property ever vest in the appellant. He was never a transferee of the property in the sense that he had any dominion over it.

Hansell, for the respondent. The order appealed from is right. The learned judge has found that the bankrupt made a present of the clock to the appellant, who allowed it to be affixed to the hotel. He admits that his uncle made a present to him and he had dominion over the property to that extent.

In *In re Vansittart* (2) Vaughan Williams J. said at p. 184: "If I had to construe the section apart from previous decisions I am not at all sure I should not have limited its operation to written transfers. I am not sure that this is not what Lord Ellenborough meant in *Kensington* v. *Chantler* (4); but it is quite impossible at this time to introduce such a limitation into the section." It was held there under the old law that money was not within the purview of the section at all because it was not the subject of conveyance. But under s. 168 of the Act of 1883 "property" includes money. The keynote to the decisions is to bear in mind the old distinction between money and other things. The question in this case is as to the intention of the bankrupt. It is no answer to the trustee to say that the appellant arranged

(1) (1885) 15 Q. B. D. 682.
(2) [1893] 1 Q. B. 181.
(3) [1900] 2 Q. B. 790, 804.
(4) (1813) 2 M. & S. 36.

with his landlord to have the clock affixed to the hotel. It is not enough that the uncle intended that it should be so dealt with. Horridge J. has held that it was a present which the nephew arranged to deal with as he did, but that does not take it out of the section.

The trustee takes the property as being the property of the bankrupt at the moment of the settlement. In *In re Farman* (1) Rigby L.J. at p. 811 said: "He urged that the gift was perfectly good as between husband and wife only, and that the property comprised in it remained the property of the wife, though vested in the trustee in bankruptcy. That depends on the proper construction of s. 47 of the Bankruptcy Act, 1883, which provides that such a settlement as this is assumed to have been shall be—and it has been in fact admitted by the wife to have been—void as against the trustee in bankruptcy. It being, then, a void settlement, he can take nothing under it. What, then, is the alternative? It is quite plain that the Act intended that the property should come to the trustee not as the property of the beneficiary under the settlement, but as if the settlement never had existed; that is to say it passes as the property of the bankrupt." Applying that to the present case the property was the property of the bankrupt. He made a gift of it to the nephew, who made the arrangement with his landlord.

[COZENS-HARDY M.R. Suppose the donee sells the property for value, is not the purchaser entitled to retain it?]

The period to consider is the time of the gift. The gift is not the less a "settlement" because of the subsequent arrangement. The only exception is where there is a gift of money or something intended to be immediately turned into money and spent by the donee. This case does not constitute a further exception. If the property has by the act of the donee passed out of his dominion he is liable for the value of it to the trustee.

[SWINFEN EADY L.J. In *In re Tankard* (2) Wright J. said: "Neither the original alienee, nor the transferee from him, could be required to restore money which he has spent or property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of

(1) [1895] 2 Ch. 799. (2) [1899] 2 Q. B. 57, 60.

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insolvency), though the alienee probably is liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift." The trustee cannot claim the property.]

Not as against the alienee. What the trustee takes is the value of the property as at the date of the settlement.

[SWINFEN EADY L.J. In *In re Vansittart* (1) Vaughan Williams J. said: "It is difficult to account for the use of the word 'settlement' in substitution for the words 'transfer or conveyance' unless the Legislature intended to indicate that the transaction to fall within the statute must manifest a contemplation by the 'donor' of the permanency of the subject-matter of transfer as the property of the 'transferee.'" Unless that is present there is no settlement.]

As it is put by Lord Alverstone M.R. in *In re Plummer* (2), "There are two lines of cases, and the difficulty is to see within which line the present case falls."

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of Horridge J., who has held that a gentleman whom I will call the nephew is liable to pay to the trustee in bankruptcy of his uncle a sum of 183*l.* odd, which represents the cost to the uncle of a certain clock and fixtures which were ordered by the uncle, paid for by the uncle, and delivered by the uncle's authority and request to the Golden Cross Hotel, of which the nephew was about to become the lessee and occupier. The facts so far as they appear lead to this inference. I am satisfied, and it is common ground, that the contract was quite plainly between the manufacturers and the uncle; it was the uncle who ordered the goods, it was the uncle who paid for them, the nephew had nothing to do with the transaction; but at this particular time the nephew was in treaty for a lease of the Golden Cross Hotel at Hastings, of which he was to be the occupying lessee. At that time the uncle, who was evidently interested in this,

(1) [1893] 1 Q. B. 181. (2) [1900] 2 Q. B. at p. 805.

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promised the nephew that he would provide the clock, not for the nephew to do what he liked with it, but he would provide it for the hotel which the nephew was about to take. It was not an ordinary clock, and the transaction was obviously a costly and rather important one. The clock was made and designed for this particular Golden Cross Hotel, a cross being part of the structure immediately on the top of the clock. The inference is irresistible that this was a purchase by the uncle of this valuable clock, not at all with the intention that it should be at the disposal of the nephew as he might think fit, but for the purpose and only for the purpose of its being put into the hotel as a fixture. That being the original transaction, the nephew made this bargain with his landlord or intended landlord: I am going to improve your property ornamentally, and so far as the attraction to customers goes, if you will reduce the rent which you have been asking me by 10*l.* a year I am content that your rights shall not merely be common law rights in respect of tenant's fixtures but that the clock shall not be treated as a tenant's fixture, it shall be for all purposes part of the demised premises. Was that a transaction for value between the nephew and the future landlord? It seems to me plainly that it was. The contract was that there should be a reduction of 10*l.* a year for the term of the lease and in consideration of that the nephew was to give up every interest which he had in the clock. That being so, the uncle having become bankrupt within two years, the trustee under s. 47 now claims the property in that clock. The answer is I think that the property in the clock was at the date of the act of bankruptcy not in the nephew at all, but had been the subject of a purchase for value from the nephew. It is impossible, having regard to Wright J.'s judgment in *In re Tankard* (1), which was in terms approved of by this Court in *In re Plummer* (2), to doubt that the order appealed from so far as it assumed that the trustee was entitled to have the clock back cannot be supported. Then if that cannot be supported how does the matter stand? The utmost I think that can be said is this: if there is any portion of the property which has been aliened and you can find that the

(1) [1899] 2 Q. B. 57. (2) [1900] 2 Q. B. 790.

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residue of it is in the possession of the donee, then to that extent the trustee in bankruptcy may recover it. I cannot see that in the present case there is any ground for applying that. This clock has become part of the demised premises, and I do not think you can say that the liability to pay during the residue of the term of the lease 90*l.* a year instead of 100*l.*, which the nephew might have had to pay, is in any fair sense of the word a retention by him of part of the property. Upon this ground, without going into all the authorities, but treating myself as bound by *In re Tankard* (1) and the approval of *In re Tankard* (1) in the case of *In re Plummer* (2) in this Court, I think, with great respect to the learn judge, that he came to a wrong conclusion and that there is no ground for supporting his judgment. In my opinion this appeal should be allowed.

SWINFEN EADY L.J. I am of the same opinion. When the facts of the case are looked at it is clear that the trustee in bankruptcy has no claim in respect of this clock. The nephew was taking licensed premises, and the uncle consented to provide a clock to be fixed to the premises. The nephew says that it was before the change he mentioned the matter to his landlord; they discussed the question of the rent, 100*l.* a year had been suggested as the rent of the premises, and then in his affidavit he sets out the circumstances under which in consideration of the prospective improvements to the premises the landlord agreed to reduce the rent from 100*l.* a year to 90*l.* a year. He further says that the uncle arranged that he would supply the clock for the outside of the premises and two illuminated signs, one for the bar and the other to be fixed to the outside of the building at the entrance to the saloon bar to improve the premises, with a view to increasing the business. Upon that affidavit the nephew was cross-examined, and upon his cross-examination it is quite clear that there never was any agreement by the uncle to make a present to the nephew of the clock and the signs for the nephew to do what he pleased with them; that was never in contemplation by any of the parties. The real agreement by the uncle was to provide the clock and signs for

(1) [1899] 2 Q. B. 57. (2) [1900] 2 Q. B. 790.

the house. It is also clear from the evidence of the manufacturers who supplied the clock that it was never delivered to the nephew. All that the manufacturers did was, upon the order of the uncle, to supply and affix to the premises the clock and signs. There was no moment of time at which the nephew could claim the clock and fittings as his. [The Lord Justice then considered the evidence in detail and continued:] The nephew never agreed to the view that the things were given to him in the way suggested. They were provided by the uncle at his own expense and put up on the house. Of course it was for the benefit of the nephew that the uncle was doing it, but there never was a gift of the things as chattels to the nephew that he might do with them as he liked. Counsel for the trustee relied rather upon the fact that the nephew in his examination in the bankruptcy said "my uncle made me a present of the clock." It was said that that was a clear admission that the uncle made him a present of it as a chattel, but that is not inconsistent with the rest of the nephew's examination. In a sense the uncle did make him a present of it, because the nephew never paid anything whatever either for the clock or the signs or for the fixing. In my view there never was a transfer or gift of this property to the nephew, the uncle provided it for the house, and the property was never in the nephew. Upon that ground alone, without in the least intimating that I do not entirely agree with all that the Master of the Rolls has said, in my view the facts are sufficient to shew that there was never any settlement of the property upon the nephew within the meaning of the section.

PICKFORD L.J. I am of the same opinion. I think on the true view of this transaction that this clock and signs never did become the property of the nephew. The evidence seems to me to shew that all the parties were contemplating, in whatever way the transaction may have been carried out, that this clock and these signs as soon as ever they were purchased were to be affixed to the public-house or hotel in such a way as to become the property of the landlord, for the landlord would not have agreed to reduce the rent merely because he got these things affixed in a way in which they could be afterwards taken away.

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As the matter had been mentioned by the nephew to the uncle before he finally came to the arrangement with the landlord as to the reduction of the rent, I think all the parties contemplated that that should be the real transaction. If that were the real transaction these things never were the property of the nephew at all. It is quite true that he describes them as a present, and in the sense that he was to get the benefit of them during the lease without paying anything for them they were a present, but I do not think when he said that they were a present he was considering whether the property had ever passed to him or not. I doubt whether he would have known what it meant if he had been asked whether it did or not; he thought that he was getting the use of them without paying for them, and when the real transaction is looked at I do not think they did become his, and therefore I agree that this order cannot stand.

Appeal allowed.

Solicitors for appellant: *Batchelor & Cousins.*
Solicitors for respondent: *Osborn & Osborn.*

G. A. S.

Applied. *Re* A DEBTOR (NO. 335 OF 1947). [1948] 2 All E.R. 533.

Approved. THEOPHILE *v.* SOLICITOR-GENERAL. [1950] 1 All E.R. 405.

[IN THE COURT OF APPEAL.]

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In re CLARK.
Ex parte POPE & OWLES.

Bankruptcy—Bankruptcy Notice against Married Woman—Carrying on Trade or Business—Debt contracted before Commencement of Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 12—*Retrospective Operation of Act.*

Where a married woman carried on business and after the coming into operation of the Bankruptcy and Deeds of Arrangement Act, 1913, a final judgment was obtained against her in respect of a debt incurred before the Act:—

Held, that the judgment was a good foundation for proceedings against her by a bankruptcy notice.

A married woman who owned and managed a private hotel sold it to a company, formed to acquire it, in consideration of shares therein, and became managing director thereof. She subsequently acquired or became interested in two other hotels which were transferred to companies in which she obtained large holdings of shares and of which she became managing director. She then promoted another company to acquire a site and build a fourth hotel. She was nominally vendor to this company, and a large proportion of the share capital was to be allotted to her in consideration of her services in the formation of the company, of which she was also to be the managing director. This company was not a success, and the hotel was never built. In connection with its promotion she incurred a debt in respect of which judgment was obtained and a bankruptcy notice issued against her by the judgment creditors:—

Held, that she was "carrying on business" within the meaning of s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913, and was consequently liable to bankruptcy proceedings thereunder.

APPEAL from a decision of a registrar setting aside a bankruptcy notice issued against the debtor on the ground that on the evidence the registrar ought to have found that the debtor was carrying on a trade or business within s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913.

On June 4, 1914, the appellants, the judgment creditors, issued a bankruptcy notice against the debtor on a judgment for the sum of 25,300*l.* 11*s.* 4*d.*

The debtor was described in the bankruptcy notice as a

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married woman carrying on business upon her own account at the Hotel York, Berners Street, London, and elsewhere.

On the hearing of a motion before the registrar to set aside the bankruptcy notice it was proved or admitted that the debtor was in 1900 the owner of four houses in Berners Street where she carried on the business of a private hotel, called the York Hotel. At that time she was a widow, her name being Mary Lawrence, but in 1906 she took the name of Mary Clark by deed poll and sold the York Hotel to a limited liability company formed for the purpose of acquiring it, in consideration of shares therein. Since that date she had married again and was now Mrs. Todd. Her holding in the Hotel York Company was 49,930 out of 100,000 ordinary shares and 11,374 out of 170,000 preference shares, and she received 100*l.* per annum as managing director of the company. In 1910 she sold to the Hotel York Company certain premises known as the Berners Hotel, and those premises were used as an extension of and in conjunction with the Hotel York, she and each of the other directors receiving an additional salary of 100*l.* a year. In June, 1910, she promoted another company to acquire the Endsleigh Palace Hotel, of which she also became managing director. Her share holding in that company was 24,900 out of 25,400 preference shares of 1*l.* each, and the whole of an issue of 35,000 deferred shares of 1*s.* each. In 1911 and 1912 a company called the Princess's Hotel, Limited, was formed to acquire a site and build another hotel. The capital of this company was 100,000 ordinary shares of 1*l.* each, of which the debtor held 2500, and 204,578 preference shares of 1*l.* each, of which she held 25,000. It was in connection with certain negotiations and contracts relating to the promotion of this company that the debtor borrowed the moneys in respect of which the judgment which formed the subject-matter of the said bankruptcy notice was recovered. The company was not successful and the proposed hotel was never built.

The questions arising on the appeal were (1.) whether the debtor carried on business within s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913; and (2.) whether the operation of that section was retrospective. Sect. 12 provides:

"(1.) Every married woman who carries on a trade or business,

whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole.

"(2.) Where a married woman carries on a trade or business and a final judgment or order has been obtained against her, whether or not expressed to be payable out of her separate property, for any amount, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid."

R. E. Moore, for the appellants. The question on this appeal is whether the debtor being a married woman was carrying on "a trade or business" within s. 12, sub-s. 1, of the Bankruptcy and Deeds of Arrangement Act, 1913, and upon the evidence it is submitted she was. She was dealing in land and houses, and in shares. She was also acting as a company promoter, hotel-keeper, and managing director of companies. Further she had adopted the name of "Mary Clark" as her trade name, which she still retained notwithstanding her subsequent marriage. The carrying on of a series of transactions of the same nature for a number of years amounts to carrying on a business: *Smith* v. *Anderson* (1); *In re Griffin, Ex parte Board of Trade*. (2)

E. Clayton, K.C., and *E. W. Hansell*, for the respondent. The decision of the registrar was right. It is a question of fact what constitutes carrying on a business. The carrying on of the business must be by the person whose business it is: *Graham* v. *Lewis*. (3) Acting as a director of a company, therefore, is not carrying on a business by the director, for the business is the business of the company.

[SWINFEN EADY L.J. In that case I observe that both the judges refer to *Ex parte Breull, In re Bowie*. (4)]

There is here no evidence that the debtor was carrying on any business when the Act came into operation on April 1, 1914, Isolated transactions are not enough to shew that a business is

(1) (1880) 15 Ch. D. 247, 258.
(2) (1890) 8 Morr. 1; 60 L. J. (Q.B.) 235.
(3) (1888) 22 Q. B. D. 1.
(4) (1880) 16 Ch. D. 484.

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being carried on: *In re Griffin* (1); *Stuart* v. *Sloper* (2); see also Robson on Bankruptcy, 4th ed., p. 109. Formerly the position of a married woman with regard to her contracts was this: at common law she was under no liability in respect of them: in equity her contract was enforceable only against so much of her separate estate to which at the time of the contract the married woman was entitled free from restraint, as remained at the time of judgment: *Pike* v. *Fitzgibbon.* (3) By s. 1, sub-s. 5, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." That provision would under ordinary circumstances include all existing contracts, but it was held to apply only to contracts entered into after the passing of the Act. Under that section a married woman could be made a bankrupt if she were trading separately from her husband.

[SWINFEN EADY L.J. The section does not add an additional incident to the contract, but gives an additional remedy to enforce it.]

It does more than that; it alters the status of the individual. It turns innocent acts into crimes.

Sect. 12 of the Act of 1913 is a penal section and the Court will give it a restrictive and not an enlarged construction. It is submitted, therefore, that the Court will not give the section a retrospective operation so as to add a burdensome incident to contracts entered into before the Act was passed. When the debtor entered into the contract in question she did so at a time when it created no personal liability so far as she was concerned. The Court ought not to give to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear, plain, and unambiguous language: *Midland Ry. Co.* v. *Pye* (4); *Waugh* v. *Middleton* (5); *Reg.* v. *Guardians of Ipswich Union* (6); *Hickson* v. *Darlow.* (7)

(1) 8 Morr. 1.
(2) (1849) 3 Ex. 700.
(3) (1881) 17 Ch. D. 454.
(4) (1861) 10 C. B. (N.S.) 179, 191.
(5) (1853) 8 Ex. 352, 356.
(6) (1877) 2 Q. B. D. 269.
(7) (1883) 23 Ch. D. 690, 692.

The Bankruptcy Act, 1861, for the first time made non-traders subject to bankruptcy. Sect. 90 of that Act contained an express provision that in order to found bankruptcy proceedings against a non-trader the debt must be a debt contracted after the passing of the Act. The effect of that section was considered in *Williams* v. *Harding* (1), where Lord Cranworth expounds the policy of the Legislature in such cases. No doubt the fact that there was an express section operates against our contention, but in *Ex parte Bailey, In re Jecks* (2), where a trader had contracted debts, and had ceased to be a trader before the passing of the Act, it was held that the provisions as to traders did not apply.

[SWINFEN EADY L.J. Is it not settled that the trading continues until the debts are paid?: *In re Dagnall, Ex parte Soan and Morley.* (3)]

This Act ought not to be given a retrospective operation: *Jones* v. *Ogle* (4); *Turnbull* v. *Forman.* (5) The point appears to have been decided contrary to our contention in *In re Hollis.* (6) See also *Shaw* v. *Allen* (7); but it is submitted that those decisions are not binding on this Court. We also rely on *Hough* v. *Windus* (8) and *In re School Board Election for Parish of Pulborough, Bourke* v. *Nutt* (9), where Lopes L.J. laid down principles which apply to this case.

R. E. Moore in reply. It is not necessary for me to ask the Court to construe the Act retrospectively: *West* v. *Gwynne.* (10) The cases relied upon for the respondent do not apply here. It is admitted that the Court will not, unless compelled by express language, so construe an Act as to interfere with vested rights or the true legal effect of past transactions. But here at the time when the debt was contracted the debtor was liable but the bankruptcy machinery was defective. The main object of the Act was to put an end to evasions of the law which up to that time a married woman was able to effect.

(1) (1866) L. R. 1 H. L. 9.
(2) (1871) L. R. 13 Eq. 314.
(3) [1896] 2 Q. B. 407.
(4) (1872) L. R. 8 Ch. 192.
(5) (1885) 15 Q. B. D. 234.
(6) (1914) 137 L. T. Jo. 319.
(7) (1914) 30 Times L. R. 631.
(8) (1884) 12 Q. B. D. 224.
(9) [1894] 1 Q. B. 725.
(10) [1911] 2 Ch. 1.

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The point in issue was rightly decided by the Divisional Court in *In re Hollis.* (1) If a married woman is carrying on business after the Act she is liable to be made bankrupt in respect of a debt incurred before the passing of the Act. The onus is upon the debtor who is seeking to set aside the bankruptcy notice to shew that she was not carrying on a trade or business, and that onus has not been discharged by her.

Cur. adv. vult.

LORD COZENS-HARDY M.R. This is an application by Mrs. Clark to set aside a bankruptcy notice. Mrs. Clark is a married woman, and the bankruptcy notice is in this form: "Ex parte the creditors to Mary Clark of Hotel York, Berners Street, W., married woman, carrying on business on her own account at the above address and elsewhere." Then it is in the usual form requiring her within seven days to pay or secure a debt of no less than 25,000*l.* odd. But for s. 12 of the Bankruptcy Act, 1913, of course, this could not have been done. Judgment was obtained against her as a married woman on May 7, 1914, after the Bankruptcy Act, 1913, came into operation. Objection was taken by Mrs. Clark that this case did not fall within s. 12, and that therefore the notice was bad. The learned registrar took that view and set the notice aside. [The Master of the Rolls read the section and continued:]

Now two points were taken in the argument before us. First and this is a point of general importance, it was argued that the debt in respect of which the proceedings were instituted was contracted before the Act came into operation and that it was against general principles to give retrospective effect to such provisions—in other words, that when this debt was contracted Mrs. Clark could not have been made bankrupt in respect of it, and we ought to imply that she contracted the debt with all its consequences with the knowledge that she was free from bankruptcy. I am unable to assent to this view. The Act is a remedial Act. The language of s. 12 is perfectly general: "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws

(1) 137 L. T. Jo. 319.

as if she were a feme sole." Then sub-s. 2 follows that out. It is said in answer that there is a good deal in the Act itself apart from the express provisions of this section to shew that the argument of the respondent cannot be regarded as sound. Under the old law it was well known that for an act of bankruptcy there must be a judgment as distinct from an order. The new Act, s. 18, puts an order which is not technically a judgment exactly on the same footing as a judgment. How can it possibly be said that an order made before the passing of this Act is not by this Act made a good foundation for a bankruptcy notice and bankruptcy proceedings? I think it would be most dangerous for us in this case to give such a narrow construction to the Act. I regard s. 12 as a highly remedial and beneficial section, and I see no ground whatever for cutting down the generality of its language, and I think that the Act of 1861, which was referred to, throws great light upon it. That was an Act which for the first time made non-traders liable to bankruptcy, but, in doing that, in s. 90 of that Act there was an express provision that the only person who could make a non-trader bankrupt was a person whose debt was contracted after the passing of the Act which was the commencement of the Act. In modern times the commencement of the Act is frequently different from the time of the passing of the Act. What seems to me greatly to assist the conclusion at which I have arrived is that the Legislature, when it for the first time made persons amenable to the bankruptcy proceedings who were not formerly so amenable, and when it desired to preserve the rights of other people, did so expressly. There is no such express provision here, and I therefore think that the first objection fails. I may say that this precise point seems to have been decided only a few days ago in the Divisional Court by Horridge and Lush JJ., in a case of *In re Hollis* (1), who held, as I hold, that when a judgment or order is made after the commencement of the Act, it is quite unimportant that the debt in respect of which it was made was contracted prior to that date. I think that decision of *In re Hollis* (1) is perfectly right, and on this point I think the argument of the respondent fails.

Then we come to the other point, which is not, of course, of

(1) 137 L. T. Jo. 319.

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general importance: Was Mrs. Clark carrying on a business, is she a married woman carrying on a trade or business, against whom a final judgment or order has been made? That is by no means an easy question to answer. It is a question as to which I confess I have during the course of the argument varied in my opinion. We must see what her history was. She was originally, so far as we know, carrying on an hotel in her own name and for her own benefit, the York Hotel. She carried it on not in her own name or the name of her first husband, but in the name of Mrs. Clark. She then became a widow, she married again; her husband was not named Clark and her own proper name was not Clark, but she registered a deed under which she was entitled to use for certain purposes the name of Clark. That, of course, is quite intelligible if Clark was her business name in which she was carrying on her trade, but if it was not her business name it certainly is a very extraordinary thing that after she was a widow and had married again she should continue doing something which, if not carrying on business, was doing something in a name which was not her own. She sold the York Hotel to a limited company which I think it is fair to infer was promoted by her. That was a good many years ago, and she has since been and is now managing director of that company. That, of course, does not make her an hotel-keeper or an inn-keeper. I think it is impossible to say that that is carrying on a trade by her. She is merely the managing director of the York Hotel. Then, the York Hotel proving very profitable, the Berners Hotel was started, and again started by Mrs. Clark. It was almost adjacent to the York Hotel in Berners Street, and it has been described as a mere extension of it. Mrs. Clark is managing director of that too. Then there is a third hotel, the Endsleigh Palace Hotel, situated somewhere in the neighbourhood of Euston Station between Euston and Russell Squares. The facts in relation to that hotel are somewhat obscure. We know, however, that Mrs. Clark was managing director of it and owns a large block of shares, probably a very great proportion of the shares, of the company which carries it on. Next we come to the Princess's Hotel. Princess's Hotel, Limited, was a company which was formed and registered in June of 1912. A prospectus

of that company is in evidence. It was with reference to this particular venture that the debt due to the petitioning creditors was incurred. It appears from the prospectus that the directors of the company were the directors of the Hotel York, Limited, including Mrs. Clark, who is described as managing director, and the prospectus contains the following statement:—"Mrs. Mary Clark, the managing director of the Hotel York, Limited, under whose management the above handsome profit has been earned,"—that refers to the profit that was made at the York Hotel—"writes as follows with regard to the prospects of the new hotel:—'With reference to the new Princess's Hotel, I have gone carefully into the prospects of profits. Basing my estimate on the audited accounts of the York Hotel, Limited, and my knowledge of hotel management, I estimate that the profits earned by the Princess's Hotel will be upwards of 72,500*l.* per annum.'" Then there is a passage which I need not read as to how the debentures and preference and ordinary shares will have to be divided, and then it says: "During the period of construction, which is not to exceed eighteen months, Mrs. Mary Clark contracts to pay the preference dividend, and the Hotel York, Limited, guarantees the fulfilment of this undertaking. These shares, therefore, will be entitled to dividend from the date of allotment on the amount paid up. The vendor is Mrs. Mary Clark, who, after negotiations extending over nearly two years, has acquired the various sites, agreements, and options necessary for carrying out the scheme, and the purchase price has been fixed at 289,000*l.*, payable as to 189,000*l.* in cash and 100,000*l.* by the allotment of 100,000 ordinary shares of the company. The vendor"—that is Mrs. Clark—"will transfer or cause to be allotted to the Hotel York, Limited, 25,000 of the 100,000 ordinary shares agreed to be allotted to her, in consideration of its services in the formation of the company and of its guarantee of the preference dividend. The cash paid to the vendor represents cash outlay on her part. The vendor's profit and payment for services rendered in securing the site is represented by her allotment of ordinary shares, and depend therefore entirely on the successful working of the hotel." Now reading that prospectus, seeing that the debtor was the vendor to the

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company, that she had guaranteed the dividend on the preference shares during the period of construction, that she herself was remunerated partly by shares and partly by cash, and that it was not the York Hotel, Limited, who were the vendors or who were promoting it, it seems to me quite plain it was Mrs. Clark who was promoting this company. But for this Princess's Hotel Company I should have hesitated to say that she was carrying on the business of a promoter, although there is a great deal that may tend to go in that direction, but in the face of this prospectus I have been driven to the conclusion that she was carrying on the business of a company promoter dealing in hotels,—if she prefers the term which I believe is more popular with some people than the term "promoter"—she was a financier dealing in the purchase of land and building hotels, and that being so, she is carrying on business within the meaning of s. 12. But then it is said that one isolated transaction is not enough to lead the Court to hold that a person is carrying on business. The fact that this hotel company has not proved a success, and that the hotel has not yet been built, does not, it seems to me, in the least affect the question of whether the debtor is carrying on the business of a promoter. It has long ago been held, and I do not refer to the authorities, that a person does not cease to be a trader when he puts up his shutters and does not come near the place, but he is deemed to be for all purposes a trader until he has paid all the debts relating to the trade. Here there is a debt of 25,000*l.* which has not yet been paid and which was contracted in the course of trade for the very purpose of enabling her to acquire these lands. I think one is entitled, nay, bound, to have regard to the fact, as I said before, that she has promoted the York Hotel—that seems to be quite clear. I think it is nearly as clear that she promoted the Berners Hotel; it may not be so clear that she promoted the Endsleigh Palace Hotel Company, but the inference is strong that she did. She is the managing director of all three and she would have been managing director of the Princess's Hotel Company if it had been a success. It has not been a success, but nevertheless it seems to me it is impossible for us to say that she is not carrying on the business of a promoter of hotel companies and is not therefore liable under

s. 12. In my opinion the decision of the registrar was wrong, and this appeal should be allowed.

SWINFEN EADY L.J. I am of the same opinion. The Court is called upon to decide whether this married woman is liable to be adjudicated bankrupt, and that turns on the extension of the law which is to be found in s. 12 of the Bankruptcy Act, 1913. The object of this provision is to extend the law enabling married women who do not pay their debts to be made bankrupt under circumstances set out in the section, which section contains a positive enactment that the law on the various points set out therein shall be changed and shall be different from what it was before. Previous to the passing of this Act a married woman could be made bankrupt by virtue of the provision in the Married Women's Property Act, 1882, s. 1, sub-s. 5, which says: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." She under that section had to carry on a trade. It was not sufficient that she should be carrying on a business or be engaged in a business; it must be a trade, and accordingly it was held in Ireland that where a woman was carrying on the business of a farmer she was carrying on business but she was not a trader, and therefore could not be adjudicated a bankrupt. That is the case of *In re Long.* (1) Then again a bankruptcy notice could not be founded upon an order that was not a final judgment, nor upon a final judgment against a married woman in the form that has been in use since *Scott* v. *Morley.* (2) There was a series of decisions on those points, and the law laid down in those cases is now altered by this section. The section says that every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole. Then sub-s. 2 provides: "Where a married woman carries on a trade or business and a final judgment or order has been obtained against her,"—the words "or order" are an extension of the previous statutory provisions—"whether or not expressed to be payable

(1) [1905] 2 I. R. 343. (2) (1887) 20 Q. B. D. 120.

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out of her separate property,"—that again overrules the previous decisions—"for any amount, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid." That, therefore, reverses the rule that was laid down by *In re Frances Handford & Co., Ex parte Frances Handford* (1), and with regard to a judgment or order reverses a long line of cases beginning with *Ex parte Chinery* (2) and going down to *In re a Debtor.* (3) It extends the law in that direction.

Now the first question is whether this married woman was carrying on a trade or business. I do not propose to go in detail again over the ground that the Master of the Rolls has travelled over, but it must be borne in mind that this debt which is of a large amount, in respect of which the present proceedings are instituted, is a business debt incurred in respect of a business transaction. The debtor has a trade name—Mary Clark. She states that she assumed that name by deed poll, but since she assumed that name she has married a Mr. Todd and her real name is Mary Todd. She was formerly a widow, Mrs. Lawrence, but the marriage to Mr. Todd took place after the date of the deed poll, so that her name now is Mary Todd. Notwithstanding that she continues to use the name of Mary Clark. In the prospectus of the Princess's Hotel, Limited, Mary Clark is written large over the whole document, and I observe that her affidavit in the bankruptcy proceedings is sworn in the name of Mary Clark. In my opinion that is not the proper way in which that affidavit should have been sworn, because although Mary Clark may be the lady's name for trade or business purposes, it is not her name, and the affidavit ought to have been sworn in the name of the deponent. The form of the oath administered by the commissioner is: "You swear that this is your name and handwriting." Mary Clark, although her name for trade purposes, was not her true name. Then it appears that she has been engaged in carrying on, first, the Hotel York, and then the Berners Hotel. She is the managing director

(1) [1899] 1 Q. B. 566. (2) (1884) 12 Q. B. D. 342.
(3) [1912] 3 K. B. 242.

of the company that carries on the two hotels, the York Hotel and the Berners Hotel. She is also the managing director of the company that carries on the Endsleigh Palace Hotel, and in the prospectus of the Princess's Hotel attention is drawn prominently to the success that has attended her labours as manager or managing director. Profits have accrued sufficient to earn dividends of 10 per cent. by virtue of her skill in the management of these concerns. I think the evidence shews that she has been engaged in promoting companies in which she was interested, in promoting the Hotel York, Limited, which has taken over the Hotel York and the Berners Hotel, and in promoting the Endsleigh Palace Hotel, in which she is a very large shareholder, and it is common ground that she was actively concerned for two years in promoting the Princess's Hotel. The scheme there was to buy up various leasehold and other interests and build an hotel, and the prospectus shews that she was engaged in this business for two years. It sets out in detail the efforts that she has been making for a period of two years in the business, and then it sets out the proposed terms of purchase by the new company and what she is to receive by way of remuneration for her efforts during the two years—what she in fact has been earning during those two years. In my opinion the evidence establishes that she is and has been engaged in carrying on a business of promoting companies to take over hotels including specially this particular venture the Princess's Hotel. Then it is said that that scheme has fallen through, and that although she may have been engaged in business when the debt was incurred, the whole matter has come to an end and she is no longer engaged in any business. The debt that was incurred has not been paid, and it has been pointed out in many cases, and it is old-established law, that where a person engaged in business has not paid the debts incurred he is to be deemed to be carrying on the business until the debts are paid. For instance, in *In re Dagnall* (1) Vaughan Williams J. said: "Whether a person is carrying on a trade or not is a question of fact;"—that is a question of trade—"and if it were not for the decision in *Ex parte McGeorge, In re Stevens* (2)"—which he explains—"I

(1) [1896] 2 Q. B. 407, at p. 410. (2) (1882) 20 Ch. D. 697.

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should have said without any hesitation that as long as a woman trading separately from her husband had not paid the trade debts which she had incurred, so long she was continuing to trade. It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you." Wright J. said in allowing the appeal: "I agree that this appeal must be allowed, upon the short ground that in my view the natural meaning of the section is that a married woman who trades separately is to be subject to the bankruptcy laws in respect of all debts incurred by her in the period during which she was carrying on the trade." That was a decision of the Divisional Court, and it came before the Court of Appeal where Lord Alverstone was sitting in the case of *In re Worsley* (1), where it was held that "A married woman who has sold a business carried on by her separately from her husband must be deemed to be still 'carrying on' the business within s. 1, sub-s. 5, of the Married Women's Property Act, 1882, so long as the debts she has incurred in the business remain unpaid." This case of *In re Dagnall* (2) was cited, and Lord Alverstone said: "Mr. Muir Mackenzie has pressed us to say that *In re Dagnall* (2) was wrong, and that, in order that the married woman may become subject to the bankruptcy laws, her liability must, under s. 1, sub-s. 5, of the Married Women's Property Act, be strictly limited to the time when she is actually carrying on the trade; and that if she ceases, even by simply putting up the shutters, to carry on a trade, the Act does not apply. We might decide this case on the limited view that there were four bills of exchange, and that so long as these bills were running Mrs. Worsley was carrying on a business in connection with and for the purposes of trade. But I go further, and say that, in my judgment, the decision in *In re Dagnall* (2) was perfectly right." Then a little later on he says: "The principle on which we decide this case was established so far back as the year 1808, as my brother Vaughan Williams pointed out during the argument, when Lord Eldon, in *Ex parte Bamford* (3), a case under the

(1) [1901] 1 Q. B. 309. (2) [1896] 2 Q. B. 407.
(3) (1808-9) 15 Ves. 449.

Bankruptcy Act of George III., laid down that so long as the debtor did not pay the debts he had contracted while engaged in the trade, he was to be regarded as still engaged in the trade." Now that is equally applicable if the person carrying on a business is liable to be made bankrupt, and in such a case the language applies as much to a business as to a trade. So, in my opinion, there is nothing in the point that the scheme that she was engaged in promoting when this debt was incurred has fallen through, and that although the debt remains unpaid she is no longer engaged in carrying on that business.

Then it is said that the Act is not retrospective. The Master of the Rolls has already pointed out that when it is intended that the debt due to a petitioning creditor must be a debt contracted after the passing of the Act the Legislature has said so in express terms. That was the provision in the Bankruptcy Act of 1861, when non-traders first became amenable to the bankruptcy laws. Sect. 90 of the Bankruptcy Act, 1861, provides: "The debt of the petitioning creditor of any debtor not being a trader, and not being at the time a person against whom such creditor would have been entitled to obtain a vesting order in insolvency if this Act had not passed, must be a debt contracted after the passing of this Act; and the judgment debtor summons must be a summons in respect of a debt contracted or of a liability incurred after the passing of this Act." Here we have no such provision. In the case of *In re Hollis* (1), decided by the Divisional Court a few days ago, the debt, or a great part of the debt, was contracted before the Act was passed. The whole of the debt was contracted before the time fixed for the Act coming into operation, and the final judgment was actually obtained after the Act came into operation. But the Divisional Court held that the case came within the Act and that the married woman was amenable to bankruptcy. In my opinion the decision was right. Now here the Act was passed on August 15, 1913. It came into operation on April 1, 1914, so that there was an interval of time during which persons if so minded and able could discharge their obligations without the risk of bankruptcy. But when the Act came into operation

(1) 137 L. T. Jo. 319.

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on April 1, 1914, it applied to debts that were then owing. For these reasons I concur in the judgment of the Master of the Rolls that this appeal should be allowed.

PICKFORD L.J. I agree, and I have only a very few words to add because during the greater part of the argument I entertained a strong opinion that although this lady was engaged in speculative transactions, and transactions which in my opinion ought to come within the provisions of the Act, still it was not shewn that she was carrying on a business. I think it was wrongly assumed that unless what the debtor was doing could be brought within one of the businesses or trades in the category which may be found in a directory or elsewhere she could not be carrying on a business within the meaning of this Act. I am not satisfied that that is right. There was considerable force in the appellants' argument that if the debtor was carrying on business transactions regularly, that might very well be called carrying on a business although you could not at the moment give it a name.

Having regard to the prospectus of the Princess's Hotel Company which has been read, I think there was obviously a promotion by this lady of the company for the purpose not only of getting promotion money, but for the purpose of holding a large number of shares in the company and of being the managing director of the company and so having the management of what the company was going to do if it ever did any business, which as a matter of fact it did not. That was to my mind clearly a business transaction, but if it had been an isolated transaction, such as may be undertaken by a landowner who wishes to develop his estate and in order to do so takes shares in a company which purchases part of it, I should not have considered she was carrying on a business. But it was not an isolated transaction, and looking at what took place before I find that the transaction which immediately preceded it was the promotion of the Endsleigh Palace Hotel, Limited, in which this lady held 24,900 preference shares out of 25,400. But going back still farther we find there was the promotion of the York Hotel, Limited, in which the lady had 49,930 shares out of 100,000

ordinary shares, and 11,374 preference shares out of 170,000. She may not have been nominally the promoter of either of those companies, I think she probably was not nominally the promoter of the Hotel York, Limited. She may not have been nominally the promoter of the Endsleigh Palace Hotel, Limited, nor of the Berners Hotel, which was intermediary between the Hotel York and the Endsleigh Palace, but she was in effect finding the money and engaging herself in assisting at any rate in the promotion of those companies for the purpose, as I say, not only of getting promotion money, but of holding shares and obtaining the position of managing director in those companies. She was not carrying on the business of an hotel-keeper, but she was engaged in the business,—to use the definite article instead of the indefinite article—whenever there was an opportunity which seemed favourable and not unlikely to yield a profit, of acquiring sites and building hotels for the purpose of holding the shares in them herself and obtaining the management and becoming managing director. Whether that comes within the meaning of those words "company promoter or financier" I do not think I am concerned to inquire. She was doing this as a business, and not as a method of developing her property, which perhaps the building of the York Hotel in the first place may have been, but she was doing it as a business for the purpose of making money, and therefore I agree, although I confess I have not felt absolutely certain about the matter, that she was carrying on a business within the meaning of this section. With regard to the other points I agree with what has been said, and I have nothing to add.

Appeal allowed.

Solicitors: *Welch & Co.; Stanley Evans & Co.*

G. A. S.

1914
July 28.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* SAGAR.

Criminal Law — False Pretences — Evidence — Indictment alleging False Pretence that Prisoner was carrying on Genuine Business — Receipts acknowledging Payment for Articles purchased by him—Entries in Bank Pass-book—Admissibility as Evidence negativing Allegation of False Pretence.

The prisoner was charged with having obtained goods by false pretences. The false pretence alleged in the indictment was that he had pretended that he was carrying on a genuine and bona fide business as a manufacturers' agent and merchant:—

Held, that receipts sworn to by the prisoner as having been given to him as acknowledgments of payments for goods purchased by him other than those the subject of the charge, and entries in his bank pass-books shewing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine and bona fide business.

Appeal by the prisoner Richard Sagar against his conviction.

On June 24, 1914, the prisoner was convicted before Ridley J. at the Winchester Assizes of obtaining goods by false pretences and sentenced to twelve months' imprisonment with hard labour.

The indictment alleged that the prisoner "on the 27th day of November 1913 at Alford in the county of Southampton unlawfully knowingly and designedly did falsely pretend to George Pearce & Son Limited that he was carrying on a genuine and bona fide business under the name or title of Richard Sagar & Sons at 69 Hyde Road Ardwick Manchester and that the said firm of Richard Sagar & Sons carried on the business of manufacturers' agents and merchants at the said address, by means of which said false pretences the said Richard Sagar did then unlawfully obtain from the said George Pearce & Son Limited certain goods to wit nine gross of wooden spades of the value of 7*s.* 9*d.* with intent to defraud whereas in truth and in fact the said Richard Sagar was not carrying on any genuine and bona fide business at 69 Hyde Road Ardwick Manchester or at all and no business of manufacturers' agents and merchants

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was carried on under the name or title of Richard Sagar & Sons at 69 Hyde Road Ardwick Manchester or at all as he the said Richard Sagar well knew at the time when he did so falsely pretend as aforesaid against the form " &c.

The sole issue at the trial (apart from the intent to defraud) was whether or not the prisoner was carrying on a business of that nature. He gave evidence to the effect that he carried on business in Manchester as a manufacturers' agent, buying and selling anything he could, and, among other things, cycles. It was then proposed to put in on his behalf a receipt which the prisoner swore was from the Runwick Cycle Company for a payment made to them by him for cycles, but this receipt was excluded by the judge on the ground that it was not relevant to the issue. The receipt was one of several (all of which it was desired to put in) shewing payments to various firms for articles of different descriptions. It was also proposed on behalf of the prisoner to put in his bank pass-books to prove payments to particular firms, but the judge ruled that, although the books might be put in, the contents might not be given in evidence. The prisoner had not paid for the wooden spades the subject of the indictment. The jury found the prisoner guilty. The prisoner appealed upon the ground that the evidence above mentioned was wrongly excluded by the judge at the trial.

A. L. B. Thesiger, for the prisoner. The receipts were admissible in evidence and were strictly relevant to the issue and most material for the defence. In long firm frauds evidence is often given that on searching the prisoner's house invoices were found, none of which were receipted; it must therefore be open to the defence to prove the converse. As to the bank pass-books there is no distinction between putting in the books and shewing what their contents are.

[He was stopped.]

A. S. Comyns Carr, for the prosecution. The receipts were not admissible as evidence in the appellant's favour. Any document found in the possession of a prisoner is evidence against him because it comes from his possession and there is therefore evidence that he knew of its contents, but this receipt

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was tendered as evidence that he had paid the account and was mere hearsay being a document signed by a third party not before the Court. It is upon the same footing as a letter written by a person saying "You have paid me and may produce this letter in support of it." That letter would clearly not be admissible in favour of the person to whom it was written. It may be concocted. A receipt purporting to be signed by a person not present is not legally admissible as corroboration of the appellant's story. The receipts ought to have been proved by calling the third parties who gave them. As to the bank pass-books it is difficult to support the distinction drawn by the learned judge between the book and its contents; but the entries should have been excluded as they were merely the statement of a bank clerk not called as a witness.

The judgment of the COURT (Lord Reading C.J., Lord Coleridge and Avory JJ.) was delivered by

LORD READING C.J. The appellant was convicted of obtaining goods by false pretences and sentenced to twelve months' imprisonment with hard labour, the false pretence being that he was carrying on a genuine and bona fide business in the name of Richard Sagar & Sons at 69, Hyde Road, Ardwick, Manchester, as manufacturers' agents and merchants. Two points have been taken by Mr. Thesiger on behalf of the appellant, first, that evidence was rejected which was admissible and of considerable importance; and secondly, that although his bank books were admitted in evidence his counsel was not allowed to refer to the entries in them, this again being important evidence and directly relevant to the false pretences charged. The real issue before the jury apart from the intent to defraud was whether the appellant was carrying on a genuine business, or whether, by making the pretence of carrying on a genuine business, he was intending to defraud persons from whom he ordered goods by obtaining them on credit. In a case of that character it was important for the defence to establish that there were bona fide transactions carried on by the prisoner in the name under which he traded, and for that purpose it was proposed to give in evidence certain documents, namely, receipts by firms

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who, according to the testimony of the prisoner, had sold him goods, and had given him receipts for payments made in respect of those goods by the prisoner. The prisoner in the witness-box began to relate the facts and counsel proposed to put in a receipt which shewed the payment for some cycles. The essence of this transaction was that it was a bona fide purchase, carried out in the usual way with the usual mercantile documents, including a receipt for payment handed by the seller to the prisoner. He was not allowed to put in that receipt, and consequently did not put in further receipts of a similar character. Again, although he was allowed to put in his bank books, he was not allowed to refer to any entries in them, shewing debits representing payments made by him, that evidence being also excluded. We are of opinion that the evidence which was tendered was admissible in law, and that its exclusion has prevented the prisoner from putting forward a substantial part of his defence. The only question is whether the mischief is cured by the summing up. It cannot be said that the jury had it properly brought to their minds that the evidence, if admitted, might have established the defence. It is impossible to say that the serious defect at the trial of the exclusion of the evidence was cured, nor can we say that, if the evidence which was wrongly excluded had been admitted, the jury would have come to the same conclusion. Consequently the conviction must be quashed.

Conviction quashed.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitor for prisoner: *Registrar of Court of Criminal Appeal.*

J. E. A

1914
Sept. 25.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* LESBINI.

Criminal Law—Murder—Provocation necessary to constitute Manslaughter—Prisoner sane, but hot-tempered and sensitive, with Defective Control and Want of Mental Balance.

The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (e.g., a person afflicted with defective control and want of mental balance) of his self-control.

Application by the prisoner for leave to appeal against his conviction for murder. The application was by the practice of the Court treated as a final appeal.

The facts (so far as material) were as follows :—

On August 12, 1914, a few minutes before 4 in the afternoon, the prisoner went into a hall in Tottenham Court Road called "Fairyland," in which was a rifle and revolver range. A girl named Alice Storey was in charge of the range, and said, in the prisoner's hearing, "Iky wants some shots." The prisoner said, "Don't you talk to me like that." She replied, "Oh, it is only my way of talking to my customers ; I am only joking." The prisoner then said, "Well, don't let it occur again." He stood by the range, and for a short time nothing further was said. Alice Storey then asked the prisoner whether he wanted any shooting. He replied, "Yes, I want some shooting." She then asked whether he wished to shoot with a revolver or a rifle, and he said that he wanted a revolver, and pointed at the one he wanted, which, with others, was in a glass case. Alice Storey went to unlock the case, and as she was doing so she dropped the keys on the floor, which the prisoner picked up for her. She then said, "It just shews what sort of temper he has, it is soon over," or something to that effect, and then unlocked the case and took out the revolver, which she loaded for the prisoner and laid on a counter for him

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ready to fire. The prisoner picked up the revolver and held it towards the target. He then brought the revolver down to his side, and turned round to Alice Storey and went in front of her, saying, "Now I have got you," levelling the revolver at her. She screamed out, "Oh, please don't, don't," and ran away. The prisoner followed her, still pointing the revolver at her, and discharged it, inflicting a wound from which she shortly afterwards died.

At the trial which took place before Atkin J. at the Central Criminal Court on September 9, 1914, medical evidence was given to the effect that the prisoner was perfectly rational both in conduct and conversation, and that there was no evidence of any delusions or condition of epilepsy or hallucination or other evidence of insanity on the part of the prisoner, but that he was hot-tempered and sensitive, with defective control and want of mental balance.

The defences set up at the trial were that the occurrence was an accident, and alternatively that the prisoner was insane.

The jury returned a verdict of guilty.

The prisoner appealed.

E. J. Purchase, for the prisoner. The grounds in the notice of appeal which was prepared by the prisoner himself are merely a repetition of the defence and are not now relied on. It was impossible to set up at the trial that the case was one of manslaughter, for the authorities that words of the kind used by the deceased girl would not justify the judge in leaving a defence of manslaughter to the jury are too strong for a judge of first instance to disregard. But it is open to this Court to rule as a point of law, where, as in the present case, the mens rea of the prisoner is in question, that the proposition laid down in *Reg.* v. *Welsh* (1)—"The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion"—is not exhaustive, but that where, as in the present case, the prisoner is of defective control and there is a want of mental balance—

(1) (1869) 11 Cox, 336, at p. 338.

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what is medically called a "border line case"—the absolute suddenness of the provocation may be taken into consideration, and although that provocation would not be sufficient in the case of a normal man to reduce the killing to manslaughter, it may be sufficient in the case of a person who, although not insane, is, like the prisoner, afflicted with defective control and want of mental balance. It must be admitted that no general proposition can be laid down having regard to the judgment of Darling J. in *Rex* v. *Alexander* (1), but in that case two hours elapsed between the provocation and the murder, and it is therefore distinguishable. In the present case the provocation and the killing took place momentarily, and under an impulse the result of the provocation acting upon the mind of a person of defective mental balance.

[AVORY J. It would seem to follow from your proposition that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder.]

It is open to this Court to place a restriction upon the rule laid down in *Reg.* v. *Welsh* (2) that the provocation must in all cases be such as to deprive a reasonable man of self-control. If the provocation is sufficient in the case of a person of defective mental balance to deprive him of his self-control, the jury will be justified in returning a verdict of manslaughter.

R. D. Muir and *E. C. P. Boyd*, for the prosecution, were not called upon.

The judgment of the COURT (Lord Reading C.J., Avory and Lush JJ.) was delivered by

LORD READING C.J. This is an application by the prisoner, who was tried before Atkin J. and convicted of the murder of a girl named Alice Storey, for leave to appeal from the verdict and the sentence which was imposed upon him. According to the practice of this Court the application comes before us as if it were an appeal. On behalf of the prisoner Mr. Purchase, as he was bound to do, admitted that he could make no complaint with

(1) (1913) 9 Cr. App. Rep. 139. (2) 11 Cox, 338.

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regard to the summing-up of Atkin J. We have read and considered the summing-up, and in our view it was a most careful one. Every point was put before the jury, and there was ample evidence upon which the jury could come to the conclusion at which they arrived with respect to the two defences submitted to them at the trial. The short story so far as it is necessary to state it is that the prisoner entered the shooting gallery at which the deceased was one of the attendants. She used some language which was perhaps provocative, but which we think was intended to be merely jocular. The expression she used was, however, understood by the prisoner to involve an offensive reference to himself or his race. It appears from the evidence that shortly afterwards she dropped her keys and the prisoner picked them up and returned them to her. She remarked that his temper was soon over. She thereupon handed the revolver to him for the purpose of shooting at the target. He seems to have pointed it at her and to have followed her armed with the revolver and eventually to have discharged it at her, with the result that she died shortly afterwards. At the trial two defences were raised. One defence was that it was an accident. The prisoner said that he had his finger on the trigger and that only a light pull was necessary to cause the trigger to fall and discharge the revolver, and that he had merely followed her with the revolver and had no intention of shooting her, but that he pulled the trigger involuntarily and by accident caused her death. The jury came to the conclusion that that was not so and negatived it, and upon the evidence it is quite clear that the jury could come to the conclusion that it was not an accident. I only refer to that in some detail because I think it is in reference to that contention that the argument addressed to us would find its proper place, namely, that the prisoner had so little self-control that he might impulsively pull the trigger by reason of the slight provocation which had been given to him. We think that that would be evidence to be taken into account as bearing upon the defence of accident. He was not of good mental balance, though not insane in the proper legal sense of the term. Atkin J. told the jury that they ought to take those circumstances into account in judging whether the occurrence was an accident. The other defence was that the

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prisoner was insane. There was no real evidence of insanity and the jury negatived it.

It is now said before us that we as a Court of Appeal might come to the conclusion that the tests laid down in the well-known authorities as to the provocation necessary to constitute a defence of manslaughter are too narrow and that we could extend it, and if we come to the conclusion that it ought to be extended we could enter a verdict of manslaughter and alter the sentence. It is sufficient to say that we see no reason to dissent from what was said by Darling J. in giving judgment in *Rex* v. *Alexander*. (1) A similar argument was placed before the Court in that case. It substantially amounts to this, that the Court ought to take into account different degrees of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling J. in *Rex* v. *Alexander* (1) and with the principles enunciated in *Reg.* v. *Welsh* (2), where it is said that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." We see no reason, therefore, to dissent in any way from the principle of law on which this case was tried. On the contrary we think it is perfectly right. This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts.

Appeal dismissed.

Solicitor for the prosecution: *Director of Public Prosecutions.*

Solicitor for the prisoner: *Registrar of Court of Criminal Appeal.*

(1) 9 Cr. App. Rep. 139. (2) 11 Cox, 338.

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1914
May 14, 15.

KACIANOFF *v.* CHINA TRADERS INSURANCE COMPANY, LIMITED.

Insurance (Marine)—Insurance of Cargo against Capture—Constructive Total Loss—Anticipation of Capture—Sale of Cargo by Assured.

By a policy of marine insurance the plaintiffs, who were Russian subjects, insured a cargo of salt beef with the defendants at and from San Francisco to Vladivostok via Nagasaki against (inter alia) capture. During the currency of the policy war between Russia and Japan broke out, and the Japanese fleet was in the Pacific and was stopping and capturing vessels. The Japanese were also blockading Vladivostok. The defendants telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, which was done, and ultimately notice of abandonment was given to the underwriters, who refused to accept it:—

Held, that the risk of capture had never begun to operate, and that the fact that it was anticipated that if the cargo went forward it would be lost by capture did not in the circumstances constitute a constructive total loss.

The Knight of St. Michael [1898] P. 30 and *Butler* v. *Wildman* (1820) 3 B. & Ald. 398 distinguished.

Decision of Pickford J. [1913] 3 K. B. 407 affirmed.

Appeal from a decision of Pickford J. in an action tried in the Commercial Court without a jury; reported [1913] 3 K. B. 407.

The action was brought by the plaintiffs, Russian subjects residing in the Empire of Russia and carrying on a general import business at various places in Russia and Siberia, against the defendants, a joint stock company carrying on business at Cornhill, to recover a loss under a policy of marine insurance dated December 16, 1903, for 3000*l.* part of 9000*l.* on cargo per steamer or steamers at and from San Francisco to Vladivostok.

The policy was expressed to be against war risk only, being in terms against the risk excepted by the clause "warranted free of capture, seizure and detention, and the consequences thereof or any attempt thereat, and also from all consequences of

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hostilities or warlike operations, whether before or after declaration of war." The plaintiffs had arranged for three shipments, one being to Vladivostok, the second to Port Arthur, and the third, with which alone this action was concerned, to Vladivostok via Nagasaki. The first two shipments were made, but the *Coptic* and the *Corea*, the vessels carrying the cargoes, were captured by the Japanese who were blockading Vladivostok during the war between Russia and Japan. The insurances in these cases were duly paid. The steamer, the *China*, which was to have carried the particular cargo—a consignment of 4000 barrels of salt beef—was to have left San Francisco on February 26, 1904, for Vladivostok via Nagasaki. At the time she was about to sail, and when some of the cargo was on board, it was known that the Japanese fleet was in the Pacific and was stopping and capturing vessels. The underwriters (including the defendants) telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, and ultimately notice of abandonment was given to the underwriters, who refused to accept it, but agreed that the plaintiffs should be placed in the same position as if a writ had been issued and an action commenced immediately after the refusal of the notice of abandonment. The cargo was then discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs brought this action claiming the value of the cargo, but giving credit for the salvage realized by the sale at Shanghai. The only question material to this report was whether in the circumstances there had been (as the plaintiffs contended) a constructive total loss of the cargo. The defendants contended that there had been no loss by a peril insured against.

Pickford J. held that there was not a constructive total loss of the cargo at the time of the abandonment, and that the assured could not succeed in the action.

The plaintiffs appealed.

Maurice Hill, K.C. (*F. D. Mackinnon* with him), for the plaintiffs. The facts shew that this was a loss by the perils insured against and not a loss by apprehension or fear of capture. Both the assured and the underwriters regarded capture by the Japanese, if the ship sailed on the voyage, as certain. What is insured is the adventure, that it shall not be defeated by the perils insured against. If it is prevented by capture or restraint of princes, then the insurance is defeated. If, however, there is a mere apprehension that the peril may happen, and the insured of their own choice decide to stop the adventure, then it cannot be said that the peril insured against has arisen. But there is a middle class of cases, where it is practically certain that the peril will operate if the voyage continues, and the present case is one of that class. By s. 60 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), there is a constructive total loss "where the subject-matter assured is reasonably abandoned on account of its actual total loss appearing to be unavoidable," and the proper inference from what everybody said and did at the time is that an actual total loss did appear to be unavoidable. The case mainly relied on by the defendants is *Hadkinson* v. *Robinson* (1), which is an authority on "apprehension." The plaintiffs rely on *The Knight of St. Michael* (2), where the heating of a cargo of coals, though no part of the coal ever was on fire, was held to be an existing condition of things producing imminent danger of fire and not merely a fear of fire. In *Butler* v. *Wildman* (3) a loss by jettison was held to be also a loss by enemies. [He also cited *Rodocanachi* v. *Elliott* (4); *Miller* v. *Law Accident Insurance Co.* (5); *Lubbock* v. *Rowcroft* (6); *Thompson* v. *Hopper* (7); *Fawcus* v. *Sarsfield* (8); *Nobel's Explosives Co.* v. *Jenkins & Co.* (9); *Barker* v. *Blakes.* (10)]

Leslie Scott, K.C. (*Leck, K.C.*, with him), for the defendants. The decision in *Nickels & Co.* v. *London and Provincial Marine*

(1) (1803) 3 Bos. & P. 388.
(2) [1898] P. 30.
(3) 3 B. & Ald. 398.
(4) (1874) L. R. 9 C. P. 518.
(5) [1903] 1 K. B. 712.
(6) (1803) 5 Esp. 50.
(7) (1856) 6 E. & B. 937.
(8) (1856) 6 E. & B. 192.
(9) [1896] 2 Q. B. 326.
(10) (1808) 9 East. 283.

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Insurance Co. (1), where it was held that there was not a loss under the policy but that the loss was due to the exercise by the captain of a power given by the bill of lading, is directly applicable to the present case. The distinguishing principle is that in this class of case the loss is caused by a free, independent act of the assured. In *Butler* v. *Wildman* (2) and in *The Knight of St. Michael* (3) the act of volition was not free and independent, and was the necessary result of the operation of the peril insured against. No case has been cited which shews that the loss is caused by a peril insured against where the peril never comes into operation. On the facts of the present case Pickford J. has come to the conclusion that, while there was a reasonable apprehension of capture, there was no real peril of capture, and his finding should not be disturbed.

[He was stopped by the Court.]

May 15. LORD READING C.J. This case, which comes before us on appeal from Pickford J., who tried it without a jury, arises out of incidents dating so far back as the end of 1903 and the beginning of 1904. It is an action upon a policy of insurance in respect of a cargo of 4000 barrels of mess beef which were shipped by the plaintiffs from San Francisco to Vladivostok via Nagasaki, and the policy of insurance is one which is against loss arising from capture. It is a policy against total loss, based upon the exception clause: substantially it is a clause known as the f.c.s. clause, and in this case all that it is necessary to say is that the insurance is against loss arising from the peril of capture. It seems to have been somewhat difficult to ascertain all the material facts, but for this point—which is the only one with which we are now concerned and upon which Pickford J. decided—they seem to be substantially ascertained.

It appears that the plaintiffs, who were merchants carrying on business at various places in Russia and in Siberia, and whose business consisted largely of importing goods into Russia or Siberia, bought three shipments or made contracts for three shipments of mess beef from San Francisco by contract with a

(1) (1900) 6 Com. Cas. 15. (2) 3 B. & Ald. 398.
(3) [1898] P. 30.

firm of Getz Brothers of San Francisco, with whom they frequently had transactions. On December 16, 1903, this policy of insurance was effected and issued by the defendants to the plaintiffs. The cargo in question, consisting of these 4000 barrels of mess beef, began to be shipped in February, 1904, at San Francisco. There had been two previous cargoes shipped, one in the *Coptic* and the other in the *Corea* by the same firm, the one to proceed to Vladivostok and the other to Port Arthur. These two vessels, the *Coptic* and the *Corea*, were seized and their cargoes condemned in consequence of the outbreak of war between Russia and Japan, but neither of those events had happened at the time that this policy was effected. The shipment in the *China* was loaded, that is to say the loading had been completed, on February 26, 1904. War had been declared on February 8, 1904. Before the declaration of war, there was every expectation that war would be declared. This vessel, the *China*, instead of setting out for Vladivostok via Nagasaki according to contract, discharged these 4000 barrels of mess beef on February 27; this cargo, when discharged, was resold and realized only approximately some 25 per cent. of the amount for which it was insured. In any event, the claim made against the defendants is for some 73 to 76 per cent. of the loss, and the cargo is insured for 3000*l.* under this policy out of 9000*l.* The claim is made against the defendants upon the policy of insurance, and the question is: Has the peril insured against operated to cause that loss? In other words: What is the proximate cause of the loss which actually happened?

In order to answer that, one must ascertain the facts with precision. The plaintiffs anticipated—and had apparently every reasonable ground for anticipating—that, if this vessel set out on that voyage, she would be captured by the Japanese and her cargo would be condemned and would be lost. It is true that the cargo was to be carried by a British ship, but in the circumstances—particularly having regard to what had happened with reference to the other two vessels which had been seized—the fear was entertained that the cargo would be condemned. It is said that not only was there a fear—that, it is admitted, would not be sufficient—but that it was reasonably certain that if this vessel

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did get to Nagasaki, and if she did tranship that cargo of 4000 barrels of mess beef at Nagasaki for Vladivostok, the cargo would be lost; that was as certain as a thing could possibly be that was to happen in the future. I will assume, for the purposes of this case, as I think Pickford J. intended to find, that it was reasonably certain, and not that there was some apprehension, that this cargo would be seized, condemned, and therefore lost. Having come to that conclusion, some inquiry was made in this country of the underwriters, and on February 23 some of the underwriters protested against further shipments under present circumstances, and other underwriters denied liability; and, subsequently, when they were asked on February 27 what they would do if the plaintiffs discharged this cargo, sold it, and gave notice of abandonment as a constructive total loss to the defendants, they declined to give any instructions.

Without reading the other documents in the case it is plain that the defendants took the attitude that they would decline responsibility in present circumstances, which meant: As it is sure that this vessel will be captured, as were the other two, we shall decline to accept liability, and you, the plaintiffs, will have to bear the loss yourselves. I think it is very unfortunate that the defendants should have taken that course. No doubt they were entitled to say that they had reasonable ground to anticipate capture, but it seems to have been admitted in the argument before us that that was not done with a real belief that they could successfully repudiate liability but merely with the object of preventing this cargo being sent and the risk operating. It is not for this Court—we are not trying the case in the first instance—to exercise any discretion with regard to the costs of the action, as the learned judge had the facts before him and made the order that the defendants should reap the fruits of their victory and have their costs. Speaking for myself, if I had been trying it, and in the absence of other circumstances which no doubt were before the learned judge, I should have come to the conclusion that, as they had contributed so much to this position, the defendants should not have the costs of the litigation. However, that is not now material except for the purpose of stating what actually happened. The plaintiffs thereupon,

having given their notice of abandonment on February 27, the defendants refused to accept it, and the real question which we have to answer in this Court is: this vessel never having set out to sea with this cargo, can it be said that the loss was occasioned by the peril insured against, that is, capture? In my opinion the question has only to be stated to be answered quite clearly in the negative. I entertain no doubt about this case. It seems to me that the peril insured against had never begun to operate. The fact of the vessel remaining in port and discharging the cargo there and then was preventing the peril from operating; it was making it impossible that the peril should operate. It would have been a totally different state of things if the vessel had left and then, outside, had been met and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger. No doubt there may be circumstances in which judges may differ as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it. In my judgment it is that which fails the plaintiffs in this case. Notwithstanding the very ingenious argument of Mr. Maurice Hill, there can be no doubt that the plaintiffs cannot make out their claim in this action. Reliance was placed in the main upon the case of *The Knight of St. Michael.* (1) That case illustrates the difficulty of deciding the precise point at which you can say that the peril has begun to operate, but it is not, in my view, a case which decides any novel principle; it is one of those cases in which there is the application of the principle to somewhat difficult facts. There the Court came to the conclusion that notwithstanding that a fire had not actually broken out the loss was by fire and fire was one of the perils insured against. It began to operate as a peril because heat was then being engendered in the cargo of coals carried. There was a very imminent danger of the temperature rising from that heat, which would in the ordinary and natural course of things cause spontaneous combustion and fire, and if that had happened to the vessel when she was at sea there would be grave danger of loss both of the ship and of the cargo. Thereupon the commander of the vessel put back to Sydney—

(1) [1898] P. 30.

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the vessel was on a voyage from Newcastle, New South Wales, to Valparaiso with this cargo of coals—and upon the advice of the surveyors discharged a large portion of the cargo of coals. There was an insurance on the freight, and of course when the vessel arrived she could only discharge part of the cargo, as part of it had been discharged by her at Sydney, and the claim was upon this insurance for freight. It was held that the assured was entitled to recover because the peril had begun to operate; it was a common form policy. If the loss had been occasioned by fire, there was no doubt about it. But the case made was that the fire had not originated, had not really happened, and the whole question (which Lord Gorell, examining the circumstances, determined with great precision and care) may be thus formulated: was there at the time such a condition of things that there was an actually existing peril of fire and not merely a fear that it might break out? The danger was present, and if nothing had been done spontaneous combustion and fire would have followed in the natural course. That means that the peril had begun to operate. In my view that case is no authority for the proposition put forward, although it affords some foundation for the argument of Mr. Maurice Hill when some of the words used in the judgment are taken without examination of the actual facts.

One other case referred to was *Butler* v. *Wildman* (1), and there the decision of the Court is plain and does not assist us. In that case there was a policy in common form, upon dollars being carried by a Spanish ship, Spain being then at war with certain parts of South America. Whilst carrying the dollars, the enemy's ship prepared to attack the Spanish ship, and the commander of the Spanish ship, seeing that he was in imminent danger of capture by the enemy's vessel, proceeded to throw a great part of the dollars into the sea in order to prevent their being of use to the enemy when the enemy captured the vessel, as eventually happened. In those circumstances the action was brought upon the policy, and one of the perils insured against was capture in respect of kings, princes and people, another was the peril of jettison, and also that of "all other losses

(1) 3 B. & Ald. 398.

and misfortunes." The Court came to the conclusion that the plaintiffs could have recovered if the insurance had only been against jettison, but that in any event the words "all other losses and misfortunes" were to be construed ejusdem generis and as covering such loss. But that is immaterial in the present case. It is material that the Court were of opinion that this was a loss which could have been recovered in respect of a peril of capture and restraint of princes; they said that as capture was imminent, and the captain did an act which was caused by the peril insured against, that is, capture, he could recover on that as well as on the other two grounds.

The case which is more in point is that of *Hadkinson* v. *Robinson* (1), in which the Court came to the conclusion that the doctrine of constructive total loss is only applicable to those cases in which it can be proved that the loss is occasioned by one of the perils insured against. In the words of Lord Alvanley C.J.: "It must be a peril acting upon the subject insured immediately, and not circuitously, as in the present case." Following the principle laid down by these decisions, I put this question: Was this loss occasioned by a risk within the policy, that is, was it a loss occasioned by capture? The answer is: Certainly not. The vessel never was in risk of capture, because she determined not to undergo the risk, the cargo never underwent the risk, because it was determined to discharge the cargo so as to avoid the risk. Therefore, never having come under the risk and the risk never having begun to operate, no claim can be made on this policy. In my judgment this appeal fails and must be dismissed.

PHILLIMORE L.J. I am of the same opinion, and as the Lord Chief Justice has so exactly expressed my own view of the case, I have nothing to add.

LUSH J. I am of the same opinion, and I fully agree with all that the Lord Chief Justice has said as to the action of the underwriters in this matter, which, to say the least of it, was unfortunate. Mr. Maurice Hill has not contended that anything

(1) 3 Bos. & P. 388.

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they did or wrote gave him a cause of action or contributed to his cause of action except in this sense, that it shewed (he said) that the risk of capture was not only probable but certain. We have, therefore, to see whether the loss of the cargo was really caused by the risk insured against—whether it was really caused by capture. Now it certainly is not necessary to prove that there was actually a capture, but it is necessary to shew, if there was not a capture, that the loss was caused by that peril, and to do that it must be shewn that the peril was the proximate cause of the loss. It seems to me on these facts impossible to say that the ship ever was in peril of capture. What was done in discharging the cargo was really done to prevent the ship ever coming into the peril; it was not done to arrest the consequences of any peril in which the ship actually was. That being so, it seems to me quite impossible to say that the one was the consequence of the other. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Waltons & Co.*

W. J. B

HEWITT BROTHERS *v.* WILSON.

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June 18, 19, 29.

Marine Insurance—Concealment of Material Fact—Innocent Mistake as to Materiality—"Held covered" Clause—Effect of.

A clause in a policy of marine insurance provided that "In the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged":—

Held, that the fact that the assured knew that the interest insured was incorrectly defined did not deprive him of the benefit of the clause if he honestly believed that the correct definition was not a matter which it was material for the underwriters to know.

TRIAL of action before Bailhache J. without a jury.

By a policy of marine insurance subscribed by the defendants the plaintiffs insured four cases of printing machinery on the ships *Gulf of Suez* and *Orchis* on a voyage from London to Malta against ordinary marine perils including risk of breakage. The policy provided that "In the event of claim for particular average or loss or injury to interest underwriters only to be liable for cost of replacing the parts lost or injured and all charges incidental thereto." It also contained the following clause: "In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." During the voyage a portion of the machinery was damaged by breakage. The action was to recover the amount of the loss so sustained.

The defence was that the plaintiffs had when effecting the policy omitted to disclose a material circumstance, namely, that the machinery was second-hand. There was evidence that the difficulty and cost of replacing lost or injured parts of machines were greater where the machines were second-hand and possibly out of date than where they were new. Evidence was also called by the plaintiffs to prove that it was unusual when insuring machinery on shipment to disclose whether it was new or old. The defendants had been in the habit of insuring different classes of machinery at one uniform rate.

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Langdon, K.C., and *H. Dobb*, for the plaintiffs. If the knowledge of the machinery being second-hand was in fact material, nevertheless the defendants by their course of business led the plaintiffs to believe that they did not so regard it and that they waived the information. In any case the plaintiffs are protected against the consequences of non-disclosure by the "held covered" clause. It may be that non-disclosure by assured who knew that the matter undisclosed was material for the underwriters to know would disentitle them to claim the benefit of that clause; but here the non-disclosure was innocent, the plaintiffs reasonably thought that the defendants attached no importance to the information.

Leck, K.C., and *F. D. Mackinnon*, for the defendants. The "held covered" clause is no answer to the non-disclosure, for the plaintiffs knew that the machinery was second-hand and that the description was consequently incorrect. Such a clause would not protect against a breach of warranty if the assured at the time of the insurance knew that he was breaking it.

Cur. adv. vult.

June 29. BAILHACHE J. read the following judgment:—This is a claim under a policy of marine insurance dated July 23, 1912. The policy was on a voyage from London to Malta by the steamers *Gulf of Suez* and *Orchis* and the interest insured was four cases of machinery. Of these cases three were new and one was second-hand. The case of second-hand machinery contained a printer's folding machine. On arrival at its destination this machine was found to be damaged, and it is in respect of this damage that the present action is brought. The policy covered risk of breakage and on a slip attached to the policy there is a replacement clause. The point taken by the underwriters is that they have a right to avoid the policy for concealment of a material fact. The four cases were all described as machinery. It is said that as this particular case was second-hand it ought to have been so described, and that the failure so to do was a concealment of a material fact. Evidence was given by underwriters of the materiality of the fact, especially where

the policy contains a replacement clause. The materiality consists in this, that the insurable value of second-hand machinery is comparatively small, while the cost of replacement where machinery is second-hand bears a much higher ratio to the insured value of the machinery than is the case where machinery is new. One of the witnesses said he never insured second-hand machinery except on f.p.a. terms, and the defendants' underwriter said he would not have insured it at all. The fact is certainly material and it was not disclosed, and the contention of the defendants would prevail as a matter of course but for the fact that the slip attached to the policy contained what is known as the "held covered" clause. The terms of the clause in this particular case are: "In the event of deviation being made from the voyage hereby insured or of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged." It is to be observed that this clause does not protect an assured from every concealment of a material fact, but only if and so far as the fact concealed affects the definition of the interest of the assured and renders it incorrect. I think the concealment in this case is a concealment of that kind. The description of this case of machinery as machinery merely, without the addition of the word "second-hand," was a concealment of a material fact, but it was also an incorrect definition of the interest insured. So far therefore the "held covered" clause would seem expressly to apply to this case. I think, however, one must look a little more closely into the clause and its object, and on so doing it appears to me that the clause is not intended to protect an assured who has intentionally misdescribed the interest insured. The clause deals first with deviation, and I am satisfied that an assured who at the time he insured knew that the carrying vessel intended to deviate from the insured voyage could not claim protection. I think by parity of reasoning the same must be true of an assured who intentionally misdescribed the interest insured. There must be something in the nature of mistake or misapprehension on the part of the assured to bring the clause into play, and the question is what sort of mistake. A mistake of fact will clearly do. If, for instance, in this case the assured did not know that

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the machinery was second-hand he would in my judgment be protected, true at a premium to be arranged, but still protected. Now the assured here were under no such mistake of fact. They were, however, under a misapprehension as to the necessity of describing this machinery as second-hand, and the mistake arose in this way: First, it is a common practice in this trade to ship all machinery, new or old, as machinery simpliciter. The proportion of second-hand machinery shipped is comparatively small. Secondly, they themselves had done so for years, and had on many previous occasions so insured with these same defendants. Thirdly, although machinery differs largely in its liability to breakage in transit, some kinds being more delicate than others, these underwriters had never inquired, as many underwriters do, as to the class of machinery they were insuring, but had taken it all at a uniform or flat rate of 12*s.* 6*d.* per cent., and that too irrespective of the length or nature of the insured voyage. Under these circumstances the plaintiffs say, and I believe them, that they thought these defendants were indifferent on the subject, and were, to use a popular expression, willing to take the rough with the smooth. In short the plaintiffs, though knowing that this machinery was second-hand, honestly thought that to describe it as machinery was a sufficient and correct definition of the interest insured. Is this such a mistake or misapprehension as entitles them to rely on the "held covered" clause? I think upon the facts of this case it is. I ought to say that it was not suggested that there was in this case any waiver or any estoppel. Taking the view I do of the "held covered" clause I give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Ashley, Tee & Sons.*
Solicitors for defendants: *Ballantyne, Clifford & Hett.*

J. F. C.

CANNELL AND THE CORPORATION OF TRINITY HOUSE, LONDON *v.* LAWTHER, LATTA & CO. AND ANOTHER.

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July 22.

[1914 C. 1575.]

Shipping—Pilotage—Compulsory Pilotage—Ship navigating in Compulsory Pilotage District for the Purpose of "making use" of any Port—Waiting outside Port for Orders—Pilotage Act, 1913 (2 & 3 *Geo.* 5, *c.* 31), *s.* 11.

By s. 11, sub-s. 1, of the Pilotage Act, 1913, "every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district" is bound to have a pilot on board.

The steamship *Anglo-Colombian*, laden with a cargo shipped at Antofagasta, was directed by the charterers, in accordance with power given them in that behalf in the charterparty, to proceed to Dover to wait for orders as to her ultimate port of destination. When the *Anglo-Colombian* arrived off Dover she stopped about a quarter of a mile outside the Admiralty Pier extension and signalled for orders. A motor boat, sent out by the charterers, then arrived alongside the *Anglo-Colombian* with a letter containing orders for her to proceed to Hamburg to discharge her cargo, and thereupon she proceeded to Hamburg:—

Held, that the *Anglo-Colombian* had made use of the port of Dover within s. 11, sub-s. 1, of the Pilotage Act, 1913, and, not being an excepted ship, was bound to have a pilot on board.

ACTION tried by Bailhache J. without a jury.

The plaintiffs claimed (1.) a declaration that the steamship *Anglo-Colombian* belonging to the defendants was, on April 16, 1914, bound to be under the compulsory pilotage of a licensed pilot of the London district, and was bound to employ the plaintiff Cannell as a pilot from Dungeness to Dover; (2.) a declaration that the said steamship on that date was making use of the port of Dover within the meaning of s. 11 of the Pilotage Act, 1913; and (3.) payment of pilotage dues and shipping money amounting to 4*l.* 15*s.*

The plaintiffs the Corporation of Trinity House, London, were the pilotage authority for the London pilotage district, and the plaintiff Cannell was a pilot duly licensed by the Trinity House to pilot all classes of ships in the London pilotage district between Dungeness and Gravesend.

On April 16, 1914, the *Anglo-Colombian*, a British screw

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steamship, laden with a cargo of nitrate shipped at Antofagasta, passed Dungeness whilst in the course of performing a charter-party under which she was to proceed to Dover, where she was to receive orders from the charterers as to her port of discharge. At 2 A.M. she arrived off Dover, stopped her engines, and signalled for orders. At 2.25 A.M. a motor boat, which had been sent out by the charterers at their own expense, arrived alongside with a letter containing orders for the *Anglo-Colombian* to proceed to Hamburg to discharge, and she then proceeded accordingly to Hamburg.

At the time the motor boat went alongside, the *Anglo-Colombian* was about a quarter of a mile outside and to the southward and eastward of the eastern end of the Admiralty Pier extension.

The *Anglo-Colombian* was not an excepted ship within the provisions of the Pilotage Act, 1913; and whilst passing Dungeness and proceeding towards Dover she was not under the pilotage of any pilot, and neither her master nor her mate possessed a pilotage certificate. Pilotage being compulsory in the London district east of Dungeness, the plaintiff Cannell offered, whilst the *Anglo-Colombian* was passing Dungeness, to take charge of the ship, but his offer was refused by the master. If Cannell's offer had been accepted he would have been entitled to receive 4*l.* 15*s.* as pilotage dues and shipping money. He claimed that amount from the defendants, but payment was refused. Thereafter an agreement in writing was made between the solicitors for the plaintiffs and the solicitors for the defendants that this action should be brought in the Commercial Court to obtain a decision on the question whether the *Anglo-Colombian* was in the circumstances above stated bound by law to employ the plaintiff Cannell as a pilot, and to recover the amount of the pilotage dues and shipping money claimed by the plaintiff Cannell.

C. Robertson Dunlop, for the plaintiffs. The question is, was the *Anglo-Colombian* "making use" of the port of Dover within the meaning of s. 11, sub-s. 1, of the Pilotage Act, 1913 (1), so as

(1) Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 11, sub-s. 1: "Every ship) (other than an excepted ship while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering,

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to be under the necessity of having a pilot on board? The words "making use" must have a different meaning from "entering" and "leaving" which are also used in the sub-section; they must include stopping outside the port for some purpose and making use of it. In this case the steamship called at Dover for orders; that was "making use" of the port. In *British Motor Syndicate* v. *Taylor* (1) Stirling J. had to consider the words "making use" of an invention, and in the course of his judgment he cited from Johnson's Dictionary the definition there given of the word "use," namely, "to employ to any purpose." Here, the defendants employed the port of Dover for the purpose of getting orders. The object of the Pilotage Act, 1913, is to ensure the safety of navigation, especially in the neighbourhood of land and in crowded waters, and for this purpose it insists on the employment of a pilot. The necessity for having a pilot on board this steamship was quite as great at the point where she stopped to receive her orders brought by the motor boat as if she had actually entered the commercial port of Dover.

W. Norman Raeburn, for the defendants. The steamship by stopping a quarter of a mile off the end of the breakwater at Dover and there receiving the letter brought by the motor boat did not "make use" of the port of Dover within the meaning of that expression in s. 11, sub-s. 1, of the Pilotage Act, 1913. "Making use" of a port means making use of it as a port; that is, making use of the facilities provided by the port authority. What was done in this case was merely making use of Dover, not of its port, as a convenient geographical place from which orders might be communicated to the steamship. Suppose she had passed Dover without stopping and had received her orders from Dover by a semaphore message or by wireless telegraphy, that would be making use of the place but not of the port. Or, again, suppose, as might possibly have been done, she had received a wireless message from Marconi House, London; in

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leaving, or making use of any port in the district . . . . shall be either—

"(*a*) under the pilotage of a licensed pilot of the district; or

"(*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship."

(1) [1900] 1 Ch. 577.

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such a case it could not be said that she was "making use" of the port of London. If a vessel does something which involves no user of the facilities provided by the port authority but merely involves taking advantage of the convenient geographical position of the place she is not "making use" of the port although she may be "making use" of the place. In many places large vessels do not enter the port but load or discharge into lighters outside. That is an instance of a vessel "making use" of the facilities of the port.

[BAILHACHE J. Is there any difference between receiving goods from a lighter and receiving a letter from a boat?]

In the latter case the facilities of the port are not made use of. In this case nothing was done for which any payment was made to the port authority. As to the argument based on the likelihood of danger: this vessel would have been in precisely the same danger if she had gone to the same point of proximity to Dover and had not in fact stopped but had proceeded on her voyage to Hamburg. If she had done so she would not have been bound to have a pilot on board.

C. Robertson Dunlop in reply. The distinction sought to be drawn by the defendants between Dover, the place, and the port of Dover cannot be maintained. By s. 62 of the Pilotage Act, 1913, that Act is to be construed as one with the Merchant Shipping Act, 1894, and by s. 742 of the latter Act it is provided that "'Port' includes place." Further, there is no difference for the present purpose between taking goods from a lighter and taking a letter from a motor boat. Both operations, from the point of view of navigation, are precisely the same. In this case a designed use was made of the port or place of Dover, and that involves the necessity of employing a pilot.

BAILHACHE J. The question in this case is no doubt of very general importance, but the point lies within a very small compass, and as I have made up my mind upon it there is nothing to be gained by further considering my judgment.

The question is whether the steamship, the *Anglo-Colombian*, which was upon a voyage with a cargo of nitrate from Antofagasta

to a destination which ultimately proved to be Hamburg, became subject to compulsory pilotage. At the material time she had passed eastward of Dungeness and was within the London pilotage district. By s. 11, sub-s. 1, of the Pilotage Act, 1913, it is provided that "every ship (other than an excepted ship)"—and the *Anglo-Colombian* was not an excepted ship—"while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district . . . . shall be either—(*a*) under the pilotage of a licensed pilot of the district; or (*b*) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship." As neither the master nor the mate of the *Anglo-Colombian* had a pilotage certificate, the steamship was bound to have a pilot on board if, when she had passed to the eastward of Dungeness, she was "entering, leaving, or making use of any port in the district." It is not suggested that she was entering or leaving the port of Dover, but it is said on behalf of the plaintiffs that she was "making use" of that port. By the charterparty the charterers had the option of ordering her to Dover to wait for orders, and they exercised that option. She pursued her usual course to Dungeness, and then altered it a little to bring her close to Dover to get the orders she was to receive there. She arrived off Dover on April 16, 1914, and was brought pretty close to the end of the breakwater—the precise position is not material—and a boat came out to her with orders to proceed to Hamburg. She received those orders and immediately thereafter proceeded to Hamburg. Did she in so doing make use of the port of Dover? At one time the question was raised whether she got within the limits of the port itself, and the boatman who took out the orders to her was called and said that he delivered those orders at a point within the limits of the dockyard port of Dover, but in my judgment this is immaterial, because I think the port referred to in s. 11 of the Pilotage Act, 1913, is not the dockyard port, but the commercial port. Did the *Anglo-Colombian* make use of the commercial port of Dover? What is "making use" of the port? It appears to be conceded that if she had slowed down in the way she did for the purpose of putting something or

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some one on shore at the port of Dover she would have been making use of the port, and personally I see no difference between a case like that and the present case where she altered her course for the purpose of approaching the port, not to put something or some one on shore, but for the purpose of receiving something or some one from the shore. The steamship was I think directed, under the option given by the charterparty, to proceed to Dover because there are at the port of Dover the necessary facilities which are desired and required for the purpose of conveniently conveying orders as to her ultimate destination. I think Dover was inserted in the charterparty because there is a port of Dover where these facilities are found. It is true that in this case the facilities of the port required by the ship were not shelter or cranes for loading or discharging her or anything of that kind; the only facilities required were those existing at Dover for conveying orders to the ship, and by taking advantage of those facilities the ship was, in my judgment, "making use" of the port of Dover within the meaning of s. 11. I should be sorry if I had to decide otherwise, and for this reason: the compulsory pilotage sections of the Pilotage Act, 1913, are for the purpose of safeguarding navigation, and although in this particular instance the steamship did not enter or leave the commercial port of Dover she approached closer to the commercial port than if she had not had to call there for orders, and the dangers of navigation are very much the same whether a vessel calls for orders or whether she enters the port. The necessity for compulsory pilotage is almost as great in the one case as in the other. The words "making use" of any port in the district clearly include such a use of the port of Dover as the vessel made on the occasion in question. My judgment must therefore be for the plaintiffs. There will be a declaration in the terms of the claim on the writ and judgment for the amount of the pilotage dues.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Sandilands & Co.*

Solicitors for defendants: *Holman, Birdwood & Co.*

J. S. H.

MELLOR AND OTHERS, APPELLANTS *v.* LYDIATE, RESPONDENT. 1914 *July* 16, 17, 31.

Licensing Acts—Sale of Liquor without Licence—Principal and Agent—Sale by Licensed Agent on behalf of Unlicensed Principal—Offence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-s.* 1.

Sect. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910, prohibits the sale of intoxicating liquor by a person who does not hold a justices' licence authorizing him to hold an excise licence for the sale of that intoxicating liquor.

The appellants were brewers and the owners of a fully-licensed public-house, the business of which was carried on by a resident manager appointed by the appellants under an agreement which required him to conduct the business under such rules and in such manner as the appellants should direct and to account to the appellants for the proceeds. The beer sold at the public-house was the property of the appellants. The justices' licence granted in respect of the premises was in the name of the manager and not of the appellants. Beer was purchased on a certain date on the premises by the respondent, the actual conduct of the sale being carried out by the manager. In respect of this sale of beer the appellants were charged with a contravention of s. 65, sub-s. 1, of the Act of 1910 :—

Held, that the appellants had not sold the beer to the respondent in contravention of s. 65, sub-s. 1, and were not guilty of the offence charged.

Dunning v. *Owen* [1907] 2 K. B. 237; 76 L. J. (K.B.) 796, distinguished.

CASE stated by the stipendiary magistrate for Liverpool.

An information dated February 18, 1914, was preferred by Robert Lydiate, the respondent, against James Mellor and others, trading as James Mellor & Sons, the appellants, for that they in the city of Liverpool on February 14, 1914, did unlawfully sell by retail certain intoxicating liquor, to wit, beer, without holding a justices' licence authorizing them to hold an excise licence for the sale of such liquor, contrary to the provisions of s. 65 of the Licensing (Consolidation) Act, 1910. (1)

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65: "(1.) Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor."

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On the hearing of the information the following facts were proved or admitted:—

(A) The appellants were a partnership firm carrying on the business of brewers and wholesale wine and spirit merchants in Liverpool, for which purposes they held the necessary wholesale licences.

(B) The appellants were the owners of several fully-licensed public-houses in Liverpool, including in particular one known as the "Central Vaults" at 30, Tithebarn Street (hereinafter referred to as "the licensed premises").

(C) The appellants held no justices' licence in respect of the licensed premises.

(D) The justices' licence in respect of the licensed premises was on February 14 last, and had for some years past been, held by Mr. Henry Smith.

(E) Henry Smith was the manager of the licensed premises for the appellants under an agreement dated March 18, 1907. The agreement, a copy which was annexed to and formed part of the case, was as follows:—

"Agreement made the eighteenth day of March, 1907, between James Mellor & Sons by one of its directors and duly authorised under its common seal in this behalf of the one part and Henry Smith (hereinafter designated the 'manager') of the other part.

"Whereas the said company (hereinafter designated the 'owner') is the owner of the public house No. 30 Tithebarn Street in the city of Liverpool and has agreed to engage the manager to manage the same at the weekly wage of thirty-five shillings and upon the terms and conditions herein stated.

"In consideration of such engagement and weekly sum the manager agrees as follows namely:—

"1. That he will enter the service of the owner as such manager as aforesaid.

"2. That he and the persons assisting him in the management of the business for the time being carried on in the said public house shall and will conduct himself and themselves in a proper and orderly and sober manner.

"3. That he and they shall and will conduct and manage the said public house and the business carried on therein under such

rules and in such manner as the owner shall require and in a quiet and orderly manner and use his best endeavours to preserve and maintain the custom and business thereto.

"4. That neither he nor his wife nor servants nor any agent assisting him in the conduct of the business shall do or suffer any act or thing which may afford or be likely to afford any reasonable pretext for the refusal or suspension of the licences attached to the said premises or for any information or complaint to be laid or made against him or the premises.

"5. That he will annually at the proper time so long as he shall remain in the said premises apply for and obtain the renewal of the said licences.

"6. That he shall personally attend to the said business and devote his whole time and attention thereto.

"7. That he will keep proper books of account (which will be provided by and be the property of the owner) and shall enter therein daily in the mode prescribed by the owner an account of all moneys received by him on that day and of all moneys paid by him that day for sundries which he may be authorised by the owner to provide.

"8. That such books shall remain upon the said premises and shall not be removed therefrom upon any pretence whatever and shall at all times be open to the owner's inspection and to the inspection of any person whom the owner may appoint for that purpose who shall be at liberty to take copies of or extracts from the said books or to remove the same from the said premises and to substitute other book or books therefor as may be thought fit.

"9. That the manager shall every Monday by 10 o'clock in the forenoon make out an account of the previous week's takings according to the mode prescribed by the owner with an account of the moneys paid for sundries as aforesaid during such week and shall hand over the said takings (less such payments for sundries) to the owner or any person whom the owner may appoint to receive the same.

"10. That he the manager shall not sleep away from the said premises without the assent of the owner.

"11. That whenever he shall be required by the owner so to

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do he will give up vacant possession of the said public house and premises and sign the necessary notices for the transfer of the said licences both by temporary authority by endorsement at petty sessions and by complete transfer at special sessions into the name of any person whom the owner may appoint and in the event of the manager's refusal or neglect to do so the owner by the secretary or any director or officer of the owner is hereby empowered to sign the said notices in the owner's name as the authorised agent of the manager.

"12. That he will at his own expense if in the city of Liverpool (but if elsewhere on being paid a reasonable sum for travelling expenses) attend before the justices both at the petty sessions and also at the special sessions for transferring licences and apply for the transfer of the said licences to the nominee of the owner and that he will also sign the withdrawal of his entry at the excise and do all other acts necessary to perfect such transfer.

"And it is hereby agreed and this agreement is upon this express condition namely that if the manager or his wife agent or any of his servants shall act in any way or do any act in contravention of the rules for the time being or any of them for the conduct of the said public house and premises prescribed by the owner then this agreement shall (at the owner's option) be at an end and the manager may be thereupon dismissed from the said public house and premises And it is hereby further agreed that this agreement may be determined and put an end to by either party giving to the other of them one week's notice of his intention to put an end hereto but the owner may at any time put an end to the same by paying to the manager the current week's wages and an additional week's wages in lieu of notice And further that on the determination of the said agreement by either of the modes aforesaid the manager shall make and give to the owner a final account of the transactions and pay over any moneys then due from him and shall then and there deliver up vacant possession of the said public house and premises and the fixtures trade utensils and stock therein to the owner or to the owner's agent And it is hereby lastly agreed and declared that the owner may at any time enter upon the

said premises and upon the determination of this agreement as aforesaid resume possession of the same and of the said fixtures utensils and stock and if the manager shall refuse to deliver up vacant possession of the premises he his wife servant or servants agent or agents shall be deemed a trespasser and trespassers and the owner or the agent or agents of the owner may expel—by force if necessary—the manager his wife and any other person or persons then found on the said premises.

"As witness the hands of the parties this eighteenth day of March nineteen hundred and seven.

"Signed by the said parties in the presence of "John Mills "21 Church Road "Walton. } James Mellor & Sons Henry Smith.

"I hereby agree with the owners that I will not at any time sell or permit to be sold on the licensed premises any ales, porter or stout for consumption on the said premises at less price than $2\frac{1}{2}d.$ per pint or $1\frac{1}{2}d.$ per half pint, nor any ales, porter or stout for consumption off the said premises at a less price than $2d.$ per pint or $1d.$ per half pint.

"The greatest possible vigilance must be exercised in serving women in the house. Where women are served at all they are only to be supplied with reasonable refreshments, and are not to be allowed to remain for an undue length of time upon the premises. Any woman of known bad character or of drunken habits must be refused altogether. No messenger known to be sent by any person who has been refused drink on the premises must be supplied.

"(Signed) H. Smith."

(F) The licensing justices when granting the licence to Smith were satisfied that he was a fit and proper person to hold a licence.

(G) Smith was resident on the licensed premises in accordance with the agreement and with the conditions made

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by the justices in granting the licence to him. He personally conducted the sale of the intoxicating liquor on the licensed premises and was responsible for the management of the licensed premises. The whole of the intoxicating liquor stocked in and sold at the licensed premises was the property of the appellants, and the appellants received the whole of the moneys arising from the sale thereof less only the deductions therefrom permitted by the agreement to be made by Smith. The licensed premises were rated in the rate-book under the name of the appellants and there appeared outside the licensed premises such signs as "Mellor's Old Derby Ale Stores," "Mellor's Wine and Spirit Stores," "Mellor's Luncheon Bar," &c.

(H) The appellants had been the owners of the licensed premises for many years, and before Smith first obtained the licence in 1907. The agreement was produced to the licensing justices, who had full knowledge of its terms and of the capacity in which Smith was to become the licensee.

(I) The respondent purchased intoxicating liquor at the licensed premises on February 14, 1914, and the actual conduct of the sale was by Smith.

(K) The appellants always exercised a strict supervision over Smith, who accounted weekly to the appellants for the takings on the licensed premises in accordance with the terms of the agreement.

(L) The business and assets (including the licensed premises) of the appellants had since February 14, 1914, been transferred to a company limited by shares.

(M) There are some 1500 persons in Liverpool holding justices' "on" licences, and of this number there are about 1050 who hold such licences with the full knowledge and approval of the licensing justices as managers for brewing firms under agreements similar to that of Smith in this case, and this system of licensing managers for brewing owners of public-houses has been in force in Liverpool for over thirty years past.

On behalf of the respondent it was contended that the sale on February 14, 1914, was in law and in fact a sale by the appellants at the licensed premises, and that as the appellants did not hold a justices' licence enabling them so to sell, they ought to be

convicted of an offence under s. 65 of the Licensing (Consolidation) Act, 1910. In support of this contention the cases of *Dunning* v. *Owen* (1), *Peckover* v. *Defries* (2), and *Williamson* v. *Norris* (3) were cited.

On behalf of the appellants it was contended that the fact that all the circumstances in connection with the licensing of the premises were known to the licensing justices at the time when they granted the licence to Smith was a sufficient protection to the appellants against any liability under s. 65, and, further, that although it was a fact that the licence in existence for the licensed premises was in the name of Smith, yet he was, and was well known to be, only acting for and on behalf of the appellants whose business was being carried on and whose intoxicating liquor was being sold by his hands, and that therefore no offence as charged had been committed by the appellants.

The magistrate was of opinion that he was bound by *Dunning* v. *Owen* (1) to hold that there had been a sale in law by the appellants on the licensed premises and that, as they did not hold a justices' licence for that purpose, they ought to be convicted, and he accordingly convicted them.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Sir R. B. Finlay, K.C., and *Rigby Swift, K.C.* (*Bodkin* with them), for the appellants. The magistrate convicted the appellants contrary to his own opinion in deference to what he thought was decided in *Dunning* v. *Owen* (4), but an examination of the judgments in that case as reported in the *Law Journal*, which contains a fuller report than the *Law Reports*, shews that Darling J. in that case said in express terms that the decision had no application to the practice of carrying on the business of licensed premises by means of a manager who is the licence holder. The facts there were that the person holding the licence was in no sense the manager of the business, but was at most

(1) [1907] 2 K. B. 237.
(2) (1906) 95 L. T. 883.
(3) [1899] 1 Q. B. 7.
(4) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.

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merely the nominee of an unlicensed person, the latter having the entire control and conduct of the business. If the decision in *Dunning* v. *Owen* (1) does cover the present case and justify the conviction of the appellants, it is wrong and ought to be reconsidered. The question is, did the appellants sell the liquor to the respondent within the meaning of s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910? For the purpose of construing s. 65 regard must be had to the Act as a whole, for the section contains the words "subject to the provisions of this Act," and a transaction which would clearly constitute a sale by the appellants in the ordinary legal sense of the word or for the purposes of the Sale of Goods Act, 1893, is not necessarily a sale by the appellants within the meaning of s. 65. The true view is that the section only applies to a sale by a person who, whether he is the owner of the liquor sold or the agent of the owner of the liquor, is the person who has the actual and effective control and management of the business carried on on the premises, a person, that is, who under the Act ought to hold the licence: *Williamson* v. *Norris* (2), per Lord Russell of Killowen C.J. The manager, and not the appellants, was, therefore, the person who sold the liquor in this case within the meaning of s. 65, sub-s. 1. The language of ss. 67, 68, and many other sections of the Act points to the same conclusion, namely, that when the Act speaks in s. 65 of a sale of intoxicating liquor, the person who sells is the person who has the actual control of the business, whether as principal or manager: *Templeman* v. *Trafford.* (3) But even in the Act itself the word "sell" is not always used in the same sense, for it was held in *Caldwell* v. *Bethell* (4) that not only the licence holder but a barman also could commit the offence of selling in contravention of s. 69; whereas in *Williamson* v. *Norris* (5), the House of Commons case, it was held that a waiter could not be convicted under s. 3 of the Licensing Act, 1872, which corresponds with s. 65 of the Act of 1910.

There is nothing in the Act of 1910 to support the view that an agent or manager cannot be a licence holder or that the

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
(2) [1899] 1 Q. B. 7, at p. 13.
(3) (1881) 8 Q. B. D. 397.
(4) [1913] 1 K. B. 119.
(5) [1899] 1 Q. B. 7.

licensee must be the owner or lessee of the premises. Under s. 1 of the Alehouse Act, 1828, licences might be granted to "persons keeping or being about to keep inns," and when this section was replaced by s. 9 of the Act of 1910 the language was altered, for s. 9 authorizes the granting of justices' licences to any person whom they may deem fit and proper. Sects. 20, 22, 23, and other sections of the Act of 1910 also clearly contemplate that a person other than a tenant of the premises may be the holder of a licence. A long series of authorities shews that the idea that an agent or manager cannot be a licence holder is absolutely novel and one that has never been acted on: *Brooker* v. *Wood* (1); *Ritchie* v. *Smith* (2); *Mayhew* v. *Suttle* (3); *Dixon* v. *Birch* (4); *Watteau* v. *Fenwick* (5); *Reg.* v. *Lyon* (6); *Nix* v. *Nottingham Justices* (7); *Peckover* v. *Defries* (8); *Stansfeld & Co.* v. *Andrews* (9); *Kinahan & Co.* v. *Parry* (10); *Hickton* v. *Hodgson.* (11)

If it can be said that the appellants sold the liquor within the meaning of s. 65 by reason of the fact that the sale was by their agent, then equally the holding of a licence by their agent makes the appellants the holders of a licence, and therefore no offence was committed by them. It cannot have been intended that, where the actual sale is carried out by the person expressly authorized by his licence to sell, some third parties should be guilty of a contravention of s. 65.

Leslie Scott, K.C. (*Howard Jones* with him), for the respondent. The facts found by the magistrate disclose all the elements necessary to constitute a sale by the appellants, and although it is possible that the word "sell" may in some parts of the Act of 1910 have a meaning different from the ordinary legal meaning of the word, no reason has been or can be suggested why it is not to be construed in its ordinary sense in s. 65, the language of which is free from any ambiguity. It is impossible to suggest any kind of sale which could have been contemplated by s. 65 which could

(1) (1834) 5 B. & Ad. 1052.
(2) (1848) 6 C. B. 462.
(3) (1854) 4 E. & B. 347.
(4) (1873) L. R. 8 Ex. 135.
(5) [1893] 1 Q. B. 346.
(6) (1898) 62 J. P. 357.
(7) [1899] 2 Q. B. 294.
(8) 95 L. T. 883.
(9) (1909) 100 L. T. 529.
(10) [1911] 1 K. B. 459.
(11) (1913) 110 L. T. 380.

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prevent the facts of the present case from constituting a sale by the appellants. A sale in the ordinary sense involves the transfer of the property in an article owned by the vendor to the purchaser, and the question as to who was the owner of the property transferred was the determining principle underlying the decisions in *Dunning* v. *Owen* (1), *Peckover* v. *Defries* (2), and *Williamson* v. *Norris*. (3) The question whether the appellants sold the liquor is not affected by the fact that the manager was the holder of the licence. If a manager is not the licence holder, and if on a true view of the facts there is a sale by the owner of the liquor, the fact that the manager was in this case the licensee cannot make any difference to the position of the appellants, the other facts being the same.

[LUSH J. Can a manager who is the licence holder be guilty of the offence under s. 65, sub-s. 6, of being privy to a sale in contravention of s. 65?

AVORY J. Might he also be guilty of aiding and abetting the commission of an offence under sub-s. 1 of s. 65?]

Yes. The fact that he is the holder of the licence does not protect him from liability if he is privy to the commission of offences by other persons, even though they are in fact his principals. It is not disputed that the manager could be convicted under s. 75 for selling liquor to a drunken person, but a distinction must be drawn between the meaning to be given to the word "sell" in s. 65, the provisions of which constitute a condition precedent to the right to sell at all, and in s. 75 and other sections which deal with the conditions and manner in which sales by a licence holder shall take place.

Even if the seller for the purposes of s. 65 is, as the appellants contend, the person who has the control and management of the business, the manager in the present case does not satisfy that test, for the terms of the agreement under which Smith was appointed shew that the entire control of the business was retained by the appellants. The liquor was not sold by Smith within the meaning of s. 65: *Graff* v. *Evans* (4); *Lynam* v.

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
(2) 95 L. T. 883.
(3) [1899] 1 Q. B. 7.
(4) (1882) 8 Q. B. D. 373.

O'Reilly (1); *Newell* v. *Hemingway* (2); *National Sporting Club* v. *Cope*. (3) [*Pletts* v. *Campbell* (4) and *Pletts* v. *Beattie* (5) were also referred to.]

No reply was called for.

LORD READING C.J. The Court is of opinion that this appeal must be allowed. The reasons for our decision will be put into writing.

July 31. The following written judgments were delivered.

LORD READING C.J. The appellants were a partnership firm of brewers who were also the owners of various fully-licensed public-houses in Liverpool, including the public-house known as the Central Vaults. One Henry Smith had acted for them since March, 1907, as the manager of the Central Vaults and of the business there conducted, and had ever since that date, and in particular on February 14, 1914, held a justices' licence authorizing him to sell intoxicating liquor by retail on the said premises. On this date Henry Smith sold a pint of beer to the respondent at the said public-house, that is, he actually conducted the sale and received the money therefor from the respondent. The liquor stocked at the public-house and that sold to the respondent was the property of the appellants. Under the agreement in writing of March 18, 1907, between the appellants and Henry Smith, he undertook to manage the public-house and the business there conducted in a proper, quiet, and orderly manner and under such rules and in such manner as the owner should require. He further agreed not to do anything which might afford a reasonable pretext for the refusal or suspension of the licences attached to the premises and undertook annually to apply for and obtain the renewal of these licences.

Upon these facts the respondent instituted proceedings against the appellants for having contravened the provisions of s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910 (10 Edw. 7

(1) [1898] 2 I. R. 48.
(2) (1888) 60 L. T. 544.
(3) (1900) 82 L. T. 352.
(4) [1895] 2 Q. B. 229.
(5) [1896] 1 Q. B. 519.

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& 1 Geo. 5, c. 24), which, so far as material, is in the following words: "Subject to the provisions of this Act a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor." The learned magistrate convicted the appellants and inflicted a nominal fine. In giving his decision he said that had the matter been "res integra" he should have held that no offence had been committed, but that he felt bound by reason of the judgment in *Dunning* v. *Owen* (1) to decide against the appellants. This Court has now to determine whether the appellants have committed any offence under s. 65 of the statute in question.

On behalf of the respondent it is contended that as the appellants were the owners of the public-house and of the intoxicating liquor there sold, and as the business on the premises was conducted by Henry Smith, their servant, who was under their control and supervision and was acting on their behalf and for their benefit, the sale to the respondent was a sale by the appellants, and as they were not the holders of a justices' licence, they had committed an offence under the statute.

On behalf of the appellants it was contended that there had been no sale by them within the meaning of the words in s. 65, and that in any event their servant, for whose act it was sought to make them responsible under the statute, was the holder of a justices' licence, and, therefore, that the requirements of the statute had been met.

The matter in dispute is of considerable public importance, and particularly in Liverpool, inasmuch as in that city alone the licensing justices have adopted and followed for over thirty years last past the policy of granting justices' licences to brewers' managers under agreements similar to that forming part of this case. Of 1500 persons holding justices' on-licences in that city there are about 1050 who hold such licences to the knowledge of the licensing justices and with their approval in the same way as Henry Smith, and under agreements similar to that between him and the appellants.

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.

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The question to be decided depends upon the construction of the words in the section, and particularly upon the meaning to be attributed to the words "shall not sell or expose for sale." If it were right to construe this section as if we were determining the rights and obligations of the parties to a contract of sale it could not be doubted, as a general principle of law, that a sale by a servant authorized in that behalf is a sale by the principal, at least to the extent of imposing upon the latter the burdens and the advantages of the contract. But I cannot think that when the Legislature enacted that a justices' licence should be required as a condition precedent to the right of selling intoxicating liquor by retail on the licensed premises it intended that every person who might be made liable as a contracting party to a contract of sale must hold a justices' licence for such sale notwithstanding that he took no part in the actual conduct of the sale on the premises. The justices' licence is not required for revenue purposes, it is required for the protection and preservation of public morals, and for the prevention of offences which are subversive of good order and the public safety: *Ritchie* v. *Smith*. (1) The object of the statutory requirement is to make the person who conducts and manages the business there transacted responsible to the licensing justices for its proper and orderly conduct and management in accordance with the requirements of the statute and of the licensing justices acting in pursuance thereof. It is clear that the word "sell" has different meanings in different sections of this statute. For example, it cannot be doubted that the barman or other assistant under the control or direction of the holder of the licence does not commit an offence under s. 65 when he sells a pint of beer across the counter to a customer (per Lord Russell C.J. in *Williamson* v. *Norris* (2)). The Lord Chief Justice in that case said that the true meaning of the section is that the sale which is prohibited must be a sale by the person who ought to be licensed. If a person is placed on the premises for the purpose of taking charge and control of the premises and the business there conducted, he is the person who, in my opinion, requires the protection of a justices' licence, and that notwithstanding that he is responsible

(1) 6 C. B. 462, at p. 474. (2) [1899] 1 Q. B. at p. 13.

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to principals for the good conduct and management of the premises and business and is acting for their benefit and as their servant. He remains responsible to the justices ; he is a person deemed by them, in the exercise of their discretion, a fit and proper person to whom a licence should be granted (s. 9 of the Licensing (Consolidation) Act, 1910). On the other hand under s. 69 of the statute every person who sells is held to include every person who does the physical act of transferring the liquor to the purchaser, and includes the barman or other person as well as the licence holder. In the present case, the question is whether the appellants can be said to have sold the liquor under s. 65. There has been only one sale, and that was the sale actually conducted by Henry Smith, who is the licence holder. In my judgment there cannot be under this section one sale physically made by him for which a licence is required and another, arising out of his acts, by the appellants as a firm and by each of the members of the firm. If the sale was not by him but by the appellants, it would mean that the person placed by the appellants on the premises to manage and conduct the business there did not require to hold a licence. For the reasons I have already given, I think he is the person aimed at by Parliament in this section, who requires the protection of a justices' licence. As he held a licence, the appellants have not aided or abetted him in committing an offence under this section. I am, therefore, of opinion that the appellants did not sell the liquor to the respondent within the meaning of the section and have, therefore, not committed the offence of which they have been convicted.

An examination of the case of *Dunning* v. *Owen* (1) as reported in the *Law Journal* makes it plain that nothing that I have said in this judgment is in conflict with that decision. That case applied the principle of law laid down in *Peckover* v. *Defries* (2) to the facts of the case then before the Court. It did not lay down any new principle of law. Upon the facts of *Dunning* v. *Owen* (1) it was clear to the Court that the licence holder was a mere dummy or nominee and was a person who in fact had

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
(2) 95 L. T. 883.

nothing to do with the conduct or management of the premises or the business. At the outset of his judgment Darling J. made it clear that he was not intending to decide the larger questions which had been argued before the Court, but confined himself to a decision on the facts of the case. Certainly I do not intend in my judgment to detract in the slightest degree from, or otherwise to weaken, the full effect of the judgments in *Dunning* v. *Owen* (1) and *Peckover* v. *Defries* (2), which in my opinion are right and salutary decisions.

I am of opinion for the reasons given that this appeal should be allowed and the conviction quashed.

DARLING J. This case raises a question under the Licensing (Consolidation) Act, 1910, s. 65, which enacts that "Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence" &c. It seems to me that the prohibition contained in the words quoted is not absolute, and that a person not holding a justices' licence may lawfully sell by retail intoxicating liquor, provided he does so "subject to the provisions of this Act," and such I think was the sale by the appellants. They were the owners of the licensed house, and the liquor was there sold and dispensed by Henry Smith; he was resident on the licensed premises, and was there acting entirely as manager of the business carried on by virtue of the agreement set out in the special case. The Court need not be embarrassed by the judgments in the case of *Dunning* v. *Owen* (1), and still less by *Peckover* v. *Defries* (2), for in the latter case the point here to be decided did not arise, and in the former one it was expressly reserved. Smith, being the manager for the appellants of the whole business conducted on their premises, did undoubtedly sell liquor there within the meaning of the Act, and therefore he needs the protection of a justices' licence. Of course there was a sale by, or at least on behalf of, the appellants of whatever liquor of theirs was by their managing agent sold, but such a sale by them is not necessarily a selling of the kind for which they require a licence. The whole

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
(2) 95 L. T. 883.

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transaction may be regarded thus : The appellants did sell their goods on the licensed premises, but merely through and by means of Smith, their fully authorized agent or manager, knowingly licensed to act in this manner on his principals' behalf. This selling was by a licensed person of goods to which the licence properly applied, and was entirely within the contemplation of the justices who granted it. But there was no complete and perfect sale without the concurrence of the principal and agent alike, and so the person conducting the sale was the alter ego of the appellants. Perhaps it would be a refinement to say that, having regard to the agreement between them, the principal and agent are rightly to be considered as a dual or complex personality, one holding a licence for the benefit of both, just as joint tenants of a copyhold estate are equally possessed of the entire holding, although only one of them is admitted tenant on the roll of the manor.

In my view the appellants did not sell liquor contrary to the provisions of the Act, and so the conviction should not stand.

BANKES J. This is a special case stated by the stipendiary magistrate at Liverpool in order to raise the question whether the appellants were rightly convicted by him of selling intoxicating liquor without being duly licensed. The material facts are that the appellants are brewers at Liverpool and owners of certain licensed premises known as the Central Vaults in Tithebarn Street. The appellants appointed one Smith as their manager to conduct their business upon the said premises upon the terms that he was to have the entire management and be paid a weekly salary, accounting weekly to the appellants for all moneys received. The appellants themselves supplied the intoxicating liquors. The terms of the engagement are contained in a written agreement, which forms part of the special case. Smith applied to the licensing justices for a licence authorizing him to sell intoxicating liquor at the said premises. The agreement was produced to the justices, who, with full knowledge of all the circumstances, granted him the licence. The effect of the granting of the licence was that the premises became licensed premises within the meaning of the Licensing (Consolidation)

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Act, 1910, and Smith became the holder of the licence, and as such the person who, under the group of sections headed "General Regulations as to the Sale of Liquor and Conduct of Licensed Premises," is responsible for the proper conduct of the licensed premises. The premises are treated in the Act as Smith's premises; for instance, s. 75, sub-s. 1, provides that "The holder of a justices' licence shall not permit drunkenness . . . . on his premises, or sell any intoxicating liquor to a drunken person." In my opinion the holder of a licence who serves a customer, or who authorizes him to be served with intoxicating liquor on the licensed premises, sells the liquor to the customer within the meaning of the Licensing Act. To contend that he does not do so because the liquor is not his property but belongs to some one else would be, in my opinion, a hopeless contention.

In the present case the respondent applied to be served upon the licensed premises, and was served with intoxicating liquor by Smith, the holder of the licence. This was in my opinion a sale by Smith, which his licence authorized him to make, and consequently it was a transaction authorized by the Licensing (Consolidation) Act, 1910. Sect. 65 of the Act provides that "Subject to the provisions of this Act a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor." The appellants themselves held no such licence as is indicated in the section. The magistrate held that he was bound by the authority of the case of *Dunning* v. *Owen* (1) to convict the appellants, and he did so, at the same time expressing his opinion that but for that decision he should have held that no offence had been committed. The question for our decision is whether the conviction was right. In my opinion it was not. It is no doubt true, as contended by Mr. Leslie Scott for the respondents, that Smith's act was in the ordinary commercial sense a sale by the appellants because it was a sale by their authorized agent of liquor which was their property. This, however, does not decide the question. I agree also with Mr. Scott's contention that we ought not, in construing s. 65, to exclude the ordinary meaning of the word "sell," unless there

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.

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Bankes J.

is something in the statute which renders it necessary to do so, or unless to include the ordinary meaning would result in an absurdity. This section is governed by the opening words "Subject to the provisions of this Act." What are the material provisions of the Act in relation to the sale by Smith which constitutes the alleged offence? They are that the act of Smith was an authorized act, a lawful sale by the holder of the licence upon the licensed premises.

It is this act of Smith which is said to render the appellants liable to conviction, because the sale by Smith was a sale by their agent, and therefore a sale by them. In my opinion any construction of s. 65 which results in the act of Smith in serving the respondent with intoxicating liquor being treated as between the respondent and Smith as an authorized and lawful act, and the same act as between the respondent and the principal for whom he, Smith, was acting in so serving the respondent being treated as an unauthorized and illegal act, is absurd and must be rejected. This, however, is the construction which the respondent is seeking to put upon the section.

I do not propose to attempt to put a construction upon the section which shall be applicable to every case which may arise. It is sufficient to say that in my opinion the opening words of s. 65 limit the operation of the section to cases other than the present case, and that no person can be convicted of selling intoxicating liquor without a licence under this section where the act complained of is an act done by such person's duly appointed manager, who holds a licence authorizing him to do the act.

AVORY J. In my opinion the question to be decided in this case is whether intoxicating liquor has been sold without the authority of a justices' licence.

The words in the Licensing Act of 1872, "without being licensed to sell the same," have, I think, been altered in order to remove doubt whether the word "licensed" referred to the excise licence or to the justices' licence.

On the facts found in this special case it is clear that the justices authorized, and intended to authorize, Smith as the

agent or servant of Mellor's, Limited, to sell intoxicating liquor which at the time of sale was the property of Mellor's, Limited. The sale in question here was therefore authorized by the licence, and whether the sale was by Mellor's, Limited, as I think it was, within the meaning of s. 65 of the Act of 1910, or by Smith their agent or servant, as I also think it was, the sale was not unlawful, but was a sale by a person holding a licence in the name of his agent or servant in the one case, and by the actual holder of the licence in the other case.

I think the learned magistrate was right in the view which he was desirous of adopting, that the requirements of the law are satisfied if the owners of the intoxicating liquor hold a licence by or through their representative with the knowledge and sanction of the licensing justices, and the case of *Dunning* v. *Owen* (1), by which he was misled, is not, in my opinion, in conflict with this decision. That case was really decided on the same ground as *Peckover* v. *Defries* (2), namely, that the sale was by a person who was neither the authorized agent of a licensed person, nor authorized to sell through a licensed agent.

I agree that the appeal should be allowed.

LUSH J. We have in this case to put a construction on s. 65 of the Licensing (Consolidation) Act, 1910. That section provides that "Subject to the provisions of this Act a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence" &c. The question is whether Mr. Smith, the appellants' manager, who held a justices' licence, sold the beer on the licensed premises, or whether the appellants, who supplied the beer and took the profits and whose agent Mr. Smith was, sold it within the meaning of the section. If the former, no offence was committed; if the latter, an offence was committed, as the appellants held no licence.

Now, it seems to me clear that there was only one sale. It was either a sale by Mr. Smith or a sale by the appellants. The argument for the respondent was that it was a sale by the appellants because the appellants were the principals on the

(1) [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
(2) 95 L. T. 883.

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contract made by Mr. Smith. The section, which is one of a group of sections dealing with the conduct of licensed premises, has nothing to do with defining contractual rights or contractual obligations. It was for the purpose of securing the proper management of the business of selling intoxicating liquor on licensed premises that the enactment was passed. Bearing this in mind, and construing the section in view of what its obvious purpose is, we must, in my opinion, hold that the seller contemplated by the section is the person who actually sells, the person who is in charge and who makes the contracts and generally conducts the business of selling. The person who does that is Mr. Smith, not the appellants, and although he sells for the appellants' benefit, it is he who sells and not the appellants themselves. The appellants, therefore, have not committed any offence, and inasmuch as their manager was duly licensed, they have not participated in the commission of any offence by him.

I think that the appeal ought to be allowed and the conviction quashed.

Appeal allowed.

Solicitor for appellants: *John Hands, for Edwin Berry, Liverpool.*

Solicitors for respondent: *E. W. & Bruce Beal, for E. H. Cooke, Liverpool.*

F. O. R.

THE KING *v.* REGISTRAR OF COMPANIES. *Ex parte* BOWEN.

1914
July 31.

Dentist—Unregistered Person—Company proposing to carry on Business of Dentistry by Unregistered Persons—Title of Company—"United Dental Service"—Unlawful Object—Discretion of Registrar of Companies to refuse Registration—Dentists Act, 1878 (41 *&* 42 *Vict. c.* 33), *s.* 3.

Application was made for the registration, under the Companies Act, 1908, of a company with the name of "The United Dental Service, Limited." One of the objects of the company was "to carry on the practice, profession, or business of practitioners in dentistry in all its branches," which it was intended to carry on by practitioners not registered under the Dentists Act, 1878:—

Held, that the use of the proposed name by the company when carrying on business by unregistered practitioners would not constitute an offence under s. 3 of the Dentists Act, 1878, and that therefore the object of the company was not unlawful; and that the Registrar of Companies had no power to refuse registration upon the ground that the name of the company would be calculated to deceive people into the belief that the business was carried on by registered practitioners.

Rule Nisi for a writ of mandamus.

Application was made to the Registrar of Companies to register the memorandum and articles of association of a proposed company under the Companies Act, 1908. The name of the company was "The United Dental Service, Limited." The objects of the company, stated in the memorandum, included: "To carry on the practice, profession, or business of practitioners in dentistry in all its branches." The memorandum and articles were signed by seven persons who were all members of a society called "The Incorporated Dental Society, Limited," the members of which were all unregistered practitioners in dentistry.

The Registrar refused to register the company unless the memorandum provided that the work of the company should be undertaken only by means of duly qualified dental practitioners, that is, dental practitioners registered under the Dentists Act, 1878 (1), or the title of the company was amended so as

(1) 41 & 42 Vict. c. 33, s. 3: "From and after the first day of August, 1879, a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or

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not to include the word "dental," "dentist," or any similar or equivalent word.

Thereupon a rule was obtained on behalf of Bowen, one of the signatories of the memorandum and articles of association, calling upon the Registrar of Companies to shew cause why a writ of mandamus should not issue commanding him to register the memorandum and articles of association delivered to him on behalf of "The United Dental Service, Limited."

Sir Stanley Buckmaster, *S.-G.*, and *G. A. H. Branson* shewed cause. This company is composed entirely of unregistered practitioners and it appears that its principal object is to carry on the practice of dentistry by means of unregistered practitioners. It is obvious that the provisions of s. 3 of the Dentists Act, 1878, are intended to prevent any unregistered person from carrying on the practice of dentistry under any title which may imply that he is a qualified practitioner. The Registrar, therefore, was justified in refusing to register this company upon two grounds; first, because one of the objects of the company is unlawful, that is, to enable unqualified persons to practise dentistry under a title prohibited by s. 3 of the Act of 1878; and, secondly, because the title of the company is calculated to deceive the public into a reasonable belief that the business of dentistry will be carried on by qualified practitioners. Under the Companies Act, 1908, s. 2, only persons associated "for any lawful purpose" can form an incorporated company by registration, and therefore, if the purpose is unlawful, registration can properly be refused. If this company is registered with this title and with this memorandum, any unqualified person can be employed by it to practise dentistry and there would be no remedy. Further, if the title of the company is calculated to

words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who, after the first day of August, 1879, not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding twenty pounds; provided that nothing in this section shall apply to legally qualified medical practitioners."

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deceive people into the belief that its business will be carried on by qualified persons, then its purpose is unlawful. The Court in Ireland has decided that the Registrar of Companies in Ireland was justified in refusing to register a company under the title of "S. G. R., Dentist, Limited," where none of the signatories were registered dentists, upon the ground that the name was calculated to deceive the public: *Rex* v. *Registrar of Companies for Ireland.* (1)

There have been many decisions upon s. 3 of the Dentists Act. In *Bellerby* v. *Heyworth* (2) it was decided in the House of Lords that the words "specially qualified to practise dentistry" refer to a qualification by diploma, &c., and not to competence or skill, and the decision in *Byrne* v. *Rogers* (3) was approved and *Barnes* v. *Brown* (4) was overruled. In *Barnes* v. *Brown* (4) there was no use of any such word as "dentist" or "dental"; but in *Panhaus* v. *Brown* (5), where the appellant used the description "German Dental Institute," it was held that he had been rightly convicted under s. 3. The correctness of the decision in *Panhaus* v. *Brown* (5) was not impugned in *Bellerby* v. *Heyworth.* (6) The case of *Minter* v. *Snow* (7), which was treated in the House of Lords as being governed by the decision in *Bellerby* v. *Heyworth* (2), is distinguishable because there the description "American" was used and the names of the persons were part of the description. The statute prohibits the use of the description "dentist" or "dental practitioner," or any similar description, and if this title "United Dental Service" were used by an individual he would commit an offence under s. 3. "Dental" to indicate a practitioner is a prohibited word. If that be so, the use of that word by a company intending to carry on the business of dentistry by unqualified persons must be an unlawful purpose.

Even if the purpose is not unlawful, the question is not concluded, for there is sufficient in the proposed title of the company to lead people to suppose that the word "dental" is the

(1) [1904] 2 I. R. 634.
(2) [1910] A. C. 377.
(3) [1910] 2 I. R. 220.
(4) [1909] 1 K. B. 38.
(5) (1904) 68 J. P. 435.
(6) [1909] 2 Ch. 23, 32, 35; [1910] A. C. 377.
(7) (1910) 74 J. P. 257.

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description of the practitioner and that he is qualified. On that ground the registration can be refused. Further, even if there is only serious ground for doubt whether this title will deceive, the Court will refuse to exercise its discretionary power to grant a prerogative writ of mandamus.

A. Grant, K.C., and *E. Grimwood Mears*, in support of the rule. The action of *Bellerby* v. *Heyworth* (1) was brought for the express purpose of testing the correctness of the decision in *Barnes* v. *Brown* (2), and resulted in the latter case being overruled. The action of *Minter* v. *Snow* (3) was then instituted on behalf of the registered practitioners in order to obtain the strongest possible decision in their favour, and the advertisement in question in that case was framed with that object. The two cases were heard at the same time in the House of Lords, and when it had been decided in *Bellerby* v. *Heyworth* (1) that the words "specially qualified to practise dentistry," in s. 3 of the Act, refer to a qualification in the nature of a diploma, degree, &c., and not to a description implying mere personal skill, the House of Lords treated the case of *Minter* v. *Snow* (3) as governed by that decision. In the latter case the description used was "English and American Dentistry. Minter and Snow, Dental Institute," and the decision was that the use of that description was not a contravention of the provisions of s. 3. The present case, therefore, is concluded by the decision of the House of Lords in *Minter* v. *Snow* (3), and the case of *Panhaus* v. *Brown* (4) must be taken to be overruled. The decision in *Royal College of Veterinary Surgeons* v. *Kennard* (5) also shews that this title is not unlawful.

This company cannot, therefore, be said to be constituted for any unlawful purpose, and the Registrar has no discretion to refuse registration upon the ground that the title is calculated to deceive. The Registrar is bound to register a company, under s. 15 of the Companies Act, 1908, unless its purpose is unlawful (s. 2), or its name is so like that of another company as to be calculated to deceive (s. 8). With those exceptions the functions

(1) [1910] A. C. 377.
(2) [1909] 1 K. B. 38.
(3) 74 J. P. 257.
(4) 68 J. P. 435.
(5) [1914] 1 K. B. 92.

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of the Registrar as to registration are merely ministerial and he has no discretion. It may be that, if the name of the company suggests an unlawful purpose, though the memorandum and articles disclose no unlawful purpose, the Registrar may have a discretion to refuse registration; but that cannot be said of the title of this company since the decision in *Minter* v. *Snow*. (1)

LORD READING C.J. The Registrar of Companies refused to register a company with the name of "The United Dental Service, Limited," when the memorandum and articles of association were presented to him. The applicant, who had applied for registration of this company, obtained a rule nisi calling upon the Registrar to shew cause why a writ of mandamus should not issue to register this company. The Board of Trade are responsible for the refusal, and to-day the Solicitor-General and Mr. Branson have appeared before us to shew cause and to justify the refusal of the Registrar.

In my opinion the question turns in the main, although not entirely, in view of the arguments addressed to us, upon whether the use of these words, "The United Dental Service," would amount to an offence under the Dentists Act, 1878. In other words, whether the use of those words is a description implying that the persons who are intending to practise under that name are persons "specially qualified to practise dentistry"; that is, whether those words mean that the persons who are ready to perform that service are, or may be, persons who hold a licence, diploma, degree, or whatever the term may be which is used, implying that such persons are entitled to be registered under the Act for the reason that they hold such licence, &c.

Does the use of those words amount to an offence under the Dentists Act, 1878? In my opinion it does not. By the light of the earlier decisions, *Panhaus* v. *Brown* (2) and that class of decision, it might be said that it would have amounted to such an offence; but I cannot come to the conclusion that the use of these words in themselves would constitute an offence if the persons practising did not hold the diploma, degree, or other qualification necessary for registration, in view of the decision of

(1) 74 J. P. 257. (2) 68 J. P. 435.

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the House of Lords in *Bellerby* v. *Heyworth* (1), and still more particularly in *Minter* v. *Snow*. (2) The House of Lords in the latter case decided that the use of the words in a circular in relation to a business, "English and American Dentistry. Consultations and advice free. Minter and Snow, Dental Institute," with an address and hours of attendance stated, did not constitute an offence under the Act. I find it impossible to say, if that is the view of the supreme tribunal of this country, that it would make any difference if the words used were "Dental Institute" without the addition of such words as "Minter and Snow." "Minter and Snow, Dental Institute," upon the arguments presented to the House of Lords, meant that Minter and Snow were carrying on the business or occupation of persons who perform operations on, or otherwise attend to, teeth, and that they were persons specially qualified within the meaning of the Dentists Act, 1878, to perform these operations, or give attendance. There was no doubt very considerable authority to support that proposition, but the House of Lords rejected it; and, having rejected it, I cannot see how a person who does not use his name but puts upon his door plate "Dental Institute" can be held to commit an offence. It seems to me that the addition of the name of "Jones" to "Dental Institute" means that it is Jones who is going to perform the operation, or give the service or attendance. If "Dental Institute" only is put upon the plate, it must mean that a person who is not named, but who is inside, is ready to perform the operation, or give the service, or attend upon the person calling. If in the case where the name is added it does not mean that he is a specially qualified person, I cannot see how without the name it can have that meaning and constitute an offence under the Act of 1878. Therefore the first point is concluded by the decision of the House of Lords both in *Bellerby* v. *Heyworth* (1), and more particularly in *Minter* v. *Snow*. (2) I think these words, "United Dental Service," imply a description of the acts to be performed, and do not imply that the persons who will perform them are persons specially qualified under the statute of 1878. The Registrar of Companies would be entitled, if the use of the proposed name

(1) [1910] A. C. 377. (2) 74 J. P. 257.

would be an offence under the statute (either under this or any other statute), to refuse to register the company with that name; but, having arrived at the conclusion that that would not be the effect of the use of the words "United Dental Service," I hold that the Registrar was wrong in refusing registration upon that ground.

Then it is said by the Solicitor-General that it is not necessary to go so far as that; that although the words may not imply by their use sufficient to constitute an offence under the Act, yet they are calculated to mislead persons notwithstanding that they would not be held in a criminal prosecution to imply a particular meaning; that the distinction may be a fine one but is plain enough; and that if there is even reasonable doubt, that is, a reasonable possibility, that persons might be misled into thinking that, if they attended at the premises of this company, the operation, or service, or attendance, would be performed by persons specially qualified under the Act, then that is sufficient ground for refusal to register. I dissent from that proposition. I do not think that the Registrar has any discretion to consider whether, when the name is presented to him with a memorandum and articles of association, it is calculated to deceive the public. The Registrar has a discretion or a duty under s. 2 of the Companies Act, 1908, not to register an association which is not formed for a lawful purpose; he has a duty or discretion under s. 8 with which I need not trouble, because that is confined to similarity of name, and does not apply to such a case as this; and under s. 15 it is his duty to register the memorandum and articles of association. If he came to the conclusion that the phrase used in the name of the company implied in the circumstances that an offence under the statute would be committed, he would be right in refusing registration. I am far from saying that he has no discretion at all if the association is formed for a lawful purpose. For instance, I think if the name presented to him for registration contained scandalous or obscene words he would be perfectly justified in refusing registration. But I cannot think it is open to him, who has not, as it seems to me, the power to hold a judicial inquiry upon evidence properly given, to come to a conclusion that the words are calculated to deceive.

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The last point taken is that, even if the Registrar has not the power, this Court in its discretion ought not to issue a prerogative writ of mandamus; that it is always open to the Court to exercise a discretion, and, notwithstanding that it has jurisdiction, it will not and does not issue it in cases in which it thinks that it would be of no real use, or in which in its discretion it does not think it is a case for the exercise of its jurisdiction. I do not think that this is a case in which we ought to refuse to exercise our discretion, having regard to the conclusion at which I have arrived. It seems to me that the Registrar cannot take upon himself to determine that the mere use of the word "Dental" in the name of the company, and attached to "Service," may be calculated to mislead, or does mislead, the public into the belief that the business will be carried on by persons specially qualified under this Act. For these reasons I am of opinion that this rule must be made absolute.

BANKES J. agreed.

AVORY J. I am of the same opinion. I think that, in order to justify the refusal of the Registrar in this case, this Court at least must be satisfied that the use of the title, "United Dental Service, Limited," by persons who are practising the business of dentistry, will amount to a breach of s. 3 of the Dentists Act, 1878; in other words, that the title, "United Dental Service, Limited," implies that the persons carrying on the business are either registered under the Act, or that they are persons specially qualified to practise dentistry. If the Court is not satisfied of that, then I think we certainly have no right to refuse this remedy in a case where the duty is ministerial. As has been said with regard to mandamus, if there be a right and no other specific remedy, then the right should not be denied. I think there is in this case a right to have this company registered, and no other remedy is open.

It appears to me that the question whether the title, "United Dental Service, Limited," does imply that the person is either registered or specially qualified (because it is to be observed that the word in the statute is "implying," and not the words

"calculated to lead persons to believe") is a question for a Court of law in every case. That appears to me to be determined by a passage from the judgment of Buckley L.J. in *Bellerby* v. *Heyworth* (1), which I think has been adopted and approved by the House of Lords. The Lord Justice, referring to the Scottish case of *Elmslie* v. *Paterson* (2), quotes from the judgment of the Lord Justice-Clerk this passage (3): "If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry;" and says: "I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist. He must not describe himself as being a person of a particular kind, but he is entitled to say that he is there to do a particular class of acts." I think the House of Lords has approved that in principle, and what is more, as my Lord has already pointed out, in *Minter* v. *Snow* (4) the House of Lords has expressly approved the title or description of "English and American Dentistry, Dental Institute," and has held that that does not amount to any implication that the persons carrying on that business are registered or specially qualified. That being so, it appears to me that the words or title, "United Dental Service, Limited," do not go so far, and certainly are not capable of the same implication that the words "Dental Institute" might possibly have borne. It is difficult to understand words more apt to express that the persons carrying on this business are prepared to do certain acts or render certain services in dentistry than the words "United Dental Service." It appears to me that "United Dental Service, Limited," is only another way of saying, as Buckley L.J. said, that a man does dental acts, or, as in this case, that he is prepared to render dental services.

For that reason I think that the Registrar was bound to register in this case. I will only add that I find it difficult to suppose that the case of *Panhaus* v. *Brown* (5) is still good law,

(1) [1909] 2 Ch. 23.
(2) (1897) 24 R. (Just. Cas.) 77.
(3) Ibid. at p. 81.
(4) 74 J. P. 257.
(5) 68 J. P. 435.

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AVORY J.

having regard to the decision of the House of Lords in *Minter* v. *Snow*. (1) I find it very difficult to distinguish between "German Dental Institute" and "English and American Dentistry, Dental Institute," which are the words in those two cases respectively.

With reference to the second point with which my Lord has dealt, I intended to cover that when I said that, in my opinion, the Registrar could not refuse to register in this case unless he satisfied the Court that this would necessarily amount to a breach of the Act. I think he has no discretion to say that, although it may not amount necessarily to a breach of the Act, it is possible that some persons might be deceived by it.

Rule absolute.

Solicitor for respondent: *Solicitor to the Board of Trade.*
Solicitors for applicant: *Percy Robinson & Co.*

(1) 74 J. P. 257.

J. H. W.

FENNING FILM SERVICE, LIMITED *v.* WOLVERHAMPTON, WALSALL AND DISTRICT CINEMAS, LIMITED.

1914
July 9.

[1913 F. 1500.]

Copyright—Cinematograph Film—Announcement by Posters and Handbills of Exhibition of Film—Authorization of Performance—Infringement of Copyright—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 1, *and s.* 6.

By s. 1, sub-s. 2, of the Copyright Act, 1911, it is enacted that "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform . . . . the work or any substantial part thereof in public, ... and shall include the sole right to authorise any such acts as aforesaid."

By s. 2, sub-s. 1, "Copyright in any work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright . . . ."

By s. 6, sub-s. 1, "Where copyright in any work has been infringed the owner of the copyright shall . . . . be entitled to all such remedies . . . . as are or may be conferred by law for the infringement of a right.'

By an agreement dated September 8, 1913, the plaintiffs, the Fenning Film Service, Limited, agreed to let a certain cinematograph film to the defendants for a period of one week for exhibition as to three days at the Strand Theatre, Wolverhampton, and as to the other three days at the Cinema de Luxe, Walsall. The defendants agreed not to exhibit or suffer to be exhibited the film or any part of it at any place other than the two above-mentioned theatres.

The defendants in fact exhibited or suffered to be exhibited the film at places other than the two above-mentioned theatres and also announced their intention by means of posters and handbills circulated in or about the town of Bilston of exhibiting the film at a theatre called the Alhambra in that town:—

Held, that, in addition to the plaintiffs' right to damages for the breach of contract, the defendants by the advertising at Bilston had, within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911, authorized a performance of the work, and that therefore there had been an infringement by the defendants of the plaintiffs' copyright in the film within the meaning of s. 2, sub-s. 1, of the Act for which the plaintiffs were entitled to recover damages under s. 6.

ACTION tried before Horridge J. without a jury.

The plaintiffs, the Fenning Film Service, Limited, were the

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owners of the performing rights in (amongst other places) the county of Stafford in a cinematograph film entitled "Doctor Nicholson and the Blue Diamond." By an agreement dated September 8, 1913, and made between the plaintiffs and defendants, the defendants in consideration of 17*l.* 10*s.* payable in advance by them hired from the plaintiffs the film in question for a period of one week commencing October 6, 1913, which was subsequently altered to October 20, for exhibition for three days at the Strand Theatre, Wolverhampton, and for three days at the Cinema de Luxe, Walsall. By that agreement the defendants agreed that they would "not exhibit or suffer to be exhibited the said film or any part thereof in any other place than the theatre," meaning by the expression "theatre" the Strand Theatre, Wolverhampton, and the Cinema de Luxe, Walsall.

The defendants exhibited the film at the Strand Theatre, Wolverhampton, for the three days October 20, 21, and 22, and they also exhibited it at the Coliseum Picture Palace, Wolverhampton. They exhibited the same film on October 23, 24, and 25 at the Cinema de Luxe, Walsall, and also at the Electric Theatre, Bloxwich. They also announced their intention by means of posters and handbills circulated in or about the town of Bilston of exhibiting the film at the Alhambra Theatre in that town. It was admitted that the plaintiffs were the owners of the copyright in the film.

The only question material to this report was whether by announcing by means of posters and handbills circulated in and about the town of Bilston, without the consent of the plaintiffs, their intention of exhibiting the film at the theatre in that town the defendants had within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911 (1), authorized a performance of the work

(1) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 1, sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform . . . . the work or any substantial part thereof in public; . . . . and shall include the sole right,—

. . . . . .

"(*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance

which was the subject of the film so as to be an infringement of the copyright within the meaning of s. 2, sub-s. 1, of the Act.

Ernest Pollock, K.C., and *W. O. Hodges*, for the plaintiffs. The defendants by advertising the film authorized a performance within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911. By virtue of s. 2, sub-s. 1, that was an infringement of the plaintiffs' copyright for which they are under s. 6 entitled to damages. It is not necessary that the damages should be capable of measurement. No specific damage need be proved. The Court can give any damages it thinks fit. In *Exchange Telegraph Co.* v. *Gregory & Co.* (1) Lord Esher M.R. said "In such a case," meaning a case in which the plaintiff's right has been invaded, "the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large." That principle is applicable to the present case.

E. W. Hansell, for the defendants.

Ernest Pollock, K.C., replied.

HORRIDGE J., after stating the facts, continued: The exhibitions at the Coliseum, Wolverhampton, and the Electric Theatre, Bloxwich, were outside the agreement, and there have been two clear breaches of the agreement. The plaintiffs are therefore entitled to damages for breach of contract. As regards the advertising at Bilston Mr. Pollock has contended on behalf of the plaintiffs that they are entitled to a remedy under the

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by means of which the work may be mechanically performed or delivered,

and to authorise any such acts as aforesaid."

Sect. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: . . . . "

Sect. 6, sub-s. 1: "Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right."

Sub-s. 2: "The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court."

(1) [1896] 1 Q. B. 147, at p. 153.

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FENNING FILM SERVICE, LIMITED v. WOLVERHAMPTON, WALSALL AND DISTRICT CINEMAS, LIMITED.

Horridge J.

Copyright Act, 1911. He contended that inasmuch as their rights under s. 1, sub-s. 2, of the Act of 1911 have been infringed within the meaning of s. 2, sub-s. 1, s. 6 gives them a remedy, and that the infringement of the right constitutes a tort to which the language of Lord Esher M.R. in *Exchange Telegraph Co.* v. *Gregory & Co.* (1), to which my attention has been called by Mr. Pollock, is applicable. In my view these contentions are correct. I do not think the defendants acted wilfully. It is quite possible that they thought that the agreement gave them the right to act as they did, and I do not think they acted mala fide in any way. The damages are, in the language of Lord Esher M.R., "at large," and therefore I can give what amount I think right as if I were a jury. I give judgment for the plaintiffs for 17*l.* 10*s.* with costs, the 17*l.* 10*s.* to cover both the breach of contract and the tort.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Mason & Co.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for R. A. Willcock, Taylor & Co., Wolverhampton.*

(1) [1896] 1 Q. B. 147, at p. 153.

J. E. A.

DATE *v.* GAS COAL COLLIERIES, LIMITED.

[1914 D. 568.]

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July 2.

Coal Mine—Inspection—Inspector appointed by Workmen—Check Weigher—Eligibility—Coal Mines Act, 1911 (1 *& 2 Geo. 5, c. 50*), *s.* 16—*Coal Mines Regulation Act*, 1887 (50 *& 51 Vict. c. 58*), *s.* 13.

By s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887, the persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may station a person (referred to in the Act as a "check weigher") at each place appointed for the weighing of mineral and for determining the deductions, in order that he may on their behalf take a correct account of the weight of the mineral or determine correctly the deductions; and by sub-s. 2 a check weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the management of the mine, but shall be authorized only to take the account or determine the deductions.

By s. 16, sub-s. 1, of the Coal Mines Act, 1911, the workmen employed in a mine may appoint two of their number or any two persons, not being mining engineers, who are or have been practical working miners with not less than five years' experience of underground work, to make periodical inspections of the mine:—

Held, that a person who holds the appointment of check weigher at a mine is not thereby disqualified from being appointed to make, and from making, inspections of the mine under s. 16 of the Act of 1911.

Action in the commercial list tried by Bailhache J. without a jury.

The plaintiff was a check weigher appointed in accordance with the provisions of s. 13 of the Coal Mines Regulation Act, 1887 (1),

(1) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13:

"(1.) The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check weigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be."

"(3.) A check weigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine; but shall be authorised only to take such account or determine such deductions as aforesaid, and the absence of a check weigher from the place at which he is stationed shall not be a

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by the workmen employed at the Meiros Colliery, of which the defendants were the owners. On October 29, 1913, the plaintiff was duly appointed by the workmen employed at the Meiros Colliery to inspect the mine under the provisions of s. 16 of the Coal Mines Act, 1911. (1) The plaintiff had been a practical working miner and had had not less than five years' experience of underground work as required by s. 16. Notice of the plaintiff's appointment was duly given to the defendants' manager.

On November 25, 1913, the plaintiff applied to the manager of the colliery for permission to make the inspection provided for by s. 16 of the Act of 1911, but permission was refused upon the ground that the plaintiff, being a person holding the appointment of check weigher under s. 13 of the Act of 1887, was not

reason for interrupting or delaying the weighing or the determination of deductions at such place respectively, but the same shall be done or made by the person appointed in that behalf by the owner agent or manager, unless the absent check weigher had reasonable ground to suppose that the weighing or the determination of the deductions, as the case may be, would not be proceeded with: Provided always, that nothing in this section shall prevent a check weigher giving to any workman an account of the mineral gotten by him, or information with respect to the weighing, or the weighing machine, or the tareing of the tubs or trams, or with respect to the deductions or any other matter within the scope of his duties as check weigher, so always, nevertheless, that the working of the mine be not interrupted or impeded."

(1) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 16: "(1.) The workmen employed in a mine may, at their own cost, appoint two of their number or any two persons, not being mining engineers, who are or who have been practical working miners and have had not less than five years' experience of underground work, to inspect the mine, and the persons so appointed shall be allowed once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officials of the mine, to go to every part of the mine, and to inspect the shafts, roads, levels, workings, air-ways, ventilating apparatus, old workings, and machinery, and shall, where an accident has occurred in a mine of which notice is required under this Act to be given, be allowed to go together with any person acting as legal adviser to the workmen, or with a mining or electrical engineer selected by the workmen, accompanied as aforesaid, to the place where the accident occurred, and to make such inspection as may be necessary for ascertaining the cause of the accident, subject, however, to the provisions of this Act requiring the place where an accident has occurred to be left as it was immediately after the accident."

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eligible for appointment under the provisions of s. 16 of the Act of 1911.

The plaintiff claimed a declaration that he was entitled to exercise all the powers conferred by s. 16 of the Act of 1911 upon a person appointed under that section to inspect a mine.

Leslie Scott, K.C., and *A. T. James*, for the plaintiff. There is nothing in the language of s. 16 of the Coal Mines Act, 1911, to support the view that a check weigher cannot be appointed an inspector. The only persons disqualified from holding that office are the persons expressly mentioned in the section, namely, mining engineers, and the only qualification for the office is that the person to be appointed must be or have been a practical working miner with not less than five years' experience of underground work. It is true that by s. 13, sub-s. 3, of the Coal Mines Regulation Act, 1887, a check weigher is prohibited from interrupting the working of the mine and from interfering with the management of the mine, but that prohibition when read with the other provisions of s. 13 dealing with the rights and duties of a check weigher should be construed as applying only to the occasions when he is actually performing the duties of a check weigher. Under s. 1 of the Coal Mines (Weighing of Minerals) Act, 1905, there is power to appoint a deputy to act in the absence of a check weigher for reasonable cause. This meets any difficulty which might otherwise arise from the impossibility of the simultaneous performance of the duties of check weigher and inspector by the same person.

Mitchell Innes, K.C., and *Harold Morris*, for the defendants. The meaning of s. 13 of the Act of 1887 is that a check weigher may discharge no official duties at a mine except those specifically allotted to him under the Act. The Act of 1911 has in no way altered or repealed the provisions of the Act of 1887 relating to check weighers; on the contrary, although nearly the whole of the Act of 1887 is repealed by the Act of 1911, the sections dealing with check weighers are expressly excluded from the repeal. The duties of an inspector must necessarily involve an interference with the management of a mine, and a mine owner is entitled to restrain a check weigher, who has been appointed

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inspector, from interfering with the management because s. 13, sub-s. 3, of the Act of 1887 contains an express prohibition against a check weigher doing so. Under s. 2, sub-s. 2, of the Coal Mines Regulation Act, 1908, a person "whether holding the office of check weigher or not" may be appointed to be at the pit head, when men are being lowered or raised, for the purpose of observing the times of lowering and raising. If it was necessary to have an express enactment in order to permit a check weigher to perform this unimportant work, it was even more necessary that the Act of 1911 should have contained an express provision that a check weigher might perform the duties of an inspector, and the only inference which can be drawn from the absence of any provision to that effect is that a check weigher is disqualified from being appointed and from acting as an inspector. [*Ex parte White* (1) was referred to.]

Leslie Scott, K.C., in reply. The object of s. 2, sub-s. 2, of the Act of 1908 is to enable a check weigher to perform the duties of a person appointed under that section at the same time as he is engaged in checking the weighing.

BAILHACHE J. The plaintiff was a check weigher at the defendants' colliery and in October, 1913, he was duly appointed an inspector by the workmen employed in the mine under s. 16 of the Coal Mines Act, 1911. Notice of his appointment was given to the defendants and in due course he asked the defendants' permission to go down the mine for the purpose of performing his duties as an inspector of the mine. The defendants refused to allow him to do so on the ground that the fact that he was a check weigher precluded him from being appointed an inspector under the Act of 1911. The only question which I have to determine in this action is whether the defendants' refusal was right or wrong. The matter depends on the construction of a few sections in two or three Acts of Parliament. [The learned judge read s. 16 of the Act of 1911 and continued:] It is to be observed that the language of that section is wide and general; the only persons who are excluded from being appointed inspectors are persons who are mining

(1) (1897) 13 Times L. R. 580.

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engineers or who have not had five years' experience of underground work. So far, therefore, as the language of s. 16 is concerned the plaintiff is a person who is qualified to be appointed by the men to inspect the mine. It is said, however, that he is disqualified by reason of his being a check weigher. The duties and rights of a check weigher are very strictly defined by s. 13 of the Coal Mines Regulation Act, 1887, sub-s. 3 of which provides that "a check weigher shall not be authorised in any way to impede and interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine." It is said that it is quite clear from the language of that section that the Legislature while conferring certain rights on the men was at the same time carefully guarding the interests of the mine owners, and it is contended that as an inspector may have to interfere with the management of a mine it follows as a necessary consequence from the prohibitions contained in s. 13, sub-s. 3, that a check weigher cannot at the same time be an inspector. The greater part of the Act of 1887 was repealed by the Act of 1911, but s. 13 and the other sections dealing with check weighers are left unrepealed. The check weighers are appointed by the men employed in the mine and their duties are to check the weight of the mineral and the deductions as recorded by the owners' servants and to see that the weight is correctly recorded. It is clear that the Legislature, while conferring certain rights upon the men, was jealously guarding the rights of the owners, and was taking care that the exercise of the rights conferred upon the men should in no way interfere with the working of the mine or with the general management of the mine. Up to the year 1908 the only rights and duties conferred upon a check weigher were those conferred by the Act of 1887. In that year the Coal Mines Regulation Act, 1908, was passed, by s. 2, sub-s. 2, of which the workmen may appoint persons "whether holding the office of check weigher or not to be at the pit head at all times when workmen are to be lowered or raised, for the purpose of observing the times of lowering and raising." It has been very strongly urged on behalf of the defendants that inasmuch as it was thought necessary in that enactment to refer

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specifically to check weighers, and as there is no similar specific reference to them in s. 16 of the Act of 1911, the inference which ought to be drawn from the silence of the later Act is that a check weigher is not eligible for appointment to the office of inspector under the later Act. That is, of course, a taking argument and one which requires attention. But I am not satisfied that so much importance as Mr. Mitchell Innes contends for ought to be given to the absence of any specific reference to check weighers in s. 16 of the Act of 1911. I think it is quite likely that the explanation of sub-s. 2 of s. 2 of the Act of 1908 suggested by Mr. Leslie Scott is the right one, namely, that a check weigher may very well be able to perform the duties of a person appointed under that section at the same time as he is performing his ordinary work of check weighing, and it was in order to make it quite clear that the duties of the two offices might be performed by the same man at the same time that the express reference to check weighers was introduced into s. 2, sub-s. 2, of the Act of 1908. On the other hand it is obvious that, if a check weigher is appointed an inspector under the Act of 1911, he cannot be performing the duty of check weighing at the same time as he is inspecting the mine, but this difficulty seems to be met by s. 1 of the Coal Mines (Weighing of Minerals) Act, 1905, which authorizes the appointment of a deputy to act in the absence of the check weigher for reasonable cause. Therefore, although the duties of a check weigher are strictly defined in the Act of 1887 and there is nothing in the Act of 1911 to extend them, I cannot see that there is any inconsistency between the two Acts, and I entirely fail to understand why the same man should not perform at one time the duties of a check weigher and at another time those of an inspector, more especially as the men have, as has been pointed out, a statutory right to appoint a deputy check weigher. I quite agree that when you have one Act of Parliament dealing in specific terms with a particular subject-matter, and a later Act dealing in general terms with the same subject-matter, if there is any inconsistency between the two Acts, the specific language of the earlier Act prevails over the general words of the later, but for the reasons which I have stated there is, in my opinion, no inconsistency

between s. 13 of the Act of 1887 and s. 16 of the Act of 1911. I think one may say that although the office of check weigher is subject to the restrictions imposed by the Act of 1887, yet a man who holds the office of check weigher may for the time being cease to act as check weigher and perform the duties of an inspector of the mine under the Act of 1911.

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The plaintiff is, therefore, in my opinion, entitled to a declaration in the terms asked for.

Judgment for plaintiff.

Solicitors for plaintiff: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

F. O. R.

BRAME *v.* COMMERCIAL GAS COMPANY.

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July 22.

Gas Company—Metropolis—Opening Street to lay Pipes—Obligation of Company to reinstate—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 10—*Resolution by Local Authority to do Work of Reinstatement themselves—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 114—*Accident from Insufficiency of Work—Liability of Gas Company.*

By s. 10 of the Gasworks Clauses Act, 1847, a gas company which breaks open the surface of a street is bound to reinstate it.

By s. 114 of the Metropolis Management Act, 1855, a local authority may do the work of reinstatement themselves instead of permitting the gas company to do it.

A borough council in the metropolis, purporting to act under that section, passed a resolution that they would in all cases where any pavement was opened by a gas company in their borough do the work of reinstatement themselves. Subsequently a gas company, having opened the pavement of a street and finished laying their pipes, gave notice to the council that reinstatement was necessary:—

Held, that the resolution did not, upon the mere expiry of a reasonable time after receipt of the notice, ipso facto release the company from the duty imposed by the Gasworks Clauses Act. To effect such release it was necessary that the council should dismiss the company from the control of the reinstatement and in fact take charge of the work themselves.

APPEAL from the Bow County Court.

The defendants are a metropolitan gas company empowered

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to supply gas in the district, amongst others, of Poplar. Under s. 10 of the Gasworks Clauses Act, 1847, which was incorporated in the defendants' special Act of the same year, it is provided that "When the undertakers open or break up the road or pavement of any street . . . . they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate and make good the road or pavement . . . . and shall keep the road or pavement which has been so broken up in good repair for three months after replacing and making good the same, and for such further time, if any, not being more than twelve months in the whole, as the soil so broken up shall continue to subside." Some time previously to July, 1913, the borough council of Poplar had passed a resolution that whenever any pavement was opened by the gas company for the purpose of repairs they would do the work of reinstatement themselves instead of permitting the company to do it. This resolution purported to be made under s. 114 of the Metropolis Management Act, 1855, which provides that "Whenever the permanent surface or soil of any street is broken up or opened, it shall be lawful for the vestry or district board of the parish or district in which the same is situate, in case they think it expedient so to do, to fill in the ground, and to make good the pavement or surface or soil so broken up or opened . . . . instead of permitting such work to be done by the company or person by whom such surface or soil is broken up or opened." In view of this resolution the practice in the borough was for the company to temporarily relay the pavement after any pipes had been repaired or laid, and then to give notice to the borough council, who permanently reinstated the pavement.

In July, 1913, the defendants opened the pavement of a certain street in Poplar, called Canton Street, to lay some fresh gas pipes, and having laid the pipes they temporarily replaced the pavement on July 28. On the same day they gave notice to the council, who on July 29 directed their district surveyor to permanently reinstate the street. The county court judge found as a fact that a two days' notice was reasonably sufficient to give the council time to take over the work, and the two days

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expired on July 31. On August 5 the plaintiff, Mrs. Brame, owing to a stone in the pavement being uneven, tripped over it and suffered personal injuries, for which the action was brought. There was no evidence that the pavement was dangerously uneven at the time that the defendants' notice to the council expired. The defendants contended that the effect of the council's resolution and of the notice was to transfer the duty of reinstating the surface from the company to the council as from July 31. The county court judge held that the defendants were liable for the condition of the pavement until such time as the council had in fact taken over the control of the work, and he said that the defendants had not satisfied him that the council had done so at the date of the accident.

The defendants appealed.

Macmorran, K.C., and *J. D. Cassels*, for the defendants. It is conceded that, apart from s. 114 of the Metropolis Management Act, 1855, an absolute liability is imposed by s. 10 of the Gasworks Clauses Act, 1847, upon the gas company to reinstate the ground which they have opened and keep the surface in repair if necessary for a period of twelve months. But s. 114 of the later Act allows the borough council to discharge the gas company from that obligation and to do the work of reinstatement themselves. Here the council passed a general resolution that they would in all such cases do the work themselves, and though possibly that resolution would not operate to discharge the gas company from the duty of reinstatement until after the expiry of a reasonable notice to the council that the ground had been opened and that reinstatement was required, here the county court judge found that a reasonable notice had been given. That notice expired on July 31, and it was not until after that date that the subsidence of the pavement occurred which caused the accident. After July 31 the defendants had no right to touch the soil, and for the neglect of the council they cannot be held responsible: *Cressy* v. *South Metropolitan Gas Co.* (1)

McCall, K.C., and *Abinger*, for the plaintiff. A mere resolution by the council to do the work of reinstatement will not get

(1) (1906) 94 L. T. 790.

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rid of the gas company's liability. Sect. 114 of the Act of 1855 only says that the council may fill in the ground and make good the pavement if they think proper to do so instead of permitting the work to be done by the gas company. But until the council enter and do the work the section does not come into operation. Here the judge has found as a fact that they did not so enter and take over the control of the work. In *Cressy* v. *South Metropolitan Gas Co.* (1) the local authority did in fact take charge of the work, and it was the negligent manner in which they did it that caused the accident complained of.

HORRIDGE J. This is an action brought for personal injuries sustained by the plaintiff in consequence of the surface of the road in Canton Street, Poplar, being out of repair. The cause of its so being out of repair was that it had been opened up by the defendants, the Commercial Gas Company, for the purpose of laying some gas pipes, and had not been properly reinstated. Now under s. 10 of the Gasworks Clauses Act, 1847, which is incorporated in the company's special Act, there is no doubt, if that section stood alone, that the obligation was thrown upon the defendants of making the surface of the road good, and not only of making it good for the time being but also of keeping it in repair, if it subsided, for a period of twelve months. But it is said that by s. 114 of the Metropolis Management Act, 1855, the liability so imposed on the defendants by the earlier Act was transferred to the borough council, who had some time previously passed a general resolution that they would in all cases do the work of reinstatement themselves, as soon as a reasonable time had expired after notice given to them by the defendants that the ground had been opened and that reinstatement was necessary. What that section says is that " whenever the permanent surface or soil of any street is broken up or opened, it shall be lawful for the vestry or district board of the parish or district in which the same is situate, in case they think it expedient so to do, to fill in the ground and to make good the pavement or surface or soil so broken up or opened, and to carry away the rubbish occasioned thereby, instead of permitting such work to be done by the

(1) 94 L. T. 790.

company or person by whom such surface or soil is broken up or opened." No doubt that gives the local authority the right to take over the work of reinstatement, and from the moment that they in fact take it over so that the work is out of the hands of the gas company, the company cease to be responsible for default in the proper execution of the work. But I do not think that the mere passing of a resolution by the local authority to do the work ipso facto relieves the gas company from the duty of seeing that the work is properly done until it is in fact handed over to the representatives of the local authority. The case of *Cressy* v. *South Metropolitan Gas Co.* (1) is not an authority to the contrary, for there the work had been actually done and done negligently by the local authority who had taken it over from the gas company. There Kennedy J. said that s. 114 "ought to be read as producing this result, that all that was prescribed in the earlier legislation was subject to this proviso 'unless the local authority step in and do the work.'" Here the local authority have not so stepped in and done the work. The county court judge has held that the defendants were liable for the pavement being kept reasonably safe until it had become the duty of somebody else to do so, and that they had not satisfied him that any one else had undertaken that duty. I think the case is disposed of by that finding of fact that the local authority had not taken over the work. Under those circumstances the appeal must be dismissed.

LUSH J. I agree. Prima facie the defendants would continue subject to the statutory duty imposed on them by s. 10 of the Gasworks Clauses Act, 1847, until the street was completely reinstated and made safe for public passage, and I think that the burden must lie upon them of shewing that something has happened to terminate that liability. Sect. 114 of the Metropolis Management Act, 1855, provides that the local authority may, instead of permitting the gas company to do the work of reinstatement, take charge of the road and do the work themselves; but, unless the defendants can shew that the local authority did take charge of the road and prevent the defendants from going on with the work, the defendants' statutory liability continues. The

(1) 94 L. T. 790.

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finding of fact by the county court judge that the defendants had failed to discharge that onus seems to me to dispose of the case.

Appeal dismissed.

Solicitors for defendants: *C. V. Young & Son.*
Solicitors for plaintiff: *Philbrick & Co.*

J. F. C.

1913
July 28, 29, 31.

INLAND REVENUE COMMISSIONERS *v.* EARL OF DERBY.

Revenue—Reversion Duty—Determination of Lease—Agreement to grant a Lease on Performance of Conditions—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13.

A tenant of premises under a lease being desirous of surrendering it and obtaining a new lease, it was on April 5, 1910, agreed between the tenant and the lessor that the lessor should upon the performance of certain conditions by the tenant grant to him such lease for the proposed term, which was to commence as from Lady Day, 1910. The agreed conditions were not in fact performed until after April 29, 1910 the date of the coming into force of the Finance (1909-10) Act, 1910. In June, 1910, the lessor granted to the tenant the new lease in pursuance of the agreement. The Crown thereupon claimed from the lessor reversion duty on the benefit accruing to him by the determination of the old lease after the coming into force of the Act:—

Held, that as the tenant had not performed the conditions before April 29, 1910, he was not entitled at that date to specific performance of the agreement to grant the lease, and could not then be treated, under the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9, as being in the same position as if the lease had been granted; that the agreement for the lease, not being under the circumstances equivalent to a lease, did not operate as a surrender by operation of law of the old lease; that the old lease was not determined until the grant of the new one; and that the lessor was consequently liable to reversion duty.

APPEAL by the Commissioners of Inland Revenue against the decision of a referee under the Finance (1909-10) Act, 1910, upon an assessment to reversion duty.

By a lease dated September 24, 1886, the then Earl of Derby, the predecessor in title of the respondent, demised certain

premises at Walton-on-the-Hill, in the county of Lancaster, which were the subject of the assessment, to certain persons for a term of seventy-five years from Lady Day, 1883, at a yearly rent of 10*l.* The lease was on March 18, 1910, vested in Colonel C. H. Webster. At that date Colonel Webster was desirous of surrendering the lease and obtaining a fresh lease for 999 years, and the respondent's agent wrote to him stating that the respondent was prepared to grant a lease for the desired term commencing from Lady Day, 1910, at the same rent upon payment of a fine of 271*l.* and subject to the further conditions of his executing a proper surrender of the existing lease, making out a good title, and paying all rent under the existing lease up to the commencement of the new term. Subsequently the respondent agreed to reduce the fine to 155*l.* on the terms of the lessee paying an annual rent of 15*l.*, and on April 5, 1910, those terms were accepted by the lessee and the agreement for the grant of the new lease was definitely concluded between the parties. On April 29, 1910, the Finance (1909-10) Act, 1910, came into operation. At that date the lessee had not performed the conditions upon which the lease was to be granted. No formal surrender of the existing lease had been executed at that date, or indeed was ever executed, nor had the lessee proved his title, and the fine of 155*l.* was not paid until June 18, 1910. On June 23 an indenture of lease was executed whereby the respondent demised the premises to the lessee for the term of 999 years from Lady Day, 1910, at a yearly rent of 15*l.* The Commissioners of Inland Revenue assessed the respondent to reversion duty in the sum of 25*l.* 0*s.* 11*d.* in respect of the benefit accruing to him by reason of the determination on June 18, 1910, of the lease of September 24, 1886. The respondent appealed against the assessment to a referee, who decided that the lease was determined before April 29, 1910, and that no reversion duty was payable. From that decision the present appeal was brought.

Sir John Simon, S.-G., and *Tomlin*, for the appellants. The old lease was not determined until the conditions were performed and the new lease granted, the execution of which operated as a surrender of the old lease by operation of law. No doubt

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according to the decision in *Walsh* v. *Lonsdale* (1) a tenant who holds under an agreement for a lease of which he is in a position to get specific performance "holds under the same terms in equity as if a lease had been granted." But here the lessee was not on April 29, 1910, in a position to demand specific performance of the agreement for the new lease, for he had not performed the conditions upon which it was to be granted.

Danckwerts, K.C., and *G. A. Scott*, for the respondent. The old lease was determined on April 5, 1910, when a binding agreement was concluded between the parties that the respondent should grant and the lessee accept the new lease for 999 years. Such an agreement was equivalent to the grant of the lease: *Walsh* v. *Lonsdale*. (1) The lessee could have required specific performance of it at that date notwithstanding that he had not then proved his title—*Bennett* v. *Fowler* (2)—or performed the stipulated conditions. Then if the lessee was on April 5 in the same position as if the new lease had been executed, the effect of the agreement was to work a surrender of the old lease by operation of law, for the acceptance by a lessee of a new lease from the reversioner during the continuance of the existing lease operates as a surrender of the latter. The old lease therefore having been determined before the coming into force of the Act, the respondent is not liable to reversion duty.

Sir John Simon, S.-G., in reply.

Cur. adv. vult.

July 31. HORRIDGE J. read the following judgment:—This case raises the question as to whether or not there was the determination of a lease dated September 24, 1886, granted by the then Earl of Derby for a period of seventy-five years from March 25, 1883, subsequently to the coming into operation on April 29, 1910, of the Finance (1909-10) Act, 1910.

The facts of the case are that by a lease dated September 24, 1886, the then Earl of Derby granted a lease of a piece of land in Oregon Street and Caroline Street, Bootle-cum-Linacre, for a term of seventy-five years from March 25, 1883. Whilst this lease was running, namely, on February 15, 1910, one Colonel

(1) 21 Ch. D. 9. (2) (1840) 2 Beav. 302.

Webster, who was in possession of the property, applied for the terms upon which the Earl of Derby would be prepared to grant him a 999 years lease of the property. On March 18, 1910, the Earl of Derby's agent by a document of that date communicated to Colonel Webster's solicitors the terms upon which a lease would be granted, upon a fine of 271*l.* and an annual rent of 10*l.*, payable as from March 25, 1910. On March 30, 1910, Colonel Webster's solicitors asked for an alteration in the fine and offered to pay an annual rent of 15*l.* On March 31 the Earl of Derby's agent consented to the rent being 15*l.*, and the fine being reduced to 155*l.*, the other conditions of renewal to remain. On April 5 a memorandum was indorsed on the document of March 18, 1910, by Colonel Webster's solicitors agreeing to the terms of that letter as regards the fine and rent. The parties therefore, in my view, came to a definite agreement on April 5, 1910. Under this agreement Colonel Webster had to comply with the following conditions before he would be entitled to receive the new lease: (1.) to pay a fine of 155*l.*; (2.) to execute a proper surrender; (3.) to make out a good title; and (4.) to pay all rent under the existing lease to the commencement of the new lease. The Finance (1909-10) Act, 1910, came into operation on April 29, 1910. It is admitted that by April 29, 1910, some of the requirements mentioned in the letter of March 18, 1910, had not been carried out by Colonel Webster. On June 18, 1910, a memorandum of surrender was indorsed upon the original lease of September 24, 1886, but such memorandum not being under seal was admitted by both sides to have no effect as a surrender at law. On June 23, 1910, a new lease dated June 20, 1910, was granted of the hereditaments in question for the term of 999 years from March 25, 1910. At the time of, or very shortly previously to, the granting of such lease the fine and the rent of the old lease up to March 25, 1910, were paid.

It was contended before me by the respondent that Colonel Webster must be treated from the date of the completion of the agreement as holding under the lease of June 23, 1910, as the agreement for the new lease was an agreement of which the Court of Chancery would grant specific performance; and that

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being so, the grant of such new lease operated in law as a surrender of the former lease as on April 5, 1910, which caused the earlier lease to determine prior to the coming into operation of the Finance (1909-10) Act, 1910. On behalf of the Crown it was contended that the true view of the law was that although there was an agreement completed on April 5, 1910, Colonel Webster did not become entitled to his lease or to hold under such lease until he had complied with the conditions on his part to be performed, and that it was admitted that such conditions had not been complied with until after April 29, 1910.

In the case of *Walsh* v. *Lonsdale* (1) Jessel M.R. says: "The tenant holds under an agreement for a lease; he holds therefore under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." My view is that that case is not applicable to the facts of the present case as, although Colonel Webster had the agreement, he did not hold under the agreement until he had complied with the conditions contained in it. The case of *Lowther* v. *Heaver* (2) is a case under a building agreement where, upon compliance with the conditions as to roofing in certain houses, a lease was to be granted, and the Court held that where such compliance had in fact taken place the builder held under the terms of the proposed lease and not under the building agreement; and Cotton L.J., at p. 264, says: "Now I am of opinion that the late Master of the Rolls was correct in saying, as he did in *Walsh* v. *Lonsdale* (1), that a tenant holding under an agreement for a lease of which specific performance would be decreed stands now in the same position as if the lease had been granted. He is entitled only in equity it is true to a lease, but being entitled in equity to have a lease granted, his rights ought, in my opinion, to be dealt with in the same way as if a lease had been granted to him, and do not depend upon its actually having been granted. In my opinion, as the builder had in June, 1887, a right to have a lease separately of each of these houses, he had from that time held these plots not on the terms of the building agreement, but on the terms of the form of lease." It seems to me that the effect of the language of

(1) 21 Ch. D. 9. (2) (1889) 41 Ch. D. 248.

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Cotton L.J., referring to the Master of the Rolls' judgment in *Walsh* v. *Lonsdale* (1), is that a tenant holding under an agreement for a lease, or at the most a tenant entitled to have a lease, is to be treated in equity as having such lease. I do not think, however, that where conditions are to be performed on behalf of the tenant before he obtains such lease it is to be so treated, and in fact the judgment in *Lowther* v. *Heaver* (2) proceeded upon the assumption that under the building agreement the builder had performed on his part conditions the compliance with which entitled him to a lease. This is not a case in which the tenancy is actually created by the agreement, in which event the Court dispenses with the document under seal, but is a case where the agreement itself provides the conditions under which a lease can be demanded, and these conditions had not been complied with at the time when the Act came into operation. For the foregoing reasons I think that the time at which the surrender by operation of law determined the lease was subsequent to the coming into operation of the Finance (1909-10) Act, 1910, and that the appeal must be allowed with costs and the decision of the referee reversed.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Gibbons & Arkle, Liverpool.*

(1) 21 Ch. D. 9. (2) 41 Ch. D. 248.

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July 24.

HIGGINS *v.* BEAUCHAMP.

Partnership—Trading Firm—Implied Authority of Partner to borrow Money for Partnership Purposes—What is a Trading Firm for this Purpose.

A firm carrying on the business of cinematographic theatre proprietors is not a trading firm for the purposes of the rule that each member of a trading firm has implied authority to borrow money on the credit of the firm for partnership purposes.

Appeal from the Bath County Court.

The defendant was in partnership with one Sydney Milles and a third person "in the business of proprietors and managers of picture palaces, cinematographic theatres and exhibitions, variety entertainments, concerts, theatrical performances, and all other forms of entertainment . . . . under the style or firm of Sydney Milles Cinema Circuit." By the terms of the partnership deed it was provided that no partner should without the consent of the other partners contract any debt on account of the partnership or in any manner pledge its credit except in the usual and regular course of business. The defendant took no part in the management of the business, which was conducted wholly by Milles. In June and August, 1913, Milles borrowed from the plaintiff two sums of 50*l.* and 34*l.* upon the representation that the money was to be used for the purposes of the partnership business. He in fact never intended to apply it to such purposes, but misappropriated it. The action was brought to recover the money from the defendant as being money lent to the firm. The county court judge gave judgment for the plaintiff. The defendant appealed.

Rawlinson, K.C., and *F. E. Weatherly*, for the appellant. Milles had no implied authority to borrow money on behalf of the firm. "The implied power of borrowing money, like every other implied power of a partner, only exists where the business is of such a kind that it cannot be carried on in the usual way without such a power. . . . . If the business is such as is customarily carried on on ready money principles . . . . or without borrowing . . . . the firm will not be bound unless some actual

authority or ratification can be proved": Lindley on Partnership, 8th ed., p. 167. There was nothing here to shew that such a business as the defendant's could not be carried on without borrowing. As for actual authority, that was expressly excluded by the partnership deed.

Foote, K.C., and *E. H. C. Wethered*, for the respondent. This was a trading partnership, and all trading partnerships imply an authority to the partners to borrow money. "Every partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm": Pollock on Partnership, 8th ed., p. 35. In *Bank of Australasia* v. *Breillat* (1) Lord Kingsdown said: "That, in ordinary trading partnerships, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm, for money so borrowed, will bind the firm, is too clear to require authority."

Rawlinson, K.C., in reply. A trading partnership is one the business of which consists of buying and selling commodities—*Wheatley* v. *Smithers* (2)—whereas here the business was simply that of providing entertainment; therefore it was not a trading partnership.

HORRIDGE J. This is an action to recover two sums of money which had been borrowed from the plaintiff by one Milles upon the representation that the money was to be used for the purposes of the business of a firm in which the defendant and Milles were partners, and of which Milles was the manager. The partnership deed expressly negatived the power of any one partner without the consent of the others to borrow money so as to bind the partnership. There being no express authority to borrow, the question is whether there was any implied authority. It is clear from the case of *Brown* v. *Kidger* (3) that the managing partner of a common trading partnership has implied authority to borrow money for partnership purposes, and in so borrowing he may bind the other partners although he may wrongfully apply it to other than partnership purposes. But was this a

(1) (1847) 6 Moo. P. C. 152, at p. 194. (2) [1906] 2 K. B. 321.
(3) (1858) 28 L. J. (Ex.) 66.

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common trading partnership in the sense in which that term is used in the cases? For that we must look at the partnership deed. It provides that the business of the firm shall be that "of proprietors and managers of picture palaces, cinematographic theatres and exhibitions, variety entertainments, concerts, theatrical performances, and all other forms of entertainment." I do not think that that is a trading business of the kind from which authority to the managing partner to borrow money or accept bills of exchange is to be implied. The judge in the Court below does not seem to have applied his mind to this question, but to have proceeded upon the assumption that the defendant by allowing Milles to hold himself out as the manager of the business, irrespectively of the nature of the business, rendered himself liable for Milles' unauthorized borrowing in the absence of negligence on the part of the borrower, and that is a proposition which clearly cannot be sustained. The appeal must be allowed.

LUSH J. I am of the same opinion. There was no actual authority to Milles to borrow money, it being a term of the partnership deed that he should not do so without the express consent of the other partners. Therefore the plaintiff must prove that he was justified under the circumstances in assuming that Milles had authority. He might shew that in either of two ways: first, by shewing that the defendant had so conducted himself as to lead him to believe that Milles had authority, and there was no suggestion of any such case here; or secondly by shewing that an authority was to be implied from the nature of the business carried on. It was this that the plaintiff endeavoured to prove. The judge below did not go upon the ground that this was a trading business. He has not so found, and in my opinion there was no evidence on which he could find it. In *Wheatley* v. *Smithers* (1) the question was whether an auctioneer was a trader and the Court held that he was not, Ridley J. saying that buying and selling were essential features of trading and that an auctioneer does not buy. Upon appeal (2) that decision was reversed upon the ground

(1) [1906] 2 K. B. 321. (2) [1907] 2 K. B. 684.

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that the partnership deed shewed that the business was something more than that of an auctioneer and that "it contemplated the sale and purchase of goods and property as part of the business of the partnership." In my opinion it would be wrong to say that every business which involves spending money is a trading business. To my mind a trading business is one which depends on the buying and selling of goods. At all events I am satisfied that this particular business is not a trading business.

Appeal allowed.

Solicitor for appellant: *Hookway, Bath.*

Solicitors for respondent: *Wansbrough, Robinson & Taylor, Bristol.*

J. F. C.

[RAILWAY AND CANAL COMMISSION.]

1914

June 24; *July* 8.

SMITH, STONE & KNIGHT, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Commission—Practice—Joinder of Complaints against several Defendants in one Application—Registrar—Power of, to award Costs in Interlocutory Proceedings — Railway and Canal Commission Rules, 1889, *rr.* 1, 53.

An applicant in the Railway and Canal Commission Court is entitled to join any number of defendants and causes of action in one application, subject to the power of the Court to strike out any party or matter the joinder of which tends to embarrass or delay, and to order separate trials of such of the issues raised as cannot be conveniently tried together.

So *held* by Bankes J. and the Hon. A. E. Gathorne-Hardy, Sir J. Woodhouse doubting.

The effect of r. 53 of the Railway and Canal Commission Rules, 1889, is to delegate to the registrar the power to award costs of interlocutory applications which was conferred on the Commissioners by s. 19 of the Railway and Canal Traffic Act, 1888.

APPEAL to the Commissioners from the registrar.

The applicants, who carry on business as paper manufacturers and paper merchants at Birmingham, Bristol, Hathern, and

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other places, complained to the Railway and Canal Commissioners of increases of rates charged since July, 1913, by the London and North Western Railway Company, the Great Western Railway Company, and eight other railway companies in respect of the traffic carried over their lines.

The applicants joined all the said ten railway companies as defendants in one application. The increases alleged in the application were in the case of the Great Western Railway increases in local rates only; in the cases of the other railways they were of both local and through rates. The several railway companies pleaded to the application and raised the same defences, that the increases were justified by the Railway and Canal Traffic Act, 1913 (2 & 3 Geo. 5, c. 29), as being reasonably required to meet the increased cost of working the railway, and also that, apart from that Act, they were reasonable. The Great Western Railway Company applied to the registrar for an order that their name should be struck out of the proceedings on the ground that there was no power to join several railway companies as defendants in respect of distinct causes of action in the same application.

The applicants proposed to amend their application by adding to the schedule of Great Western rates complained of a list of through rates for traffic partly carried over the Great Western Railway which had also been increased. The registrar refused to make the order, and ordered the Great Western Railway Company to pay 3*l.* 3*s.* costs. The railway company appealed against the registrar's refusal and also against the order to pay costs.

Lynden Macassey, K.C., J. G. Talbot, K.C., and *W. A. Robertson*, for the appellants. There is no power to join these various companies as defendants, for the cause of action against each company is quite distinct. The extent to which the increased cost of working the railway is attributable to the improved labour conditions existing on its system may differ on each railway. It may be that in the case of a through rate the several companies to whose lines the particular through rate relates may be joined as defendants, but here so far as appears

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in the application no through rate with which the Great Western Railway Company is concerned is complained of. With regard to the costs of the summons the registrar had no jurisdiction to award them. The only power to award costs is that given by s. 19 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), which confers it upon the Commissioners, who are in that Act defined to be a judge of a superior Court and two appointed Commissioners. According to the decision in *Rickett, Smith & Co.* v. *Midland Ry. Co.*(1) that power of the Commissioners to award costs still holds good in interlocutory proceedings, notwithstanding the provision in s. 2 of the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54). But nowhere is there any power given to the Commissioners to delegate their authority over costs to the registrar.

Disturnal, K.C., and *Wrottesley*, for the applicants. The Court has jurisdiction to authorize the joinder of these several causes of complaint. By r. 65 of the Railway and Canal Commission Rules, 1889, the Commissioners may apply the principle of practice of the superior Courts. By Order XVI., r. 4, of the Rules of the Supreme Court any number of persons may be joined as defendants at all events if the relief asked for arises out of the same facts, and here the alleged justification of the increase of the rates is the same in the case of all the defendants. If after the defendants have respectively delivered particulars of their justification it appears that the issues between the applicants and the different companies cannot be conveniently tried together, the Court may under Order XVIII., r. 1, "order separate trials of any of such causes of action to be had." But until the interlocutory proceedings are closed and the issues are ready for trial the application of one of the defendants to sever the complaints is premature. The joinder of all the defendants for the purpose of interlocutory proceedings will under the circumstances effect a great saving of expense. For the purpose of considering whether the proportion of the increased cost of working allocated to this particular traffic is reasonable it will be necessary to go into the question of the Great Western through rates as well as their local rates, even though the Great Western through rates

(1) (1895) 9 Ry. & Ca. Tr. Cas. 107.

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are not complained of in the application. But, further, the applicants propose to amend the schedule of the appellants' rates complained of by adding certain through rates.

Cur. adv. vult.

July 8. BANKES J. This is an appeal from an order of the registrar dismissing the appellants' summons asking to be struck out of the application, and awarding the respondents 3*l.* 3*s.* costs.

Two points were taken in support of the appeal: first, that the applicants had no right to join the appellants as defendants in the application, and second, that the registrar had no power to award costs. The application is one by traders complaining of the recent increases in rates, and the applicants joined as defendants the railway companies who carry their goods. The application contains schedules in which specimens are given of the rates complained of. In the case of some of the defendants the rates are through rates as well as local rates. In the case of the appellants (the Great Western Railway Company) the rates happen to be local rates only, but the registrar was informed when he heard the summons, and Mr. Disturnal repeated to us, that it was an accident that local rates only had been inserted in the schedule, and that it was the intention of the applicants to amend their application and particulars by inserting some specimens of through rates. It was contended for the appellants that the applicants' case as against each railway company was a separate and distinct case, and that it was not competent for the applicants to join in one application separate and distinct cases, and that, except possibly in a case where through rates were complained of, when all the companies concerned could be joined, a separate application must be made against each railway company in respect of the rates charged by that railway company. I do not agree with this contention. The rules governing the procedure in this Court are expressed in very general terms. Rule 65 gives the Court power of applying at its discretion the general principles of practice in the superior Courts, but there is no obligation to apply them. Arguments were addressed to us upon the question as to whether the Rules

of the Supreme Court permitted the joinder of such different forms of complaint as the applicants had inserted in their present application. I do not consider it necessary to deal with these arguments, as the question in this case can, in my opinion, be determined upon the rules applicable to proceedings in this Court. Rule 1 provides that in the construction of the Rules and Forms words importing the singular number shall include the plural, and that the term "defendant" shall mean the persons or company against whom the application is made. No limit is anywhere in the rules placed upon the number of persons who may be joined as defendants in any application, or as to the number of complaints which may be included in one application. There is nothing therefore in the rules which prevents the plaintiff in the present application joining all the defendants, and nothing which gives the present defendants a right to be struck out of the proceedings. The Court, however, has, in my opinion, a full power to prevent any abuse or embarrassment arising from this unlimited power of joining defendants by putting in operation its powers to strike out matters which may tend to embarrass or delay, or by applying when necessary the Rules of the Supreme Court as to joinder of parties or causes of action, or of confining the application to such matters as can conveniently be tried together. I see no reason in the present case for interfering with the applicants' procedure at the present stage. To join all the defendants in one application and to deal with any interlocutory proceedings upon the one application is a considerable saving of expense, and up to the present it has not in my opinion embarrassed the defendants in any way. When the interlocutory proceedings are completed it will probably be necessary, in order to avoid confusion, to make some order which will keep the trial of the issues which concern each particular railway company separate from the trial of those which concern any other railway company, but the question does not arise on the present application, which was misconceived and, in my opinion, was properly dismissed by the registrar.

I must now deal with the power of the registrar to award costs. In my opinion his power to do so is quite clear. Sect. 19 of the Act of 1888 gave the Commissioners full discretion over the costs

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of all proceedings before them. Sect. 20 gave the Commissioners power to make rules for the carrying into effect of the Act. Sect. 2 of the Act of 1894 cut down the power of the Commissioners with regard to costs, but it left untouched their discretion over the costs of interlocutory proceedings: see *Rickett, Smith & Co.* v. *Midland Ry. Co.* (1) By r. 53 the Commissioners imposed upon the registrar the duty of dealing with interlocutory applications, and he is directed to determine them in a summary way. This delegation of their authority by the Commissioners is a complete delegation, and certainly, in my opinion, carries with it the same power as the Act conferred upon the Commissioners themselves of dealing with the costs of any application. This view is in accordance with the reasoning of Tindal C.J. in *Prescott* v. *Roe* (2), where he dealt with the power of a judge at chambers to award costs. For these reasons I am of opinion that this appeal fails, but as the application to strike out the appellants' name was misconceived rather than entirely unnecessary, we think that no costs should be given here or below.

HON. A. E. GATHORNE-HARDY. I agree with the judgment just delivered. I think the application to strike out the Great Western Railway Company was premature, and that up to the present time they have not been prejudiced, and therefore the registrar's decision was right and should be upheld.

SIR JAMES WOODHOUSE. I also agree, for the reasons which my Lord has stated, that the registrar has power to award costs in interlocutory proceedings before him. With regard to the appeal against the registrar's decision refusing to strike out the Great Western Railway Company as a defendant in the particular circumstances of this case, namely, that the application has been amended so as to make that company a defendant in respect of through rates, I think the registrar's order should stand, but that part of it which gives the applicants costs should be varied, and each party should pay their own costs. I desire, however, to say that, whilst no one is more desirous than I am of making the

(1) 9 Ry. & Ca. Tr. Cas. 107. (2) (1832) 1 Dowl. 274.

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Sir James Woodhouse.

Court as useful as possible, and, to this end, of simplifying its procedure and minimizing the expense of proceedings, I am not wholly convinced that it will conduce to this end to allow an applicant to join any number of complaints against any number of defendants in one application, nor am I personally satisfied that he has a right to do so. I think this Court has and should have a discretion in the matter, and, judging from my experience of the Court, I can conceive many cases in which it would be embarrassing and inconvenient and add to the expense to allow this to be done, but in the present case we can sufficiently guard against this by directing how the issues are to be tried at a later stage.

Appeal dismissed.

Solicitor for Great Western Railway Company: *L. B. Page.*
Solicitors for applicants: *Wedlake, Letts & Birds.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1914

June 17; *July* 18.

BRITISH OIL AND CAKE MILLS, LIMITED *v.* PORT OF LONDON AUTHORITY.

[1913 B. 1852.]

Docks—Port Rates—Exemption—Goods imported for Transhipment only—Goods exported "coastwise" — Transhipment in Port of London for Rochester — Conveyance "by sea only" — Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London* (*Port Rates on Goods*) *Provisional Order Act,* 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c. c.*), *Schedule, s.* 9.

Sect. 13, sub-s. 1, of the Port of London Act, 1908, provides that, subject to the provisions of that section, all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates contained in a provisional order under the section, be liable to port rates, provided that "the provisional order . . . . shall provide for exempting from such rates goods imported for transhipment only . . . ."

Sect. 13, sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point . . . ."

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Sect. 9 of the provisional order in the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, provides that "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only . . . . For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise" which are certified and proved within the period and in the manner provided by the section to have been intended for transhipment and to have been shipped again as soon as practicable within the Port of London for conveyance by sea to such other port.

Goods belonging to the plaintiffs were imported by steamer into the Port of London from beyond the seas, and the plaintiffs delivered to the collector of the Port Authority a certificate under s. 9 of the provisional order stating that the goods were intended for transhipment to the port of Rochester, on the river Medway, by sailing craft. Rochester was within the Reculvers line but not within the Port of London. The Port Authority declined to accept the certificate, and the plaintiffs paid the port rates on the goods under protest. The goods were put over the side from the steamer into a sailing barge and conveyed to Rochester. The plaintiffs sued to recover the amount of the port rates :—

Held, by Kennedy and Phillimore L.JJ., Buckley L.J. dissenting, that the expression "coastwise" in s. 9 of the provisional order was used in its ordinary sense unaffected by the meaning attached to the words "goods imported or exported coastwise" in s. 13, sub-s. 5, of the Act of 1908; that the conveyance to Rochester down the river Thames and up the river Medway was a conveyance "by sea only" to another port "coastwise" within the meaning of s. 9; and that therefore the goods, having been imported for the purpose of being so conveyed, were exempt from port rates.

Judgment of Pickford J. [1914] 1 K. B. 5, affirmed.

APPEAL from the judgment of Pickford J. at the trial of the action in the commercial list without a jury; reported [1914] 1 K. B. 5.

The plaintiffs claimed 1*l.* 13*s.* 4*d.* as money paid by them to the defendants under duress in order to obtain the release of 100 tons of linseed, the plaintiffs' property. The 1*l.* 13*s.* 4*d.* was claimed by the defendants as port dues.

The facts were agreed by the parties as follows :—

The steamship *Assyria* from Calcutta and other ports with a general cargo was reported on June 12, 1912, at the Custom

House, London, to have arrived for discharge at Victoria Docks, London.

Part of this cargo, namely, 100 tons of linseed, belonged to the plaintiffs, who on June 12, 1912, as owners of the goods presented and delivered to the collector of the Port Authority at the Port Rates on Goods Office of the Port of London Authority a certificate under their hands. The certificate was in the form required by the Port Authority under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910 (1), in respect

(1) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 13, sub-s. 1: "Subject to the provisions of this section, ... all goods imported from parts beyond the seas or coastwise into the Port of London, or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix, not exceeding such rates as may be specified in any provisional order, made by the Board of Trade, for the time being in force, but the port rates charged by the Port Authority shall at all times be charged equally to all persons in respect of the same descriptions of goods under the like circumstances, ...

"Provided that—

. . . . . .

"(*b*) The provisional order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port, and may determine what goods are for the purposes of such exemption to be treated as goods imported for transhipment only."

Sub-s. 2 provides for the preparation and embodiment in a provisional order of a schedule of maximum port rates on goods.

Sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury in pursuance of the power conferred upon them by section one hundred and forty of the Customs Consolidation Act, 1876, ..."

Sect. 15 contains a prohibition of preferential dock charges.

By s. 49 the expression "Port of London" means the port within the limits described in Sched. V. to the Act. By Sched. V. the port is defined as extending "down both sides of the river Thames to an imaginary straight line (in this Act referred to as the seaward limit of the Port of London) drawn from the pilot mark at the entrance of Havengore Creek, in the county of Essex, to the Land's End, at Warden Point, in the Isle of Sheppey, in the county of Kent" (this being the eastern or seaward limit of the port

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of goods imported into the Port of London and intended for transhipment, and was entitled "Inwards port rates exemption certificate." The certificate stated that the goods were intended for transhipment and described them as linseed, the quantity being 1364 bags weighing 100 tons, the destination and route being Rochester in the county of Kent, and the mode of conveyance being by sailing craft belonging to the London and Rochester Barge Company, Limited. The certificate was given within the period and in the manner prescribed by the section.

The Port Authority declined to accept such exemption certificate and made a note on it as follows: "Inside line which extends from Colne Point to Reculvers." Thereupon the plaintiffs paid under protest the sum of 1*l.* 13*s.* 4*d.*, being the amount claimed by the Port Authority for foreign inwards port rate on the 100 tons of linseed at the rate of 4*d.* per ton.

The said 100 tons of linseed were shipped again at the Victoria Docks within the limits of the Port of London by being put overside from the *Assyria* into a sailing barge, and the goods were then conveyed by that barge to the port of Rochester on the river Medway as soon as practicable after June 12, 1912, namely, on July 2, 1912.

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and including the waters which give access to the river Medway), but is not to include any part of the river Medway above the seaward limit of the jurisdiction of the Conservators of that river. The Reculvers to Colne Point line is to the east of the seaward limit of the port.

Port of London (Port Rates on Goods) Provisional Order Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. c.), schedule, s. 9: "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port.

"For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided (1.) to have been intended for transhipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter excluding Sundays and holidays and (2.) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port . . . ."

The point in dispute was whether under the above circumstances the foreign inwards port rate was legally chargeable on the 100 tons of linseed.

Pickford J. held that the word "coastwise" in s. 9 of the provisional order in the schedule to the Act of 1910 must be construed in its ordinary sense unaffected by the meaning attached to the words "imported or exported coastwise" in s. 13, sub-s. 5, of the Port of London Act, 1908; that the expression "by sea only" in s. 9 is used in contradistinction to "by land"; and that therefore the goods were exempt from payment of port rates as having been imported into the Port of London from beyond the seas for the purpose of being conveyed by sea only to another port coastwise within the meaning of the section. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Upjohn, K.C., and *George Wallace*, K.C. (*Wootten* with them), for the defendants. Though the seaward limits of the Port of London are, by Sched. V. of the Port of London Act, 1908, placed eastward of the mouth of the Medway, the river Medway is not within the port, and therefore Rochester is not within it. Sect. 13, sub-s. 1, of the Act imposes such port rates on "goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port," as may be contained in a provisional order, and by the proviso in sub-s. 1 (*b*) the provisional order shall provide for exempting from such rates "goods imported for transhipment only," or which remain on board the ship for conveyance therein to another port. By sub-s. 5, for the purpose of the section, goods are not to be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point. This line is eastward of the limits of the port. By s. 9 of the provisional order in the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, no port rates shall be levied on "transhipment goods," which expression means and includes "goods imported for transhipment

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only," and also goods which remain on board the vessel for conveyance to another port; and for the purposes of the section the expression "goods imported for transhipment only" means "goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise." The word "coastwise" there has the meaning given to it in s. 13, sub-s. 5, of the Act of 1908, and therefore the goods in this case were not imported for transhipment only, because they were not imported for the purpose of being conveyed to a place seaward of the Reculvers line. By s. 3 of the provisional order "expressions defined in the Port of London Act, 1908, shall, unless the context otherwise requires, have the same meanings in this order." The definition of goods "imported or exported coastwise" in s. 13, sub-s. 5, of the Act of 1908 is a definition of an expression in the Act, and it occurs in a section under which the provisional order is made. Sect. 4 of the provisional order follows the language of s. 13, sub-s. 1, of the Act of 1908, and the word "coastwise" there must have the same meaning as in s. 13, sub-s. 1, that is to say, the meaning given to it by sub-s. 5. Sect. 7 differentiates, so far as port rates are concerned, between goods imported or exported coastwise and goods imported from or exported to parts beyond the seas. There again "coastwise" must have the meaning attached to that word in s. 13, sub-s. 5, of the Act of 1908. So too the expression "coastwise goods" in ss. 13, 14, and 30 has that meaning. Sect. 9 of the provisional order carries out the mandate of s. 13, sub-s. 1 (*b*), of the Act of 1908, and in defining "goods imported for transhipment only" it substantially repeats the words in the earlier part of s. 13, sub-s. 1, "goods imported from parts beyond the seas or coastwise." The words in s. 9, "from beyond the seas or coastwise," where they first occur, qualify "imported"; and the later words, "whether beyond the seas or coastwise," qualify "conveyed." By s. 31 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), where any Act confers power to make any instrument, as, for instance, an order, expressions used in the instrument shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power. Statutes on the

same subject ought to be read as one statute: *M'William* v. *Adams*. (1) Therefore throughout the provisional order "coastwise" is used in the sense given to that expression in s. 13, sub-s. 5, of the Act of 1908, namely, seaward of the Reculvers line. If the learned judge's construction of the word "coastwise" in s. 9 is correct, the words "whether beyond the seas or coastwise" are unnecessary and have no meaning, and the words ought to read "for the purpose of being conveyed by sea only to any other port." That is not a legitimate mode of construing a statute. No doubt s. 43 of the Act of 1908 prevents dues being levied on any vessel or on any goods carried therein by reason only that the vessel passes through any part of the Port of London on a voyage between places situate on the rivers Medway or Swale and not within the Port of London and any other places not within that port; but the defendants are not claiming dues on the goods because they are carried by the barge to Rochester. They claim dues on the goods because they were imported into the Port of London.

Further, the goods were not imported "for the purpose of being conveyed by sea only" to any other port whether beyond the seas or coastwise, within the meaning of s. 9 of the provisional order. "Conveyed by sea" is not, as the learned judge thought, intended to be distinguished from conveyance by land. If that were so, goods could be conveyed by canal to many parts of England free from port rates. "By sea" cannot mean water carriage as distinguished from land carriage. A navigable tidal river is not the sea: *Woolwich Overseers* v. *Robertson*. (2) The voyage must be by sea. The word "only" qualifies the word "purpose." The words mean, "For the purpose only of being conveyed by sea to any other port whether beyond the seas or coastwise." Sched. V. of the Act of 1908 specifies the limits of the Port of London as extending "down both sides of the river Thames to an imaginary line" which is seaward of the entrance to the Medway; and by s. 7, sub-s. 2 (*c*), the eastward limit of "the Thames" in s. 3 of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), is extended so as to coincide with the seaward

(1) 1852) 1 Macq. H. L. 120, at p. 141. (2) (1881 6 Q. B. D. 654.

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limit of the Port of London. The voyage to Rochester is therefore not a sea voyage. The goods, to be exempt from port rates, must have been imported from beyond the seas or coastwise, that is, from a place seaward of the Reculvers line, for the purpose of being conveyed by a sea voyage to another port beyond the seas or coastwise. The judgment of the learned judge was therefore wrong. [They also referred to the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 140, 142, 143.]

E. M. Pollock, K.C., and *Morton Smith* (*Talbot, K.C.*, with them), for the plaintiffs. The Port of London Act, 1908, carefully protects the river Medway traffic. The Medway is expressly excluded from the limits of the Port of London, see Sched. V.; and by s. 7, sub-s. 2 (*c*), the definition of "the Thames" in s. 3 of the Thames Conservancy Act, 1894, is enlarged, but it is expressly provided that no part of the river Medway is to be included in it. By s. 43 no dues are to be levied on any vessel or on any goods carried therein by reason only that the vessel passes through any part of the Port of London to or from places on the Medway or Swale. Sect. 13, sub-s. 5, is likewise intended to protect the traffic passing between the Port of London and the ports within the Reculvers line, such as the Medway ports. It is a negative provision, and is intended to exclude the Medway traffic. It is not a definition section, and it only applies "for the purpose of this section," the definition section proper being s. 49. It limits the wide area covered by sub-s. 1. Under sub-s. 1 (*b*), the provisional order is to exempt a certain class of goods from port rates imposed by sub-s. 1. The Port of London (Port Rates on Goods) Provisional Order Act, 1910, is an independent Act, and is not merely ancillary to the Act of 1908. Sect. 13, sub-s. 5, of the Act of 1908 is not imported into the provisional order. The word "coastwise" in s. 9 of the provisional order has its ordinary meaning unaffected by s. 13, sub-s. 5, of the Act of 1908. Sect. 9 exempts goods from port rates which would otherwise have to pay rates. The word "coastwise" throughout the provisional order is used in its ordinary sense, and goods conveyed to any port along the coast are conveyed "coastwise." The words "whether beyond the seas or coastwise" in s. 9 are not words of limitation. They do

not limit the preceding words "for the purpose of being conveyed by sea only to any other port." They are intended to amplify those words, that is, to prevent any doubt as to their wide meaning. The words "whether beyond the seas or coastwise" are therefore not unnecessary, because they emphasize the generality of the preceding words. According to the defendants' construction goods transhipped in the Port of London for conveyance to Rochester or other ports within the Reculvers line would have to pay port rates, whereas if the goods were carried on in the same ship they would not. The Legislature cannot have intended this result. Moreover the Legislature, while desiring to protect Medway traffic, can hardly have intended to place Medway ports in a worse position than ports east of the Reculvers line, such as Ramsgate and Harwich.

As to the words "by sea only," they were inserted for the purpose of distinguishing the carriage from a carriage by sea and land. The carriage must be waterborne carriage, part of which is by sea. Thus the carriage may be by sea, or by sea and river, or by sea and canal. Many ports are reached by river and some by canal. The voyage down the Thames to Rochester is a voyage partly "by sea" in the ordinary meaning of these words.

Upjohn, K.C., in reply. The defendants do not rely upon s. 9 of the provisional order as imposing port rates upon these goods. That is done by s. 13, sub-s. 1, of the Act of 1908 and s. 4 of the provisional order. The whole question is whether s. 9 of the provisional order extends the benefit of the exemption to these goods. The defendants contend that it does not. The two Acts are not independent Acts, but even if they were, as they are in pari materia, the same expression must be construed in each Act in the same way: *Waterlow* v. *Dobson.* (1)

Cur. adv. vult.

July 18. BUCKLEY L.J. read the following judgment:—The point for decision is a neat point of law, namely, the true construction of the Port of London Act, 1908, and the provisional order of 1910. The facts are the simplest possible. A ship arrived from Calcutta for discharge at the Victoria Docks

(1) (1857) 27 L. J. (Q.B.) 55.

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in the Port of London. She discharged certain linseed, part of her cargo, by way of transhipment into a sailing barge which took the linseed to Rochester and there delivered it. The proper certificate required by s. 9 of the provisional order of 1910 was given. The plaintiffs say that these being transhipment goods were, by virtue of s. 9 of the provisional order of 1910, free of port rates. The defendants charged port rates. The plaintiffs paid the amount under protest, and now sue to recover it. The defendants say that these were not transhipment goods, for that when conveyed from the Victoria Docks to Rochester they were not "conveyed by sea only to another port whether beyond the seas or coastwise" within s. 9 of the provisional order. The whole question is as to the meaning of s. 9, and in particular of the words "by sea" and "coastwise" in that section.

The Act of 1908 contains (s. 13) a charging section. Under that section all goods imported from or exported to parts beyond the seas or coastwise into or from the Port of London are subjected to port rates, subject to exemptions there referred to. Sect. 13 is not complete in itself. The rates are to be specified in a provisional order (s. 13), and that order is to be confirmed by Parliament (Sched. IV., clause 4). The Act contains in s. 13, sub-s. 1 (*b*), provisions as to something which this provisional order is to do, and as to something which it may do. The provisional order was made in 1910 and confirmed by the Act of 1910. For all material purposes that order is, I think, to be read as taking effect under the Act of 1908, and is to be read with the Act of 1908.

One thing seems plain, namely, that goods which are brought into the Port of London on board ship, and remain on board that ship for conveyance therein to another port, are to be exempt. Sect. 13, sub-s. 1 (*b*), so provides, and s. 9 of the order of 1910 gives effect to that provision. That port may be any other port wheresoever it be. If these goods had gone from the Victoria Docks to Rochester in the ship in which they arrived in the Port of London no port dues, so far as I see, could have been charged. I am not deciding the point; it does not arise for decision. But that is at present my view. Under these circumstances it is

highly improbable that port dues should become chargeable by reason of the fact that the goods have been put into a barge and carried in a barge to Rochester. The Act of 1908 intended, I think, to protect such a port as Rochester, and did so under some circumstances by s. 43, although having regard to the words "by reason only" in that section the protection is not so expressed as to infer an intention to give protection under all circumstances. I start, however, upon the consideration of the true construction of those portions of the Act which are relevant to the present question with a leaning in favour of holding that the Act cannot have intended to charge rates upon these goods merely because they were not carried in the same bottom to Rochester.

The Act of 1908, s. 13, sub-s. 1 (*b*), remits it to the provisional order to determine what goods are to be treated as "goods imported for transhipment only," and are consequently to be exempt. The provisional order of 1910, s. 9, contains a determination upon the question. The question to be answered is whether the goods put into the barge at the Victoria Docks and taken to Rochester were transhipment goods within s. 9. The words are "'Goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise," and they must be goods which are "certified and proved . . . . (2.) to have been shipped . . . . for conveyance by sea to such other port." The words "whether beyond the seas or coastwise" in that sentence qualify, in my opinion, not the noun substantive "port" which immediately precedes them, but the verb "conveyed." "Coastwise" is an adverb expressive of motion. A port cannot be coastwise. Goods can be conveyed coastwise. I therefore read the sentence thus: "for the purpose of being conveyed whether beyond the seas or coastwise by sea only to any other port." The conveyance must be a conveyance (whether beyond the seas or coastwise) by sea, and it must be certified that the goods have been shipped again for conveyance by sea. Then what is the meaning of the word "only" in the context "for the purpose of being conveyed by sea only to any other port"? If the conveyance is partly by river, is that

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excluded? I answer No. Many ports are reached by river after leaving the sea. In leaving the Port of London the voyage is partly by river. The word "only," I think, qualifies the word "purpose," or possibly is to be read with the next words "to any other port." The purpose of conveyance to another port must be the only or real purpose and not an illusory purpose. Another possible, and I think probable, meaning is that the word "only" qualifies the words "by sea," and means that the conveyance must be by sea to the exclusion of conveyance not by sea. It need not be conveyance wholly by sea. The condition is satisfied if there is a conveyance wholly or partly by sea, but not if there is no conveyance by sea. The words are thus equivalent to "provided that there must be conveyance by sea." Whichever of these meanings is attributed to the word "only," it remains that it is an essential condition that there shall be conveyance by sea, and that conveyance by sea must be either from beyond the seas or coastwise.

The expression "transhipment goods" does not include goods conveyed to any other port without qualification. It is confined to certain goods, viz., goods conveyed to another port of which it can be predicated that the conveyance to it involves conveyance either beyond the seas or coastwise. Transhipment, therefore, for conveyance to another port is not sufficient, although conveyance to another port in the same bottom is. If the conveyance is not in the same bottom it must (where conveyance beyond the seas is not in question) be conveyance by sea to another port coastwise if the exemption is to prevail. The Act of 1908 contains in s. 13, sub-s. 5, an explanation of the meaning of the phrase "imported or exported coastwise." It is not a definition clause. It is a clause negative and not affirmative in form. But it is a clause which in speaking of motion coastwise explains that such motion must be a motion of coming from or going to a place beyond the Reculvers line. It is not necessary to rely upon s. 3 of the provisional order as introducing into the provisional order a definition of the word "coastwise" found in the Act of 1908. I doubt whether "coastwise" is defined at all by the Act of 1908. I doubt whether "conveyance coastwise" is defined by the Act of 1908.

But goods imported or exported coastwise are by the Act of 1908 restricted to goods of which it can be predicated that they have been imported from or exported to a place seaward of the Reculvers line, and when coastwise conveyance forms a part of the qualification of goods entitled to exemption, I think the same meaning must be given to the word "coastwise" in that context.

The subject-matter to be dealt with by the provisional order required by s. 13 of the Act of 1908 is goods imported from or exported to parts beyond the seas or coastwise. That subject-matter is taken up in the same words (as it ought to be) by s. 4 of the provisional order. The second paragraph of s. 9 takes up the same subject-matter so far as imported goods are concerned, and where the word "coastwise" is first used in that paragraph it plainly bears the same meaning as in s. 13, sub-s. 5, of the Act of 1908. When the word "coastwise" occurs for the second time in that paragraph, it ought, upon true principles of construction, in the absence of some context or some plain inference to the contrary, to bear the same meaning as when used in the last preceding line. Its meaning when it is first used is beyond dispute. It is that given to it by sub-s. 5 of s. 13 of the Act of 1908. The same meaning is, I think, to be given to it when next it is used. Throughout the provisional order, as, for instance, in s. 7, sub-ss. 1, 2, and 4; in the preliminary paragraph of s. 13, sub-s. 1, and in clauses (A), (B), and (C) of that sub-section, in s. 14 (A) and (B), and elsewhere, I believe, in the order, the word is used. The order further invents a phrase not found in the Act of 1908, namely, "coastwise goods." "Coastwise" is a word which cannot be said to have an ordinary meaning. It is in this connection a technical expression. As used throughout the order, it must, I think, be used in the sense attributed to it in s. 13, sub-s. 5, of the Act of 1908, and goods conveyed coastwise must mean goods conveyed to seaward of that certain line. In such a context I cannot see my way to say that the word "coastwise" when secondly used in s. 9 bears a meaning different to that which it bears when first used, or, in other words, is not to bear the same meaning as is attributed to it in s. 13, sub-s. 5. If this is so, these goods were not conveyed

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coastwise, and they were not, I think, conveyed by sea. In that context the word "sea" imports, I think, a sea voyage such as would be involved in a conveyance beyond the seas or coastwise.

It is not my duty or my right to say whether the language of the order was intended to be something different to that which it is. I can see no reason for saying that goods taken to Rochester in another bottom ought upon any reasonable ground to be differently treated from goods which go on in the same ship. But the fact remains that the Act of 1908 remitted it to the provisional order to determine what goods should for the purpose of exemption be goods imported for transhipment only, and I find myself unable to say that carriage from the Victoria Docks to Rochester is conveyance "by sea," or that it is conveyance "whether beyond the seas or coastwise."

For these reasons, while I agree that the judgments of my brethren give effect to what I cannot help thinking it must have been intended to provide, I think that can be only matter for amendment. I am unable to find as matter of construction that the order has so provided.

For these reasons I must hold that the defendants are right, and that judgment should be entered for them.

KENNEDY L.J. read the following judgment:—The material facts in this case are that the s.s. *Assyria* from Calcutta and other foreign ports arrived at the Victoria Docks, London, with a cargo of which part consisted of 100 tons of linseed intended for transhipment to the port of Rochester on the Medway, and that the linseed was at the Victoria Docks transhipped into a sailing barge and conveyed to Rochester. The question is whether in these circumstances the Port of London Authority was or was not entitled to charge the owners of the linseed with port rates. The answer depends upon the interpretation to be placed upon certain sections of two statutes, the Port of London Act, 1908, and the Port of London (Port Rates on Goods) Provisional Order Act, 1910.

The earlier of these two statutes created the Port of London Authority, and under the head "Financial Provisions" by the 13th and following sections provided for the levying of rates on

imported and exported goods according to a scheme to be fixed by the Board of Trade and embodied in a provisional order, to be confirmed by Parliament, and for the exemptions therefrom.

The material portions, so far as this appeal is concerned, of s. 13 are as follows:—"(1.) Subject to the provisions of this section . . . . all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix, not exceeding such rates as may be specified in any provisional order . . . . Provided that . . . . (*b*) The provisional order under this section shall provide for exempting from such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port . . . . (5.) For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point." The result and the purpose of the last quoted enactment are plain. Whereas, under s. 13, sub-s. 1, there is a general provision for the imposition of port rates upon all goods imported from or exported to parts beyond the seas or coastwise (i.e., from ports in the United Kingdom or from ports outside the United Kingdom), subject only to certain exemptions to be specified in the provisional order, which must under sub-s. 1 (*b*) include an exemption for goods imported for transhipment only or which remain on board the importing ship for conveyance therein to another port, this sub-s. 5 excludes from any liability to port rates, as goods imported or exported coastwise, goods which are imported to or exported from places landward (i.e., roughly westward) of a line drawn from Reculvers Towers to Colne Point. It was obviously intended, for reasons, I presume, of policy, to grant a favour by way of exemption from port rates, to places with a shipping trade, of which there are several, such, e.g., as Whitstable, or Rochester, or Colchester, in the neighbourhood of the Port of London. A similar policy is shewn by s. 43: "Nothing in this Act shall be

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construed as imposing any dues on any vessel or on any goods carried therein by reason only that the vessel passes through any part of the Port of London on a voyage between places situate on the river Medway or the river Swale and not within the Port of London and any other places not within that port." The important thing to note is that s. 13, sub-s. 5, does not enact any definition of "coastwise." All that it says is that when the expression "imported or exported coastwise" is used in the section it does not include goods imported from or exported to places—of which, as I have just observed, Whitstable, Rochester and Colchester are samples—landward of the line drawn from Reculvers Towers to Colne Point.

We have now to consider the Port of London (Port Rates on Goods) Provisional Order Act, 1910. Between the years 1908 and 1910 the Board of Trade had made a provisional order, as contemplated by the Act of 1908. The Act of 1910 amends and confirms that order, which is set out in the schedule to the Act, and in s. 9 of the order as appearing in the schedule are the provisions which carry out the enactment of s. 13, sub-s. 1 (*b*), of the Act of 1908 in regard to exemption from port rates. So far as they affect the present case, those provisions are as follows:—"No port rates shall be charged by the Authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only, and also goods which remain on board the vessel in which they were imported for conveyance therein to another port. For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided." Now in the present case it is not disputed by the appellants that the linseed was imported from beyond the seas for transhipment only and was carried in a sailing barge proceeding down the Thames and up the Medway to the port of Rochester, and that the conditions of certification and proof mentioned later in the 9th section have been fulfilled. But, say the appellants, the Port of London Authority are nevertheless

entitled to charge port rates upon these goods because the words "any other port whether beyond the seas or coastwise" are to be understood and interpreted as meaning and including only a port which is either beyond the seas or a port seaward of the line drawn from Reculvers Towers to Colne Point, and in the present case Rochester is not seaward but landward of that line, and, further, the transport to Rochester is not "by sea only," but by river, i.e., down the Thames and up the Medway. I agree with Pickford J. in holding that these contentions of the appellants cannot be sustained.

As I have already pointed out, the statement in s. 13, sub-s. 5, of the Act of 1908 does not purport to be a definition of "coastwise." It means just what it says upon its face, namely, that when the import and export of goods coastwise is spoken of in that section (and I shall assume that the same meaning is to be given to the same expression in the Act of 1910, as, for example, in ss. 4, 7, 9, 13 and 14) the references to goods imported or exported coastwise are always to be understood to apply to goods imported from or exported to places seaward of the line from Reculvers Towers to Colne Point. But I see no ground of justification for giving "coastwise" any special meaning when it occurs apart from the special context in which it is used in s. 13, sub-s. 5, of the Act of 1908. Sect. 13, sub-s. 5, of the Act of 1908 is no authority for giving a special meaning to the use of the word "coastwise" either in any other connection or by itself. The phrase in s. 9 of the schedule to the Act of 1910, which we have here to construe, is "goods imported from beyond the seas or coastwise"—as these goods unquestionably have been imported—"for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise." In the part of s. 9 which we are considering, as well as in s. 13, sub-s. 1 (*b*), of the Act of 1908, the thing which is being dealt with is not export or import coastwise, but the "conveyance" to another port of goods which have been imported in accordance with the definition in s. 13, sub-s. 5, of the Act of 1908, and are afterwards transhipped for "conveyance" to another port "whether beyond the seas or coastwise." In my judgment, the introduction in this place of the words "whether beyond the seas or coastwise" is

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not a happy piece of draftsmanship, because on a cursory perusal of this section by itself those words might appear to lend colour to such a view as that for which the appellants contend. But, grammatically, the words "whether . . . . or" cannot properly be read as words of limitation; and, even if they could, there is, as it appears to me, and as I have already said, no definition of the word "coastwise" in s. 13, sub-s. 5, of the Act of 1908, but purely and plainly a statement of what in that section is to be the meaning of the expression "imported or exported coastwise" as a whole. That is not the expression here. The context is, in reference to transhipped goods, "for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise."

So far I have dealt only with the unsoundness of the appellants' contention, as I venture to think that it is, as a matter of legal construction, in basing upon the language of s. 13, sub-s. 5, of the Act of 1908, when it states for the purpose of the imposition of rates what the particular expression "imported or exported coastwise" is for the purpose of that section to be taken not to mean, or to include, the inference which the appellants' case requires, that the word "coastwise" has by itself the same particular meaning wherever and in whatever context it occurs. But there are, it seems to me, at least three additional arguments of considerable cogency against such an inference to which these two statutes themselves give rise. In the first place, the result would be in regard to this question of transhipment not, as is the plain intention of s. 13, sub-s. 5, and also of s. 43 of the Act of 1908, to put the places to the landward of the line from Reculvers Towers to Colne Point in a more favourable position, but to put them in a less favourable position, than places to the seaward of that line. In the next place, the purpose of the Act of 1910 being to carry out s. 13 of the earlier Act in the matter of transhipment, the effect of the appellants' contention would be to narrow, to the prejudice of the places to the landward of the line, the proviso (*b*) in s. 13, sub-s. 1, as to exemption for transhipped goods. That proviso enacted in general and unlimited terms that the provisional order "shall provide for exempting from

such rates goods imported for transhipment only, or which remain on board the ship in which they were imported for conveyance therein to another port." The appellants' contention as to s. 9 of the schedule to the Act of 1910 would have the effect of limiting the transhipment to a port (not being a port beyond the seas) to the seaward of the line from Reculvers Towers to Colne Point. Thirdly, whether we look at s. 13, sub-s. 1 (*b*), of the Act of 1908 or at s. 9 of the schedule to the Act of 1910, there seems to be a clear intention to treat the transhipment of goods and the carriage of goods which remain on board the vessel in which they were imported for conveyance therein to another port exactly on the same level in regard to exemption from port rates. If the appellants' view in regard to the meaning of the language in s. 9 as to transhipped goods is right, there would be in regard to this linseed an exemption if the *Assyria* herself carried on the goods to Rochester, but no exemption if the same goods were transhipped to Rochester, as in fact they have been.

In my judgment the word "coastwise" in the expression "beyond the seas or coastwise" has, as Pickford J. has said in his judgment, its ordinary meaning; its ordinary meaning being a voyage between places on the coasts of the United Kingdom when used, as it is in this context, in contrast to "beyond the seas." The adverb is to be found in the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 142 and 143, in regard to goods ("to be carried coastwise"), and in regard to a ship ("arriving coastwise"). In the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 11, sub-s. 5, we have the phrase "a ship . . . . trading coastwise." And by s. 140 of the former of the two last-mentioned Acts it is enacted that "All trade by sea from any one part of the United Kingdom to any other part thereof shall be deemed to be a coasting trade." It may be noted that in regard to the import and export of goods, s. 7, sub-s. 4, of the schedule which we are considering expressly treats, but for the purpose of that section only, references to import and export coastwise as including references to import and export from and to respectively the Isle of Man and the Channel Islands, indicating that but for this express provision those localities would not come within the term.

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One other point upon which the appellants laid some stress remains to be mentioned. The words are "for the purpose of being conveyed by sea only." It is objected by the appellants that this linseed, being imported for the purpose of being conveyed by transhipment to the port of Rochester, which is reached by traversing the rivers Thames and Medway, is not within this description. But I think that "by sea only" in this context must be read generally as intended to exclude any substantially inland or overland transit, whether by canal or river or rail or road. It cannot bear its literal and obvious meaning, for the simple reason that it would practically preclude all transhipment. Many ports which it could not be intended to exclude, such, for example, as Bristol and Newcastle in the United Kingdom, and as Antwerp, Rouen, and Bordeaux on the Continent, can be reached only by river for several miles of a vessel's voyage. New York and Quebec, to go further afield, come into the same class of destination. But the impossibility of a literal construction is, if possible, even more plain when you consider that in truth no vessel, great or small, can carry transhipped goods from London to any other port without passing on its voyage, at the start, along some portion of the river Thames before reaching the sea. It appears to me to be not merely reasonable, but necessary, in these circumstances, to treat the expression "by sea only" as a rather careless piece of drafting, and as meaning a transit which is substantially a transit by water outwards and not inland or overland carriage.

It is not, I think, unworthy of notice that the possibility of controversy as to the meaning of the expression "by sea," which is used in the first line of s. 140 of the Customs Consolidation Act, 1876, seems to have occurred to the framer of that section; for in the latter part of that section it is provided "if any doubt shall at any time arise as to what or to or from what parts of the coast of the United Kingdom shall be deemed a passage by sea, the Commissioners of the Treasury may determine and direct in what cases the trade by water from one port or place in the United Kingdom to another of the same shall or shall not be deemed a trade by sea within the meaning of this or any Act relating to the Customs."

In my opinion the judgment of Pickford J. was right and should be affirmed.

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PHILLIMORE L.J. read the following judgment:—Certain goods were brought by sea from Calcutta to the Victoria Docks in the Port of London. There they were put over the ship's side into a sailing barge bound for the port of Rochester, to which port they were ultimately taken.

The Port of London Authority claimed dues upon these goods as being re-shipped for a place inside the line Reculvers to Colne Point. Pickford J. (as he then was) decided that no dues were payable; and from this decision the present appeal is brought.

Prima facie the goods were liable to pay dues. The Port of London (Port Rates on Goods) Provisional Order Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. c.), gives statutory force to the provisional order which forms the schedule to this Act. By clause 4 of this schedule: "Subject to the provisions of this order and to any exemptions or rebates allowed by the Port of London Authority . . . . under s. 13 of the Port of London Act, 1908, the Authority may demand and take in respect of all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port port rates not exceeding the rates specified in the schedule to this order"; and these were "goods imported from parts beyond the seas."

But in clause 9 there is an exemption for transhipped goods, and this exemption is in the following language: "No port rates shall be charged by the Authority on transhipment goods, which expression wherever used in this order means and includes goods imported for transhipment only and also goods which remain on board the vessel in which they were imported for conveyance therein to another port. For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved within the period and in manner hereinafter provided."

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It is contended for the Port of London Authority that the exemption does not apply, for two reasons: First, it cannot be said that these goods were transhipped "for the purpose of being conveyed by sea only"; and secondly, that Rochester is not "any other port whether beyond the seas or coastwise."

It is convenient to take the second point first. Rochester is a port, a separate and independent port, to which before the passing of the Port of London Act, 1908, access could be had from the open sea without passing through the limits of any other port or conservancy district. Now that the Act of 1908 has placed the limit of the Port of London further seaward, vessels approaching the port of Rochester have to pass through what I may call the vestibule of the Port of London. It is the same for any port to which access may be had by the West Swale.

In order to protect these ports on the Medway and on the Swale there are special clauses, s. 43 in the Act of 1908 and s. 37 of the schedule to the Act of 1910. The words "any other port" would therefore include Rochester. But it is said that the exemption is not given to every other port, but only to any port so situated that it can be described as being beyond the seas or coastwise, that Rochester is not beyond the seas (which is true), and that the conveyance to it cannot be described as coastwise, the reason being that a peculiar meaning is given to that word in sub-s. 5 of s. 13 of the Act of 1908. This argument seems to me illegitimate. The words "whether . . . . or" are not words of limitation. "Whether . . . . or" may be words of extension or of demonstration making it clear that each limb or part is in the whole, or mere words giving force to the affirmation. Sometimes they may have a further use. To be accurate, they imply a complete dichotomy, and therefore they form an assertion by implication that there are and there are only the two limbs or parts. In other words, of every other port to which conveyance can be made by sea it may be predicated that the conveyance is either beyond the seas or coastwise. If it be necessary to hold that no words in an Act of Parliament can be otiose, this seems to me to give a sufficient value to the phrase "whether . . . . or." On the other hand, the contrary

construction seems to me not to give full force to the words "any other."

But for argument's sake assuming otherwise, I go to s. 13, sub-s. 5, of the Act of 1908. The general scheme of this clause is as follows: The Act has created a new authority, the Port of London Authority. It has extended the limits of the port. It does not itself impose port dues. But it proceeds to sketch the outlines or principles on which port dues should be imposed, and to require the Port of London Authority to prepare scales of dues to fill up these outlines and to be thereafter enacted. Generally speaking, the outlines are as follows: Goods brought from or to be sent to other ports are to pay dues on varying scales according as they are from over seas or carried coastwise. But goods brought in only for transhipment are not to pay, and goods moved about in the port from one place in the port to another are not to pay.

To this last principle an extension is given by sub-s. 5. Goods brought from or sent to certain ports in the near neighbourhood are to be treated as if they were only being moved about inside the port. They are not to be conceived of as carried coastwise—over seas is out of the question. This object is carried into effect in the following way, sub-s. 1 having provided as follows: "Subject to the provisions of this section, as from such day as may be fixed . . . . all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port, shall, subject to any exemptions or rebates which may be contained in a provisional order under this section or allowed by the Port Authority, be liable to such port rates as the Port Authority may fix . . . ." Sub-s. 5 then provides: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point, being a line determined by the Treasury . . . ."

Because this object is expressed in language of quasi-definition it is said that a special and non-natural meaning is given to the word "coastwise" in the Act of 1908, and therefore in the later Act of 1910, which no doubt is in pari materia. I do not think this

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force should be given to a clause put in alio intuitu. I have used the word "non-natural." The natural meaning of coastwise is that put upon it in the Customs Consolidation Act, 1876, ss. 142, 143. The line from Reculvers to Colne Point which bounds the area within which goods moved about are to be treated as moved about within the port covers, as is shewn in the map, the mouths of the rivers Blackwater and Colne and the ports of Maldon and Colchester, if not others.

I should have been glad if counsel appearing for the Port of London Authority could have supplied some business explanation or suggestion for their contention. Failing this, it seems to me a somewhat fanciful contention that goods should pay dues if transhipped for Rochester or Colchester, but not if transhipped for Ramsgate or Harwich.

There is another point which seems to me worthy of some consideration. Ships coming to the Port of London with a part cargo for other ports may either tranship this cargo, or may after breaking bulk and discharging their London cargo proceed with the rest (possibly the more easily because the ship has been lightened) to another port. I think the contention that goods so carried on in the same bottom would not pay Port of London dues is sound. If so, again we have had no business reason furnished for a discrimination between these goods and goods actually transhipped.

Now, as to the first matter, whether the goods can be said to have been transhipped for the purpose of being conveyed by sea only to any other port, &c. These words are confessedly difficult to construe, and may well give rise to difference of opinion. They cannot mean conveyance wholly by sea. Because, to begin with, the conveyance outward is for miles down the river; and secondly, the majority of ports in Great Britain, Ireland, and the Atlantic seaboard of the Continent are approached by rivers. In three cases, Gloucester, Manchester, and Amsterdam, they are approached by canals. Probably the words mean "only when conveyed by sea." This, however, leaves it difficult to say what is meant by the phrase "being conveyed by sea."

Perhaps it will be well to consider what are the mischiefs to be prevented. Goods might be unladen in London, put on rail

and sent by rail to another port, such as Dover or Southampton, or by rail with only a trifling sea passage at the end to Cowes or Ryde. Goods so treated are not, and are not to be deemed to be, transhipped. Neither would the putting of goods into non-seagoing craft for conveyance by inland water be transhipment. This is perhaps hardly a practical question; for transhipment has to be for another port, and there is no port on the upper Thames or on the Lea, or on the lesser tributaries. Birmingham could be reached by canal, but is not a port. Theoretically Manchester and even seaports can be reached by canal, but with the present state of our canal navigation this is not likely to be done. However, practical or not, this is ruled by the definition not to be transhipment.

The words "conveyed by sea" therefore exclude land carriage and exclude carriage on inland waters. They admit of conveyance seaward in seagoing craft, and that is, I think, their meaning. I may add that I think that a vessel rounding the Nore is at sea.

Upon the whole I think the judgment is right and should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Dollman & Pritchard, for Hayward Smith & Challis, Rochester.*

Solicitors for defendants: *E. F. Turner & Sons.*

W. F. B.

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[IN THE COURT OF APPEAL.]

MASH *v.* DARLEY.

Bastardy—Evidence—Corroboration—Conviction for having had Unlawful Carnal Knowledge—Proof of Conviction—Evidence of Conduct of Accused —Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

Upon the hearing of a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, the evidence adduced in corroboration of that of the complainant was the evidence of a person who deposed that he had been present at the trial and conviction of the alleged father of the complainant's child upon an indictment charging him with having had unlawful carnal knowledge of the complainant, and who also deposed to the fact that when before the committing justices the alleged father gave evidence that the complainant was a fast girl and that that was the cause of her then condition, and that on his trial at the assizes no suggestion was made that the complainant was a fast girl, nor was the evidence of the alleged father to that effect repeated:—

Held by Buckley L.J. and Kennedy L.J. (Phillimore L.J. doubting), that the conviction was not sufficiently proved, and that the evidence as to it was not corroboration of the complainant's evidence in a material particular as required by the statute.

Held, further, that the evidence as to the conduct of the alleged father in giving evidence before the justices that the complainant was a fast girl and in not giving evidence to that effect at the assizes was corroboration of the complainant's evidence in a material particular.

Decision of the Divisional Court [1914] 1 K. B. 1 affirmed on different grounds.

Appeal from the decision of a Divisional Court (Ridley, Scrutton, and Bailhache JJ.) upon a case stated by justices; reported [1914] 1 K. B. 1.

On February 27, 1913, the respondent preferred a complaint at petty sessions against the appellant, under the Bastardy Laws Amendment Act, 1872, alleging that the appellant was the father of her bastard child and applying for an order under the statute. The justices, having adjudged the appellant to be the putative father and made an order for the payment of 4*s.* a week, stated a case for the opinion of the Court to the following effect.

Upon the hearing of the complaint the respondent gave evidence that the appellant had had connection with her in December, 1911, and in January, February, and March, 1912;

that no other man had interfered with her during that period; and that she had been delivered of a bastard child in November, 1912.

The only evidence by way of corroboration as required by the statute (35 & 36 Vict. c. 65, s. 4) tendered by the respondent was that of Henry Tebbey, a superintendent of police, to the effect

(*a*) That he was present at the hearing before the justices at Oundle Police Court when the appellant was committed for trial on the charge that on divers dates between December 1, 1911, and March 31, 1912, he unlawfully and carnally knew a certain girl named Gertrude Dexter Darley, being above the age of thirteen years and under the age of sixteen years, to wit, of the age of fourteen years; that at the hearing before the justices the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her then condition; that he (Tebbey) was in Court during the trial of the appellant at the assizes at Northampton, but no suggestion was then made by the defence that the respondent was a fast girl, nor did the appellant repeat the evidence on this point which he gave before the justices.

(*b*) That he (Tebbey) was present at the conviction of the appellant at the assizes at Northampton upon an indictment charging that the appellant on or about March 22, 1912, and on divers other occasions within six months then last past did unlawfully and carnally know the respondent, she then being above the age of thirteen and under the age of sixteen years, when the appellant was sentenced to eighteen months' imprisonment.

The respondent contended that the evidence of the superintendent was admissible and amounted to corroboration of her evidence in some material particular as required by the statute. The appellant contended that the said evidence was inadmissible in point of law; that it was not proof of the fact of the said conviction; that, if admissible, it did not amount to corroboration as required by the statute; that the fact of the said conviction, if held to be proved, was not corroboration of the respondent's evidence in any material particular as required by the statute, and that, therefore, there was no corroboration of the respondent's

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evidence to satisfy the statute, and the justices were bound in law to refuse the order applied for.

The justices admitted the evidence of the superintendent and held that the conviction of the appellant was sufficiently proved, and came to the conclusion upon the whole of the facts which had been proved before them that the evidence of the respondent was corroborated in some material particular as required by the statute.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and if not what should be done in the premises.

The Divisional Court held (1) that evidence of the conviction was admissible, that the conviction was properly proved, and that this evidence was corroboration of the complainant's evidence in a material particular as required by the statute.

The appellant appealed.

B. Campion, for the appellant. The conviction was not properly proved. At common law it was necessary to produce the record of the conviction in order to prove it. But s. 13 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), substitutes a certified copy of the record. There is no authority that a criminal conviction can be proved in any way but at common law except under the statute. The respondent, not having availed herself of the means of proof provided by the statute, is thrown back on the common law mode of proof. As regards the suggested corroboration by the appellant's conduct, a defendant does not corroborate a charge made against him by remaining silent. There is no corroboration in the fact that he said before the justices that the respondent was a fast girl but did not say so at his trial.

Barrington-Ward, for the respondent. It is admitted that it is not possible to contend that the conviction was properly proved. But in the case as it stands there is corroboration. Corroboration may be provided by anybody, and you may rely on the conduct of the appellant when the paternity of the child is under

(1) [1914] 1 K. B. 1.

consideration. His excuse before justices in cross-examination and in his own evidence was that the respondent was a fast girl, and this defence was dropped at the trial at the assizes; the justices on the hearing of the bastardy summons were justified in treating these facts as corroboration. It is admitted that the case is on the line, but on the whole there is sufficient corroboration. [He cited *In re Crippen* (1) ; *Bessela* v. *Stern.* (2)]

Campion in reply. The real question is whether the conviction was properly proved. and whether, if so, it amounted to corroboration.

BUCKLEY L.J. This case comes to us upon appeal from an order of the Divisional Court made upon a case stated by justices. The question for decision is whether there was evidence corroborating the evidence of the mother in some material particular by other evidence to the satisfaction of the justices. I have only to examine whether there is upon this case stated evidence in some material particular which could satisfy the justices, for they, and not we, are the people to be satisfied.

The facts of the case, as appearing on the case stated, are as follows: On or about February 27, 1913, a complaint was preferred at the petty sessions against the appellant under the Bastardy Laws Amendment Act, 1872, alleging that the appellant was the father of the applicant's bastard child. Before the justices the girl gave evidence to the effect that she had been a domestic servant in the appellant's house from September, 1911, to March, 1912, and that the appellant first had connection with her just before Christmas, 1911, after which he used to visit her bedroom two or three times a week and had connection with her in her bedroom two or three times a week during January, February, and March till March 1912. There are some further facts which I need not go on to read. On August 9 and 10, 1912, there was a hearing before the justices at the Oundle Police Court when the appellant was committed for trial on a charge that he "at divers dates between December 1, 1911, and March 31, 1912, unlawfully and carnally did know a certain girl named Gertrude Dexter Darley, being above the age of thirteen years

(1) [1911] P. 108. (2) (1877) 2 C. P. D. 265.

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and under the age of sixteen years, to wit, of the age of fourteen years, contrary to the form of the statute," &c. The evidence of the superintendent of police states that he was convicted of that offence. The girl was delivered of a child on November 26, 1912, so that at the date of the proceedings which I have been mentioning she was pregnant, and the bastardy summons was issued, as I have said, in February, 1913. The case stands in this position—that upon the evidence of the girl the paternity of the child is established, the offence is proved, if the evidence can be listened to; but, having regard to the statute, the case cannot be taken to be proved unless within s. 4 of the Act of 1872 the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the justices.

The first point upon which the justices proceeded was that the superintendent of police who was giving evidence spoke to the fact of the conviction, that he was present when the man was convicted, and the justices say, "We admitted the evidence of the superintendent of police and held that the conviction of the appellant was sufficiently proved." The conviction was not proved either by the production of the record or by the proper proceedings under s. 13 of Lord Brougham's Act of 1851, and on that point—I do not see that it is necessary to decide it, because I am going to decide this case upon other grounds—I do not myself see that it could be said that the conviction was proved, and in fact Mr. Barrington-Ward before us has not raised that contention. He does not say that the evidence of the police superintendent that the conviction was arrived at in his presence is a proof of the conviction. I therefore pass from that. I do not rely upon that. What I do rely upon is this. There are two matters, it seems to me, which are plainly admissible evidence. The first is that the superintendent of police said that he was present at the inquiry before the justices when the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her then condition. That is admissible. The second is that the superintendent of police was in Court during the trial at the assizes and he says that no suggestion was then made by the appellant that the

respondent was a fast girl, nor did the appellant repeat the evidence on this point which he gave at the hearing of the charge before the justices in August, 1912. That is admissible. Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake. The defence could have been set up in cross-examination of the girl when she was in the box. Nothing of the kind was done. So, upon matters which are admissible in evidence, it is established that the conduct of the man was this—that before the justices he took a particular course and at a subsequent date he did not take a particular course, and that that was a course which you would have expected him to take under circumstances of his innocence. It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justices were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true. It appears to me that that disposes of this case. Therefore I do not say anything about the question of the proof of the conviction.

The eighth paragraph of the case runs thus: "We admitted the evidence of the said Henry Tebbey and held that the said conviction of the appellant was sufficiently proved." I do not proceed upon that. Then it goes on, "and we came to the

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conclusion upon the whole of the facts which had been proved before us that the evidence of the respondent was corroborated in some material particular as required by the statute 35 & 36 Vict. c. 65, s. 4. The question for the opinion of the Court is whether upon the above statement of facts we came to a correct determination in point of law." I say that they did, in that they were entitled to say that the matters to which I have pointed were evidence upon which they might proceed and they were matters on which it was for them to form an opinion. For that reason I think that this appeal fails and should be dismissed with costs.

KENNEDY L.J. In my view this is an exceedingly unsatisfactory case. To begin with—as Buckley L.J. has just read the words I need not repeat them—prominence unquestionably is given in the case stated (and no doubt quite in accordance with the fact) to the admission by the justices of the conviction as a thing which they say they found was sufficiently proved. I agree that in the latter part of the sentence the wording is open to the conclusion that they took into consideration what they call the whole of the facts, and that in those facts there was evidence of the corroboration required by the statute. But one cannot help feeling that the admission of the conviction as a piece of evidence which I think clearly ought not to have been admitted was a fact which may have led to the conclusion to which they came, and which may perhaps unconsciously have influenced their minds, although there be sufficient in the rest of the evidence for the conclusion at which Buckley L J. has himself arrived. Worse still, when the matter came before the Divisional Court, when the counsel for the respondent, Mr. Barrington-Ward, was not called upon to argue in support of the proof of the conviction, the case proceeded in the judgment of my brother Ridley upon grounds which, with all due respect, I think are grounds which I could not possibly have supported. Indeed, Mr. Barrington-Ward says that they could not be supported. The judgment could not be supported on the grounds given. I say "the grounds given" because the beginning of the judgment in the Court below is "The justices held that the evidence of

Tebbey as to the conviction of the appellant was corroboration," &c. Therefore the question stated, and very clearly stated, by Ridley J. is, Was evidence of the conviction admissible? That is the question, as he calls it, in the case. When I come to the conclusion of the judgment I find a statement of the law which, with all respect, I cannot as at present advised think is a right statement. "In my opinion," says the learned judge, "in a case like this where it is not necessary to prove a conviction but evidence of a conviction is offered by the complainant simply as part of the evidence in support of her case, the evidence of a person who is present is sufficient." It seems to me that if a conviction is offered by a party as part of the evidence in support of her case, one has simply got to go to those rules of law which state whether such evidence is admissible, and we find that the evidence of a conviction is only admissible for any purpose as evidence in a Court of law under certain conditions which were not fulfilled in the present case. "I think, therefore, that there was sufficient evidence before the justices of the conviction of the appellant of having had carnal knowledge of the respondent, this not being a case in which it was necessary to prove the conviction. There is another ground upon which I think that the evidence is admissible, that is, as evidence of the opinion of the jury expressed in the presence of the appellant." I confess that this is the first time I have heard—there may be authority of which I am unfortunately ignorant—that oral evidence of a conviction can be given by somebody who heard the jury give a verdict which is to let in indirectly evidence of the conviction as to the proof of which we have express statutory provision. "I do not see how it can be said that that was not corroborative evidence against him." That is the evidence of the opinion of the jury. "There is no authority to that effect; but as a matter of principle I do not see why this evidence of the verdict of a jury was not some corroboration of the evidence of the respondent. Upon both grounds, therefore, either as a conviction, or as a piece of evidence, I think this evidence was admissible." I am quite unable to follow that: "either as a conviction"; the conviction is put in as a part of the evidence. Therefore, really it seems to me there was only one question which was considered, as the

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learned judge had said at the commencement, Were the justices or were they not entitled to treat the evidence before them as properly bringing before them the conviction of the appellant as a matter of corroboration?

But it is, as has been said, no doubt open to the respondent to support this judgment upon facts appearing in the case stated, although not the facts upon which the Court below had relied in affirming the conviction, and with considerable hesitation I think I ought not to differ from the opinion of the other members of the Court. It is, as Mr. Barrington-Ward said, to use his own words, "only just over the line." I confess that I feel some doubt as to whether it is over the line at all. In many cases I think a change of defence could not be treated as in any way corroborative of the guilt of the prisoner, as to which of course there should be direct evidence on the part of the prosecution where corroboration was required. I should greatly have preferred to find that I was dealing with a case in which I knew that this wrongly admitted evidence of the conviction had had no weight with the justices; but I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases. I am not prepared to differ from my brethren in thinking that this was one of them. The girl had been living in the man's house as a domestic servant; the fact of her being with child was not in dispute. The man had given evidence himself on the first occasion suggestive of improper conduct of other persons, and on the later occasion, when it was very important for him, if he could, to have shewn similar conduct on her part, he withdrew that suggestion altogether. Whether, if I had had to deal with the case in the first instance, knowing the seriousness of the charge and the difficulty in many cases of disproving it, I should have thought this fact sufficient evidence of corroboration is another matter. All we have to consider is, might the justices acting judicially consider that conduct and act upon it? I will not differ from the conclusion to which my brethren have come. The statute says that it must be corroboration "in some material particular," and we must

consider the particular in regard to the charge which is made, which is, here, one of paternity. As I say, I am not sure that I should myself have acted upon it. What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it. Upon the whole I will not differ from the conclusion to which the Court has come, though, as I say, I refrain from doing so with some reluctance, and with the feeling that I could not concur in the reasoning in the Court below. I regret that the fact of the conviction, as evidence which could have influenced the justices, should appear so prominently on the face of the case stated.

PHILLIMORE L.J. I agree that this appeal should be dismissed, and I put it upon the ground—it is quite sufficient to put it upon the ground—given by Buckley L.J. As the matter strikes me, here is a young woman with a child, and she deposes with detail to acts of sexual connection by her master in his house in her bedroom. He, before the magistrates, being charged, the girl being under sixteen and therefore it being a criminal offence, deposes on oath to facts which conceivably would lead the magistrates to suppose that somebody else was the parent of the child, though it would be still possible that he might have had sexual connection with her. His defence is not sufficient to prevent the magistrates committing him for trial. When the trial comes it gets as far as his having to give evidence. That I am quite prepared to take from the evidence of the police constable. I also take the finding "nor did the appellant repeat the evidence on the point" as a finding of the magistrates that he did go into the witness-box. It does not very much matter whether he did so or not. He then, being in increased peril, does not repeat, either through his advocate, by cross-examination, or when he comes to give evidence, if he did give evidence, the suggestion which would explain the matter in a way favourable to himself. I do not say that by itself it would be nearly enough; but when corroboration only is required, when, as the books put it, the corroboration is required to prevent men being at the mercy of profligate women, such evidence by conduct might be treated by

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the tribunal which had to determine not a criminal but a purely civil question as sufficient corroboration. That is all I think it is necessary to say to support the decision.

But I am bound to say that other matters in this case may require on some future occasion further consideration. Mr. Campion, in his very able and concise argument, to my mind inverted the points. I think that the first and really important point is whether, if the conviction had been properly proved, it would have been admissible. I can see the difficulty. As you can convict without corroboration, ought a conviction which may have been obtained without corroboration to go any further than the girl's evidence? I think that that is a matter which will require some very careful consideration. But if it is admissible to prove that on another occasion the person has been convicted and you once get into the history of the trial, it seems to me very difficult to say that you must not go to the end of the history of the trial; and although I entirely agree that for any purposes for which a conviction is to be relied on as a conviction of crime (if it is to be relied on under the Habitual Criminals Act or for the purposes of the Common Law Procedure Act, and so on) you must have strict documentary evidence, I am not certain that as part of the history of the case (if the conviction was admissible, as to which I desire to express no opinion,) it was not for this purpose sufficiently proved for the particular case. All, however, that it is necessary for me to say is that I agree, on the ground put by Buckley L.J.

Appeal dismissed.

Solicitors for appellant: *Samuel Price & Sons, for Darnell & Price, Northampton.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Simpson & Mason, Higham Ferrers.*

W. J. B.

Explained. O'DEA *v.* TETAU [1951] 1 K. B. 184

1914
July 30.

THE KING *v.* HUMPHRYS AND OTHERS, JUSTICES OF HEREFORD.

Ex parte WARD.

Bastardy—Affiliation Order—Child born Abroad—Jurisdiction of Justices—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

The fact that a bastard, the child of English parents resident and domiciled in England, was born abroad is not a bar to bastardy proceedings, since there is no necessity to consider any but English law in order to ascertain the status of the child:—

So *held* by Bankes and Lush JJ., Avory J. dissenting.

Reg. v. *Blane* (1849) 13 Q. B. 769 discussed and distinguished.

RULE NISI directed to William John Humphrys and others, justices for the city of Hereford, to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division an order of four of the justices of the said city dated June 8, 1914, whereby it was adjudged that Henry George Ward was the putative father of a certain bastard child born of the body of one Caroline Frances Jenkins. (1)

(1) Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3: "Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

Sect. 4: "After the birth of such bastard child, on the appearance of the person so summoned . . . . the

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The ground on which the rule was granted was that the justices had no jurisdiction to make the order, the bastard in question having been born in New South Wales.

On the application for the rule the following evidence was adduced:—An affidavit of Thomas Alfred Matthews, solicitor to Henry George Ward, the applicant for the rule, stated that the summons came on for hearing before the justices of the city of Hereford on May 11, 1914. At that hearing Caroline Frances Jenkins appeared and gave evidence on oath that her bastard child, the subject of the summons, was born in New South Wales. She produced the certificate of the birth of the child. Mr. Matthews thereupon submitted that the justices had no jurisdiction to adjudicate upon the case. The justices adjourned the hearing of the summons to June 8, 1914. On that date Mr. Matthews again appeared on behalf of the applicant. It was then admitted by the solicitor appearing for Caroline Frances Jenkins and again sworn by her that the child was born in New South Wales. Mr. Matthews again submitted that the justices had no jurisdiction to adjudicate upon the case and referred to *Reg.* v. *Blane.* (1) The justices overruled the objection and adjudged the applicant to be the father of the bastard child.

An affidavit of the applicant was also put in which corroborated the evidence of Mr. Matthews.

A rule having been granted upon this evidence as stated above,

Rowsell shewed cause. The mother of the child was engaged to the applicant. In August, 1912, she sailed for New South

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justices . . . . shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child . . . . of a sum of money weekly, not exceeding five shillings a week, for the maintenance and education of the child . . . ."

(1) 13 Q. B. 769.

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Wales to take up an appointment there. When she arrived at Sydney she found that she was pregnant. On May 18, 1913, the child was born. In April, 1914, she returned to England. On May 10, 1914, she applied for the summons which was granted and upon which the order was made as above stated.

The justices had jurisdiction to make the order. *Reg.* v. *Blane* (1) is distinguishable. In that case the mother was a foreigner and the status of the child according to foreign law had to be inquired into. Such a case is not the subject of our bastardy laws. In the present case no law other than English law applies. The mother is a single woman who has been delivered of a bastard child within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, and there is nothing to prevent the justices from making the order.

S. R. C. Bosanquet, in support of the rule. The Bastardy Acts were and are part of the Poor Law. They were passed with a view of relieving the rates and imposing the burden of maintaining a bastard child upon the putative father instead of the mother or the parish in which the child was born. The whole basis of the bastardy laws is that a bastard has been born in some parish in England or Wales: *Reg.* v. *Blane* (1); *Marshall* v. *Murgatroyd* (2); *Hampton* v. *Rickard.* (3) [*Reg.* v. *Lightfoot* (4) was also cited.]

BANKES J. This rule was obtained upon an affidavit of the solicitor for the applicant, the person against whom the bastardy summons was issued. On the hearing of that summons evidence was given by Caroline Frances Jenkins, the mother of the bastard, in which she stated that the child was born in New South Wales. The affidavit is silent as to any fact proved before the justices except that one fact. As to whether the applicant or the mother of the child was a British subject domiciled or resident in or out of England, or as to where the child was begotten, the affidavit says nothing. Mr. Bosanquet contents himself with relying on the one fact that

(1) 13 Q. B. 769.
(2) (1870) L. R. 6 Q. B. 31; 40 L. J. (M.C.) 7.
(3) (1874) 43 L. J. (M.C.) 133.
(4) (1856) 6 E. & B. 822.

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the child was born in New South Wales and contends that *Reg.* v. *Blane* (1) establishes the impossibility of obtaining a bastardy order if the child is born out of England. I do not agree that that is the law or that *Reg.* v. *Blane* (1) so states it. In that case the mother was not a British subject; there was no evidence that she was domiciled in England. She was a native of France. The report in 13 Q. B. states that "the principal ground of objection to the order was that the magistrate had no jurisdiction to make it, because the mother of the child was a foreigner by birth, and was in France when the child was born." In order to ascertain whether that child was a bastard or not the status of the child according to French law would have to be ascertained; it did not depend upon the English law alone.

The Act says "any single woman who may be with child or hereafter may be delivered of a bastard child after the passing of this Act may apply" &c. Therefore to obtain an order it is a condition precedent that the mother should prove that she has been delivered of a bastard child. If she and the putative father are both English subjects resident and domiciled in England, the mere fact that he is the father of the child and that the parties were unmarried when the child was born decides the question whether the child is or is not a bastard. If the facts proved before the magistrates shew that the status of the child is governed by some foreign law so that the fulfilment of the condition precedent cannot be proved without recourse to foreign law, then no doubt the case would fall within the principle of *Reg.* v. *Blane* (1); but in the absence of such evidence it is not the law, and *Reg.* v. *Blane* (1) does not decide, that in the case of a bastard child of English parents the mere fact that the child is born abroad bars bastardy proceedings. Take the case where both parents are domiciled and resident in England and, merely to conceal her shame, the woman goes to France or Scotland to be confined, after which she comes straight back and takes out a bastardy summons against the putative father; what ground is there for suggesting that the Act does not apply to such a case? No law other than English law has there to be considered. For all that appears to the contrary that is the present case.

(1) 13 Q. B. 769.

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Therefore in my opinion in the absence of further evidence this rule should be discharged.

I would add a few words regarding the decision in *Reg.* v. *Blane.* (1) Lord Denman C.J. in giving judgment in that case said: "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws." The Lord Chief Justice meant that the case in question was clearly one in which the status of the child had to be ascertained according to French law, and that, even assuming that the magistrate had examined the law of France and ascertained that according to that law the child was a bastard, he still thought that the case was not subject to the bastardy laws. With that I entirely agree. Coleridge J. bases his decision entirely on the ground that the status of the child had to be ascertained by foreign law. Erle J. in his judgment said: "It is quite clear that our statutes relating to bastardy never contemplated the case of a child born a bastard in a foreign country"; that is to say born a bastard according to the law of some foreign country. Therefore Mr. Bosanquet has failed to satisfy me that the present case comes within *Reg.* v. *Blane.* (1) In my view there is nothing to prevent the justices from making the order which they made, and the rule ought to be discharged.

AVORY J. If this case were res integra I should unhesitatingly come to the same conclusion as that which my brother Bankes has already expressed, and particularly in view of the fact that this statute contemplates that the application may be made by the woman before the birth of the child. In such a case it is obvious that she may go to the justices in the jurisdiction where she is residing and the justices may then grant a summons. It is true that before the order is made she must wait until the birth of the child, but the statute contemplates that justices of the same jurisdiction as the justices who have granted her the summons before the birth of the child will proceed to adjudicate on that summons after the birth of the child. I

(1) 13 Q. B. 769.

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cannot believe, taking the case which Bankes J. put as an illustration, that the mere fact that the woman has in the meantime taken a trip across the Channel and returned and that the child has been born on the other side of the Channel would deprive the justices of the jurisdiction they originally exercised in granting a summons under the statute. But, speaking for myself, I am unable to say that *Reg.* v. *Blane* (1) does not decide the very point before us. I agree that there is an important distinction in the fact that in that case the mother was a foreigner; and it is true that the report states that the principal ground of objection to the order was that the magistrate had no jurisdiction to make it because the mother of the child was a foreigner by birth and was in France when the child was born. But when I look at the judgments of Lord Denman C.J. and Coleridge J. I confess that I am unable to assent to the construction which I am glad to see that the other members of this Court are able to put upon them. Lord Denman C.J. says: "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws." I read those words as meaning that even if according to the law of France the child in that case was a bastard, nevertheless the Court were of opinion that a child born out of this country is not the subject of our bastardy law. If Lord Denman C.J. had intended that which my brother Bankes has expressed he could easily have said "assuming that the magistrate who made this order had examined the law of France and had ascertained that according to that law the child is a bastard, we are clearly of opinion that such a child as the one in the present case born out of this country is not the subject of our bastardy laws because it is the child of a foreign mother." That is not what the Lord Chief Justice did say. The words of Coleridge J. tend in my view to the same conclusion. He said "The Legislature in all these statutes is obviously dealing with bastards born in some parish"—that is in this country. I am unable therefore to say that the actual point before the

(1) 13 Q. B. 769.

Court in this case was not the real ground of the decision in *Reg.* v. *Blane* (1) or that the order under review was properly made.

LUSH J. I can see nothing in the language either of the earlier Act of 7 & 8 Vict. c. 101 or of the amending Act of 1872 to indicate that unless the child is born in England or Wales the Act does not apply. If the mother domiciled and resident in England goes to Scotland and is confined there and then returns to the place where she was formerly resident, I see nothing to suggest that in that case the statute does not apply. On the other hand there is much to indicate that the Act would not apply when the mother is a foreigner and the child is born abroad, because by s. 3 of the amending Act "any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act" may make the application. If that enactment applied to the case of a foreign mother where the child is born abroad, it would necessitate an inquiry into the status of the child, and for that purpose the foreign law on the subject would come in question. In *Reg.* v. *Blane* (1) the mother was a foreign subject and the child was born abroad, and therefore the Court was confronted with that very difficulty, namely, that if the Act applied it would be necessary for the Court to inquire into the status of the child according to the law of the country where the mother was domiciled. In view of that difficulty the Court came to the conclusion that the Act did not apply. It is true that the judgments of Lord Denman C.J. and Coleridge J. seem to go the length of holding that even if the mother were a British subject the Act would not apply if the child were born abroad; but it was not necessary for the Court to decide that. Erle J. does not seem to have considered the point. The real question dealt with and decided was whether the child born abroad of a foreign mother was a bastard child in respect of whom an order could be made under 7 & 8 Vict. c. 101.

Another case to be considered is *Marshall* v. *Murgatroyd.* (2) According to the report in the *Law Journal,* when counsel argued that the child must be born in England or Wales Lush J. pointed out that the Act did not say so. According to the same

(1) 13 Q. B. 769. (2) L. R. 6 Q. B. 31; 40 L. J. (M.C.) 7.

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report Blackburn J. in giving judgment said: "We think that the decision of *Reg.* v. *Blane* (1) is correct, and that the Act applies only to a child born of a mother in English territory. But the report in the *Law Reports* contains no such passage, and Blackburn J. makes no reference to *Reg.* v. *Blane* (1), but confines his judgment to the facts in *Marshall* v. *Murgatroyd* (2), pointing out that the child was not born abroad but on board a British ship. The question for us is whether *Reg.* v. *Blane* (1) concludes this case in which the mother was not a foreigner but was resident in England when the child was begotten, went to Australia and was confined there, and then returned to England. I can find nothing in the statute to suggest that in such a case an order cannot be made, and in my view *Reg.* v. *Blane* (1) when properly considered does not compel us to say that the mere fact that the child was born abroad prevents an order from being made. For these reasons I think that the rule should be discharged.

Rule discharged.

Solicitors for applicant: *Metcalfe & Sharpe, for T. A. Matthews, Hereford.*

Solicitors for respondent: *Andrew, Wood, Purves & Sutton, for Corner & Co., Hereford.*

(1). 13 Q. B. 769. (2) L. R. 6 Q. B. 31; 40 L. J. (M.C.) 7.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1914
July 13, 14, 23.

HOBSON AND ANOTHER *v.* SIR W. C. LENG & CO. ("SHEFFIELD TELEGRAPH") AND ANOTHER.

[1913 H. 399.]

Practice—Costs—Taxation—Joint Defendants in Action of Libel—Defendant severing in Pleading—Judgment against both Defendants with Costs—Liability of Defendants for Costs of Plea of Justification pleaded by one Defendant only—Order LXV., r. 1.

In an action of libel against two defendants one defendant admitted his liability and pleaded an apology, the other pleaded justification. At the trial a verdict was found against both defendants for 750*l.*, and judgment was entered for the plaintiffs for that sum, with costs to be taxed:—

Held, that the defendant who pleaded the plea of justification was alone liable for the costs occasioned to the plaintiffs by and in consequence of that plea, and that the other defendant was not liable for those costs.

Order of Rowlatt J. affirmed.

APPEAL of the plaintiffs from an order of Rowlatt J. at chambers.

The plaintiffs A. J. Hobson and W. Hobson issued a writ against Sir W. C. Leng & Co., Limited, the proprietors of the *Sheffield Daily Telegraph*, and Charles Hobson for an alleged libel published in that newspaper. The defendants Sir W. C. Leng & Co. in their defence admitted their liability and pleaded publication of an apology; the defendant C. Hobson pleaded a justification. At the trial the jury found a verdict for 750*l.* damages against both defendants, and judgment was entered accordingly with costs. The form of judgment as drawn up was as follows: "It is adjudged that the plaintiffs recover against the defendants 750*l.* and costs to be taxed." Upon the taxation of the plaintiffs' costs by the district registrar the defendants Sir W. C. Leng & Co. asked that the costs should be apportioned between the two defendants so that the defendants Sir W. C. Leng & Co. should not be liable to pay any part of the costs caused solely by the defendant Hobson's plea of justification. The

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district registrar refused the application and allowed the costs occasioned by the plea of justification as against both defendants; the defendants Sir W. C. Leng & Co. carried in objections to this taxation, and the district registrar issued his certificate disallowing the objections. Upon a summons to review the taxation Rowlatt J. ordered that the objections of the defendants Sir W. C. Leng & Co. to the taxation be allowed and that it be referred back to the district registrar to vary his certificate accordingly, and he gave the defendants Sir W. C. Leng & Co. the costs of and consequent upon the application.

The plaintiffs appealed.

Tindal Atkinson, K.C., and *Jardine* (*Waddy* with them), for the plaintiffs. The libel was a joint tort; the damages and costs cannot be severed; and there can be only one judgment against both defendants for the same sum: *Greenlands* v. *Wilmshurst.*(1) The question arose in *Stumm* v. *Dixon* (2), and the Court of Appeal was divided on the point, Lord Esher M.R. holding that the defendant who delivered a separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate pleading, while Fry L.J. held that both defendants were jointly and severally liable for all the costs of the action. It is submitted that the view of Fry L.J., which proceeded upon the ground that the result of the opposite view would be to vest in the Master a discretion which belonged only to the Court or judge, was right, and ought to be followed in preference to the view of Lord Esher M.R. It must not be forgotten that the justification was a defence of which the newspaper could take advantage. The present is not a case in which an issue has been decided in favour of the defendant. The costs were properly incurred by the plaintiffs in fighting the case of two joint tortfeasors. *Stumm* v. *Dixon* (2), as finally decided, is in the teeth of the old authorities, and engrafts an exception on the old rule that the plaintiff was entitled as against all the defendants to his costs. In *Kelly's Directories* v. *Gavin and Lloyds* (3) the plaintiffs sued two defendants to

(1) [1913] 3 K. B. 507. (2) (1889) 22 Q. B. D. 529.
(3) [1901] 2 Ch. 763.

restrain an infringement of copyright; they obtained an injunction with costs against one defendant, but failed (though without costs) against the other; by the order as drawn up the unsuccessful defendant was directed to pay to the plaintiffs "their costs of this action"; and it was held that he was liable to pay to the plaintiffs all the costs of the action, including those incurred against the successful defendant. That decision is conclusive in favour of the plaintiffs. The decision in *Stumm* v. *Dixon* (1) was based on hardship and natural justice; but this is a question of pure law as to the meaning of an order for the plaintiffs' costs.

Coutts Trotter, for the defendants Sir W. C. Leng & Co. The opinion of Lord Esher M.R. in *Stumm* v. *Dixon* (1) is to be preferred to that of Fry L.J.; he was dealing with a common law taxation, with which he was naturally more familiar.

Jardine in reply.

BUCKLEY L.J. We will consult one of the taxing Masters before delivering our judgment.

Cur. adv. vult.

July 23. BUCKLEY L.J. read the following judgment:—This was an action for libel against two defendants. The one pleaded justification, the other did not. The jury found a verdict for the plaintiffs, and the judgment as drawn up is as follows: "It is adjudged that the plaintiffs recover against the defendants 750*l.* and costs to be taxed." The district registrar allowed the costs of the plea of justification (which, no doubt, was expensive) as well against the defendant who had not, as also against the defendant who had, pleaded justification. The former defendant objected as to so much of the items as were due to that plea. Rowlatt J. allowed the objection, and referred it back to the district registrar to vary his certificate. From that order the plaintiffs appeal. Mr. Tindal Atkinson for the plaintiffs first argued that inasmuch as the libel was a joint tort, the damages and the costs could not be severed, and

(1) 22 Q. B. D. 529.

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that there could be only one judgment against both defendants for the same sum. As regards the damages this is so: *Greenlands* v. *Wilmshurst*. (1) But that case has no bearing, I think, upon the present question. Each defendant delivered his own defence. There was no joint act in defence. On the contrary, the defence differed in an essential particular. *Greenlands* v. *Wilmshurst* (1) has no bearing upon the matter before us.

He then argued that, of the conflicting judgments given by Lord Esher M.R. and Fry L.J. in *Stumm* v. *Dixon* (2), the judgment of Fry L.J. was to be preferred, an argument to which, if this question had arisen upon a judgment of the Chancery Division, I should assent. In *Kelly's Directories* v. *Gavin and Lloyds* (3) Byrne J. proceeded upon the view that an order in the Chancery Division ordering the defendant to pay the plaintiff's costs cannot be read as excepting some costs which it is contended that the plaintiff ought not to have. Lord Coleridge C.J. and Manisty J. had held in *Stumm* v. *Dixon* (2) that the costs occasioned by the separate pleading of the one defendant ought to be allowed as against him alone. The two judges in the Court of Appeal differed in opinion, with the result that the decision stood unreversed. In this state of facts this Court is not bound by the decision: *The Vera Cruz* (No. 2). (4) It is open to us to consider the question, assisting ourselves by what was said in *Stumm* v. *Dixon* (2), but not bound by its result.

The exact point is this: the judgment being for the plaintiffs with costs, has the taxing Master any power to divide the costs of separate issues where no direction as to the costs of such issues has been given by the order of the Court? If the case had been tried without a jury, there is a very recent decision of this Court that he could not: *Ingram & Royle* v. *Services Maritimes*. (5) But where the case is tried with a jury, Order LXV., r. 1, has effect, and although the Court has not given specific directions in the matter, the parties are entitled to have the order so drawn up as to give the successful party in any event

(1) [1913] 3 K. B. 507.
(2) 22 Q. B. D. 529.
(3) [1901] 2 Ch. 763.
(4) (1884) 9 P. D. 96.
(5) Ante, p. 28.

the costs of the event of the issue on which he succeeds: *Hoyes* v. *Tate*. (1) This leaves, however, still the question as to what is the right taxation when the order as drawn up does not give the costs in that manner.

In the present case I entertain no doubt that it would be right that the plaintiff should not have the costs of the issue of justification against the defendant who had not pleaded that issue, and the judgment might have been properly drawn up to express this in terms. I regret that the judgment was not made and drawn up in that form. In justice, that defendant ought not to bear those costs. I am glad to find that according to the practice in the King's Bench Division we are not precluded by the form of the judgment from giving to it that effect. In the Chancery Division the judge does so mould his order as to give effect to the rights of the parties in respect of costs. The order is drawn up by the registrar in the presence of the parties, and nothing is left to be determined subsequently by the taxing Master as to what costs are to be allowed, and to whom. He must tax such costs as are given by the order, and no other.

This, however, is not the practice in the King's Bench Division. The directions of Order LXV., r. 1, are applied by the taxing Master, and the order of the Court is treated as made subject to and so that the taxing Master is to regard the proviso at the end of that rule. In the present case, at the conclusion of the trial, application was made to the judge to exempt from costs relating to the plea of justification the defendant who had not adduced that plea. The judge said, "I leave that to the taxing Master. I shall not say anything about it." The judgment was then drawn up in the form in which it stands, and we have to consider what is its effect.

For that which follows we are indebted to materials which have been supplied to us by the senior taxing Master. In an unreported action of *Anglo-Mexican Colonisation Co.* v. *London Bank of Mexico*, [1903 A. 764], judgment was given on March 1, 1904, in the following terms: "It is adjudged that the plaintiffs recover against the defendants 125*l.* and their costs to be taxed." The case was carried to the Court of Appeal. The

(1) [1907] 1 K. B. 656.

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order made was: "That this appeal be allowed, and that the judgment be varied by reducing the damages to the sum of 6*l.* 11*s.* 6*d.*, with the costs to be taxed as though the judge had certified sufficient reason for bringing the action to the High Court."

In giving judgment on November 2, 1904, Mathew L.J. used the words, "the consequences being that the costs should be taxed by a Master of the Court with reference to the established rules, allowing to each party the costs of the issues on which they succeeded." The draft order as prepared ran thus without the brackets, which I have inserted for convenience of reference only: "with the costs [only of the issue or issues on which the plaintiffs have succeeded and that further judgment be entered for the defendants on the issue or issues on which the plaintiffs have failed with the costs of such issue or issues, all such costs] to be taxed."

The form of the order was brought before the Court of Appeal on November 10, and they amended it by striking out the words above included in brackets. In the course of the discussion the Master of the Rolls said: "I took it as a matter of course the costs of the cause went to the successful party and the costs of the issues were taxed by the taxing Master," and Mathew L.J. said: "Our order has hitherto been," [that is to say, the order commonly used in the Court has been,] "that the costs be taxed and on that taxation the costs of the issues shall be dealt with by the Master, but there shall be no judgment by the Court." Stirling L.J. delivered a short judgment, which, as the case is not reported, I set out at length: "I should like to add a word, because I have taken an interest in this question ever since I became a member of the Court of Appeal. When I came here and first sat on common law appeals the question very soon arose as to this form of order, which is different to the one that is adopted in the Chancery Division. In the Chancery Division it has always been the practice, when either party failed on certain issues, to make a special order and to direct the taxing Master to consider whether the costs had been increased by reason of the issues that failed, and if so, to provide by the order that the party failing should pay those costs and there

should be a set-off of costs. But, as I understand, on the common law side that is not the form of order, at any rate where a case is tried by a judge with a jury. An order which gives the plaintiff the costs of the action does not necessarily give him the costs of the issues on which he fails, but does entitle the taxing Master, indeed it makes it his duty, to tax the costs of the issues on which the party fails and set them off exactly as is provided for by the order in the Chancery Division in express terms. I have been party to many appeals in which that has been laid down in this Court as the practice, and that form of order being so understood and acted upon, I think it ought not to be departed from without special leave." I think that for "special leave" there should probably be read "special reason."

In a case of *Thomas* v. *Phillips* (1) the judgment was: "It is this day adjudged that the plaintiff on his claim recover from the defendants 487*l.* 9*s.* 1*d.* and costs to be taxed, and the defendants recover on their counter-claim from the plaintiff 180*l.* 15*s.* and costs." The matter was sent back to the taxing Master to review the taxation upon the footing of giving to the successful party in each case the costs of proving that issue on which he had succeeded. Mathew L.J. said this: "The difficulty in dealing with these matters by the Masters is somewhat increased, not perhaps to a very great extent, by reason of our modern pleading. In the olden time the plaintiff who succeeded upon an issue raised before the Court was entitled to the costs of that issue. There are no issues in that sense now: there is the plaintiff's case on the one hand and the defendant's case on the other. The learned Master, when he has the whole case before him, and the assistance given in taxation, as a general rule has not the slightest difficulty in ascertaining what were the real points of the controversy at the trial—in other words, what the issues were at the trial; nor has he any difficulty in ascertaining what the event of each of those issues was. That being so, it appears to me he would have no difficulty in taxing in the ordinary way, having regard to the result of the different issues and the different events. It is said here that the Master must not go into any

(1) January 12, 1903.

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inquiry of that sort, because he has been precluded or prevented from doing it by the form of the judgment. I have no reason to believe that my brother Kennedy thought, when he was giving his directions with reference to costs, that the result would be to give to the plaintiff the costs of an issue upon which he had failed. The learned judge at the trial is frequently troubled about these questions of costs, and the general rule is to refer them to the Master: it is not possible to deal with them in any other way. There is the certainty, if there is any reasonable objection, that the matter can be dealt with afterwards."

As regards the manner in which the matter is carried out in the taxing office, the learned Master has given me the papers in a case of *Every* v. *Patterson* [1905 E. 675]. The judgment was that the defendant Page pay to the plaintiffs their costs to be taxed (other than certain costs mentioned), and that the defendants Grigg and Brettell pay to the plaintiffs their costs to be taxed (except the same costs). The taxing Master directed the bill to be brought in in three columns, the first containing the general costs of the action, the second the costs relating specially to the defendant Page, and the third the costs relating specially to the defendants Grigg and Brettell, and he made his certificate by finding three items, namely, (1.) the general costs of the action, (2.) the costs caused to the plaintiffs by the defendant Page as distinguished from the other defendants, and (3.) the costs caused to the plaintiffs by the defendants Grigg and Brettell as distinguished from the other defendant; and he certified the costs due to the plaintiffs from each defendant accordingly.

The result of the foregoing is that the practice in the King's Bench Division is not the same as that in the Chancery Division. Under Order LXV., r. 1, costs after a trial by jury are to be dealt with in a particular way, and if the judgment simply be for the plaintiffs with costs, that leaves it to the taxing Master to determine what costs, having regard to the issues in the action, are taxable in favour of the plaintiffs as against the defendant, or where there are several defendants against any particular defendant.

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The result is that the order of Rowlatt J. is right, and this appeal must be dismissed.

KENNEDY L.J. I entirely concur, and have nothing to add.

PHILLIMORE L.J. I too concur.

Appeal dismissed.

Solicitors for plaintiffs: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for Bramley & Sons, Sheffield.*

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[IN THE COURT OF APPEAL.]

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PATHÉ FRÈRES CINEMA, LIMITED *v.* UNITED ELECTRIC THEATRES, LIMITED.

Practice—Writ—Special Indorsement—Liquidated Demand—Application for Leave to sign Final Judgment—Sufficiency of Affidavit in support—Order XIV., r. 1.

By Order XIV., r. 1, "Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed . . . ."

In an action in which the writ was specially indorsed with a claim for a balance of an account for goods sold and delivered, an application for leave to sign final judgment under Order XIV. was supported by the affidavit of a person who stated that he was a clerk and was in the employ of the plaintiffs, and that he was duly authorized by them to make the affidavit, and added that it was within his own knowledge that the debt was incurred and that the debt, to the best of his knowledge and belief, still remained unpaid. The affidavit contained no statement of the means of knowledge of the matters referred to possessed by the deponent:—

Held, that the affidavit was a reasonable compliance with the requirements of Order XIV., r. 1.

Order of Rowlatt J. affirmed.

APPEAL of the defendants from an order of Rowlatt J. at chambers.

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The plaintiffs' writ of summons was specially indorsed with a claim for "balance of account for goods sold and delivered and for hire of goods, full particulars whereof have been rendered and exceed three folios in length, 353*l.* 19*s.* 7*d.*" In proceedings for leave to sign final judgment under Order XIV., the affidavit on the plaintiffs' behalf was made by a deponent who described himself as a clerk to the plaintiffs. In its material parts the affidavit was as follows: "I, William Shepherd . . . . clerk to the above-named plaintiffs, make oath and say as follows:—The defendants are justly and truly indebted to the above-named plaintiffs in the sum of 353*l.* 19*s.* 7*d.* for the price of goods sold and delivered . . . . And I further say that I am a person in the employ of the above-named plaintiffs, and that I am duly authorized by them to make this affidavit, and that it is within my own knowledge that the aforesaid debt was incurred, and for the consideration above stated, and that such debt to the best of my knowledge and belief still remains unpaid and unsatisfied."

By Order XIV., r. 1, "Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed . . . ."

Rowlatt J. was of opinion that the affidavit was in substantial compliance with the terms of r. 1, and made an order giving the plaintiffs leave to sign final judgment.

The defendants appealed.

J. B. Matthews, K.C., and *Doughty*, for the defendants. The affidavit made by the plaintiffs' clerk does not satisfy the requirements of Order XIV., r. 1. It appears from the particulars that the goods were delivered from several different branches of the plaintiffs' business, and the clerk cannot possibly have been familiar with the facts. Besides, a person who is not the plaintiff must shew his means of knowledge. It is said in the Yearly Practice for 1914, at p. 2138, in a note to Form 22A, "where

the deponent is not the plaintiff, he . . . . should state the means he has of knowing the facts." Here there is no attempt to shew the deponent's means of knowledge. [They also referred to Chitty's Forms, 13th ed., p. 86; *Chirgwin* v. *Russell* (1); *Lagos* v. *Grunwaldt* (2); *Symon & Co.* v. *Palmer's Stores.* (3)]

E. G. Palmer, for the plaintiffs, was not called upon.

BUCKLEY L.J. This is an action to recover a balance of an account for goods sold and delivered; the items in the account are numerous, and some of them exceedingly small. The question is whether the affidavit made on behalf of the plaintiffs under Order XIV., r. 1, is sufficient. That rule originally ran thus: "The plaintiff may, on an affidavit made by himself, verifying the cause of action," &c.; it was amended by the insertion of the words "or any other person who can swear positively to the facts." The rule seems to assume that a plaintiff is qualified to make the affidavit simply because he is plaintiff; the other person who may make the affidavit must be able to swear positively to the facts. In the present case the plaintiffs are a company. They cannot swear; somebody must therefore do it for them. The affidavit is made by a clerk in their employ. He describes himself as a clerk of the plaintiffs and in their employ and says that the facts are within his own knowledge; that, in my opinion, brings this affidavit reasonably within the rule. I think the affidavit complies with the requirements of the rule.

KENNEDY L.J. I agree, and have nothing to add.

PHILLIMORE L.J. I agree, and will only add that, if we were to take the opposite view, it would make things very hard for plaintiffs. I agree that the rule should receive a reasonable construction.

Appeal dismissed.

Solicitor for plaintiffs: *V. H. Henderson.*
Solicitors for defendants: *Davis & Taylor.*

(1) (1910) 27 Times L. R. 21. (2) [1910] 1 K. B. 41.
(3) [1912] 1 K. B. 259.

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Applied. WESTMINSTER AIRWAYS, LTD. *v.* KUWAIT OIL CO., LTD. [1950] 2 All E.R. 596.

Considered. WESTMINSTER AIRWAYS *v.* KUWAIT OIL CO. [1951] 1 K. B. 134

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July 25.

[IN THE COURT OF APPEAL.]

THE ADAM STEAMSHIP COMPANY, LIMITED *v.* THE LONDON ASSURANCE CORPORATION.

[1914 A. 126.]

Practice—Discovery—Documents—Privilege—Documents coming into Existence in Contemplation of Litigation—Documents obtained for the Purpose of Advice from Solicitor.

On October 28, 1913, the plaintiffs' vessel, which was insured with the defendants, went ashore on Perim Island, and the defendants instructed the Salvage Association to protect their interests in the matter. On October 30 the plaintiffs gave notice of abandonment, which the defendants refused to accept. On January 26, 1914, the plaintiffs brought an action to recover for a constructive total loss of the vessel, and the action was transferred to the commercial list. The defendants agreed that the plaintiffs' right to give notice of abandonment and claim a total loss should be decided on the footing that the writ was issued on October 30, 1913. In their list of documents the defendants claimed privilege for cables and correspondence which passed between the Salvage Association and their agent on the spot and which came into existence on and after October 30, the day on which notice of abandonment was given, "such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf":—

Held, that the documents, though not obtained by the defendants' solicitor, were privileged from production within the decision in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* [1913] 3 K. B. 850.

APPEAL from an order of Bailhache J. in chambers.

The plaintiffs' steamship *Aberlour* was insured against the usual perils by a policy of marine insurance effected with the defendants for 2725*l.*, the steamship being valued at 35,000*l.* On October 28, 1913, during the currency of the policy, the *Aberlour* went ashore on Perim Island, and on October 30 the plaintiffs gave the defendants notice of abandonment, which the defendants refused to accept. The *Aberlour* remained on shore until April 14, 1914, when she was got off. On January 26, 1914, the writ in

the action was issued, claiming 2725*l.* for a constructive total loss of the vessel by perils of the seas. On February 19, 1914, the defendants agreed in writing that the plaintiffs' right to give notice of abandonment and claim a total loss should be decided on the footing that the writ was issued on October 30, 1913, the day when notice of abandonment was given. The action was transferred to the commercial list. The defendants in their points of defence denied that the vessel was a constructive total loss.

On October 28, 1913, the defendants and the other underwriters on the ship employed the Salvage Association to protect their interests in the matter, and on and after that date telegrams and letters passed between the Salvage Association and their agent and other persons in Perim, which were supplied to the defendants. The defendants' list of documents (which in a case in the commercial list takes the place of an affidavit of documents) was divided into two parts. Part 1 included cables and letters passing between the Salvage Association and their agent and other persons in Perim on and from October 28 to October 30, 1913, for which the defendants did not claim privilege from production. Part 2 was as follows: "Cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons and came into existence on and after the 30th October, 1913, the day on which notice of abandonment was given and which is treated at the plaintiffs' request as the day on which the writ was issued, such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf."

The plaintiffs took out a summons for an order that the defendants should allow the plaintiffs to inspect and take copies of all cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons referred to in part 2 of the defendants' list of documents. Bailhache J. made an order as asked. The defendants by leave appealed.

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A. H. Chaytor, for the defendants. The cables and letters from the Salvage Association and their agents in Perim after notice of abandonment was given are privileged from production as having been obtained by the defendants for the bona fide purpose of the prospective litigation and of being laid before their solicitor with the view of having his advice thereon, even though they were not obtained by the solicitor. Bailhache J. followed the old practice under which the reports of the Salvage Association, who are usually employed by underwriters to protect their interests, are disclosed to the other side in the event of litigation ensuing. The case comes within the principle laid down in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (1), and is covered by the observations of Buckley L.J. in that case (at p. 856): "It is not I think necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all." The principle is that the opposite party is not entitled to see the materials for his opponent's brief. The defendants only claim privilege for letters and other documents obtained from the Salvage Association and which were intended to be laid before the defendants' solicitors for their advice. In *Jones* v. *Great Central Ry. Co.* (2) the letters which were ordered to be produced were written by a person for the purpose of giving information to the trade union to which he belonged, so as to enable the union to say whether it would take up his case. The information there was not prepared for the plaintiff's solicitor, and it did not become privileged merely because it was subsequently laid before the solicitor.

Macgillivray (*F. D. Mackinnon* with him), for the plaintiffs. The practice has always been to allow production of the reports made by the Salvage Association to the underwriters. The

(1) [1913] 3 K. B. 850. (2) [1910] A. C. 4.

Salvage Association are not always employed solely on behalf of the underwriters. They are frequently employed on behalf of all whom it may concern. There is nothing here to shew that the cables and letters after October 30 are more confidential than those sent down to that date. The case comes within the decision in *Anderson* v. *Bank of British Columbia* (1), which was approved by the House of Lords in *Jones* v. *Great Central Ry. Co.* (2) [*Southwark and Vauxhall Water Co.* v. *Quick* (3) was also referred to.]

BUCKLEY L.J. The plaintiffs' steamship went ashore on October 28, 1913. On October 30 notice of abandonment was given to the underwriters, who refused to accept it. The writ was not issued until January 26, 1914, but nothing turns upon that. October 30 is to be taken as the date on which the parties were at arm's length. In these circumstances the question is whether documents from October 30 onwards of the class that I shall presently mention ought to be produced. Bailhache J. has held that they ought, and he has ordered their production. The appeal is from that order. The case being in the commercial list there is no affidavit but only a list of documents. Part 2 thereof, which is to be taken as if it were in an affidavit, is as follows: "Cables and correspondence which passed between the Salvage Association and their agent in Perim and other persons and came into existence on and after the 30th October, 1913, the day on which notice of abandonment was given and which is treated at the plaintiffs' request as the day on which the writ was issued,"—now come the relevant words—"such cables and correspondence being with regard to the subject matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf." To my mind that is a complete and satisfactory claim of privilege based upon the grounds recognized in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (4) The question to

(1) (1876) 2 Ch. D. 644.
(2) [1910] A. C. 4.
(3) (1878) 3 Q. B. D. 315.
(4) [1913] 3 K. B. 850.

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be answered is this: Is the judge satisfied that the documents, which are sought to be protected, were bona fide obtained for the solicitor, though not actually by him? Were they documents obtained for the purpose of being used, not necessarily in an existing litigation, but in an anticipated litigation? The documents here, according to the statement I have read from part 2 of the list of documents, were clearly documents which passed between the Salvage Association, representing the underwriters, and their agent in Perim and other persons for the purpose of obtaining information to be used in the litigation which was then in contemplation between the parties. In my opinion those documents are privileged. I do not find anything against this view in *Jones* v. *Great Central Ry. Co.* (1), which was considered by this Court in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (2) I think that this case falls within the principle of the *Birmingham Case* (2), and the order for production ought to be discharged.

KENNEDY L.J. I am of the same opinion. It seems to me that the *Birmingham Case* (2) is directly in point. I do not lay any stress upon the fact that at a much later date, for a reason that is perfectly intelligible, it was agreed that it should be taken that the writ was issued on October 30 and therefore about three months before it was actually issued. This case must be dealt with having regard to the dates as they really are. If the purpose of the letters in question between October 30 and the date of the actual commencement of the action was such that privilege could not be claimed for them within the principle of the *Birmingham Case* (2), I do not think that the fact that the writ was to be considered as having been issued on October 30 would affect the right of the plaintiffs to have discovery of them. We ought to look at the facts as they actually are unaffected by the agreement as to the date of the issue of the writ.

Assuming that to be so, these letters were written after the first step had been taken which put the parties, as has been said, at arm's length. The defendants in their list of documents, which is to be treated as if it were an affidavit of documents,

(1) [1910] A. C. 4. (2) [1913] 3 K. B. 850.

claim privilege for them. To my mind they clearly appear privileged. They were letters which passed between the Salvage Association and their agents in Perim for the purpose of being used by the underwriters in a litigation which was obviously threatened and impending, and they were letters written for the purpose of obtaining or giving advice on the subject; and counsel has assured us that the only letters for which privilege is claimed are of that character. Upon principle as well as upon authority the documents are privileged.

PHILLIMORE L.J. I agree. It seems to me to be a sound and sensible rule that the moment that notice of abandonment is given and acceptance of it is refused the parties are sufficiently at arm's length to make the case of *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (1) applicable.

Appeal allowed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Waltons & Co.*

(1) [1913] 3 K. B. 850.

W. F. B.

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1914
July 23, 24.

[IN THE COURT OF APPEAL.]

STOTT (BALTIC) STEAMERS, LIMITED *v.* MARTEN AND OTHERS.

[1912 S. 4029.]

Insurance (Marine)—Time Policy—"Perils of the seas"—Institute Time Clauses, cls. 3 and 7—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *Sched. I., r.* 12.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke, causing the boiler to fall into the hold of the ship and thereby damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached:—

Held, that the loss was not recoverable under the policy as it was not caused by a peril of the sea, nor was it within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the risks insured by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.

Decision of Pickford J. [1914] 1 K. B. 442 affirmed.

APPEAL from the decision of Pickford J in an action tried in the Commercial Court without a jury; reported [1914] 1 K. B. 442.

The plaintiffs claimed to recover a loss under a policy of marine insurance on the steamship *Ussa*, subscribed by the defendant and other underwriters. The policy was for twelve months from March 16, 1911, and was in the ordinary Lloyd's form, the perils insured against being "of the seas . . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . ship or any part thereof." The policy included "the conditions of the Institute Time Clauses as attached," clause 3 of which provided as follows: "In port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places and on all occasions . . . ." Clause 7 was as follows: "This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to, hull or machinery through the negligence of master, mariners,

engineers, or pilots, or through explosions, burstings of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

The damage in respect of which the action was brought occurred on October 23, 1911, on which date the *Ussa* was lying in the Bramley Moore Dock at Liverpool, and a boiler weighing about thirty tons was being lowered into the No. 4 hold of the *Ussa* from the steam crane *Atlas*, which had brought the boiler from the North Docks to the Bramley Moore Dock. Whilst the boiler was in the act of being lowered by the crane into the ship's hold, it caught upon the coamings of the hatch, and this to a certain extent took the strain off the fall of the crane which was on board the *Atlas*. This caused the *Atlas* to list over away from the ship. The boiler then freed itself from the coamings and continued to descend, causing some extra strain upon the pin of the shackle attached to the rope, and in consequence the pin broke and the boiler fell to the bottom of the hold and damaged the hull.

The plaintiffs' case was launched upon the basis that the accident was due to some swell which caused the *Atlas* to list, but for which the boiler would not have caught the coamings; but on the evidence the learned judge was satisfied that that was not the cause of the accident, and that no motion of water had anything to do with the accident. Another question of fact raised was whether the pin and the shackle were in a proper condition; the learned judge did not think they were, and he thought that that fact largely contributed to the accident. The learned judge held that the loss was not recoverable under the policy as it was not caused by a peril of the sea, nor was it within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the risks insured by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.

The plaintiffs appealed.

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Leslie Scott, K.C., and *L. F. C. Darby*, for the plaintiffs. The loss here was due to a peril of the sea or to a peril of a similar character. The boiler was being loaded on to a water-borne ship, which was at the time being used as a ship, and the accident which happened was owing to a risk peculiar to a marine adventure. The accident was peculiar to a ship as such. It comes within the language of Lord Bramwell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) as being "a peril, loss, or misfortune of a marine character, or of a character incident to a ship as such." Perils of the seas "are not confined to damage caused by the sea, but include damage of a character to which a marine adventure is subject"; and "such an adventure has its own perils, to which either it is exclusively subject, or which possess in relation to it a special or peculiar character": per Lord Herschell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2) Those observations exactly cover this case. The accident was fortuitous and unexpected: *The Xantho* (3); *Hamilton, Fraser & Co.* v. *Pandorf.* (4) [They also referred to *Davidson* v. *Burnand.* (5)]

Next, the loss is recoverable under clause 3 of the Institute Time Clauses. No doubt clause 3 on its face only refers to times and places and not to perils. But it must be construed as enlarging the class of perils insured against in the policy, which is a time policy, because, if not, it adds nothing to the policy. In order to give it some effect, it must be read as enlarging the class of perils insured against. It is not necessary always to construe policies of marine insurance according to their strict grammatical meaning: *McCowan* v. *Baine, The Niobe.* (6)

Lastly, the plaintiffs can at any rate recover under clause 7, known as the Inchmaree clause, of the Institute Time Clauses. Under s. 30 and Sched. I., r. 12, of the Marine Insurance Act, 1906, the general words "all other perils" include perils similar in kind to the perils specifically mentioned in the policy. If therefore a peril is specified anywhere in the policy the general

(1) (1887) 12 App. Cas. 484, at p. 492.
(2) 12 App. Cas. at p. 498.
(3) (1887) 12 App. Cas. 503.
(4) (1887) 12 App. Cas. 518.
(5) (1868) L. R. 4 C. P. 117.
(6) [1891] A. C. 401, at pp. 403, 408.

words apply to it. The true mode of reading the policy is to insert clause 7 into it before the general words. If that is done, this damage is covered by the clause as being due to a cause which is analogous to the negligence of the crew, or breakage of shafts, or a latent defect in the machinery. This is contrary to the decision of Kennedy J. in *Jackson* v. *Mumford* (1), but that decision, even if well founded upon this point at the time it was given, which is not admitted, is no longer law since the coming into operation of the Marine Insurance Act, 1906.

Adair Roche, K.C., and *Mackinnon*, for the defendants. The damage in this case is not akin to damage by perils of the sea. There is no case in which damage of this nature, that is to say, damage to a ship not arising from the action of the winds or waves or from the intrusion of water, has been held to be a peril of the sea. In *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (2) Brett L.J. dissented from the view that the explosion of the boiler of a steamer is a peril of the sea. A peril of the sea means a peril which is encountered because the adventure is a marine adventure.

Leslie Scott, K.C., in reply cited *Phillips* v. *Barber* (3); *Laurie* v. *Douglas*. (4)

BUCKLEY L.J. The important question, perhaps the most important question, in this case is whether this injury was due to a peril of the sea. The facts are quite simple. The vessel was in the Bramley Moore Dock, Liverpool. She was moored there, and was taking on board a boiler. The boiler was being lowered into her from a steam crane on the *Atlas*, a floating structure carrying a crane that had brought the boiler from the place where it was and was putting it into the ship. Whilst being so lowered the pin broke and the boiler fell into the hold and damaged the hull. Having read the three cases which follow one another at 12 App. Cas. 484, and which begin with *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, and having endeavoured to see what is the proper definition of a peril of the sea in such a policy as this, I am

(1) (1902) 8 Com. Cas. 61.
(2) (1880) 6 Q. B. D. 51.
(3) (1821) 5 B. & Ald. 161.
(4) (1846) 15 M. & W. 746.

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unable to see that this was in any sense a peril of the sea. I will, without attempting a definition, endeavour to express in my own words what it seems to me, consistently with authority, a peril of the sea means. I suggest that it means a peril to which the assured would not be exposed if his adventure were not a marine adventure; or, to express it affirmatively instead of negatively, a peril to which the assured is exposed by reason of the fact that his adventure is a marine adventure. Of these two I prefer the former: I think the latter, perhaps, is too narrow. But I think that, when a peril of the sea or a peril akin to or like to a peril of the sea is spoken of, the peril must in some sense be attributable to the fact that the adventure is marine. In the present case I do not see that the peril is within that. This accident might equally well have happened if the crane had been a crane on the quayside. The mere fact that the crane was water-borne had, I think, little or nothing to do with it. As regards the *Ussa*, the ship herself, she was a boat injured by the fall of something which was being put on board her. It cannot be that, merely because the recipient of goods is a thing which is going to engage, or if you please is at the moment engaged, in a marine adventure, the fact that she is injured by putting goods on board is a peril of the sea or akin to a peril of the sea. I do not think that it is.

The next point put was this: What is the effect of clause 3 of the Institute Time Clauses which were by reference introduced into this policy? When I look at that clause, I find that it names no perils at all. It does not enlarge the class of perils, for it names none; all it does is, accepting the fact that there are certain classes of perils, to mention places and times and occasions and conditions which are to be relevant for the purpose of determining whether the particular risk which is being sued upon is a risk within the policy or not. It is said that, if that view of it be taken, the clause does nothing at all. I do not for a moment say it does nothing at all, but if I am to assume that it does nothing at all—I do not shrink from the alternative—I cannot say that it provides for something for which by its language it does not provide by reason of the fact that, unless it has that effect, it does nothing. If that be so, I accept the

alternative that it does nothing. However that may be, I am clear that it does not in any way enlarge the class of risk.

The last point is upon clause 7, what is commonly called the Inchmaree clause. It seems to me that clause 7 is a special and a separate clause. It is not an addition to the ordinary Lloyd's perils clause to be added before the general words in that clause so that the general words apply to the subject-matter of clause 7. Neither is it to be read as if it contained the words "and all other perils" like those mentioned in this clause 7. It seems to me that it stands apart, and that, as I understand it, was the decision of my brother Kennedy in *Jackson* v. *Mumford*. (1)

Under these circumstances it seems to me that this appeal fails. I have given this judgment in this exceedingly brief form because my brother Kennedy is much more conversant with this class of case than I am, and no doubt he will deal with it more at large.

KENNEDY L.J. I do not propose to deal with this case at any length, great as the temptation is to discuss a matter of considerable business importance. This is a case with which one may deal shortly because it appears to me, I confess, to be a reasonably plain case. The facts are described in the judgment of my brother Pickford, and they are undisputed, apparently, except in one respect. While the boiler was being lowered by a crane into the ship's hold, the crane itself being on another floating body, the *Atlas*, it caught on the coamings of the hatch, and the consequence of that was that there was an accident, partly due to the improper condition of the pin and shackle and partly to the strain which resulted from the catching of the boiler. The boiler freed itself from the coamings where it had caught, continued to descend, the pin broke, and the boiler fell into the bottom of the hold and did damage to the ship.

It is unquestionable that this accident is one which might just as well have happened if the crane itself had been on the quay and not on another vessel, and the crane was not working properly, as the result of which the weight held by the crane

(1) 8 Com. Cas. 61.

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tumbled into the object, be it house or ship, into which it was delivering the article attached to the crane. There was an attempt to say that there was some swell which caused the vessel on which the crane was to list and that caused the accident. That would have presented a different class of case. But upon the facts Pickford J. found there was no truth in that allegation of the plaintiffs, that there was no swell which caused the accident and that no motion of the water had anything to do with the accident. I am not going to attempt to give a new definition, or attempt a definition at all, of what is or is not within the general words—they are called the "sweeping words"—of the clause which adds to the express words in a policy of this kind to the perils of the sea as enumerated "all other perils losses and misfortunes that should come to her detriment or damage the subject-matter of the insurance." Seeing that the House of Lords in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) has not attempted to give any definition, I certainly shall not attempt to do so. Each case must be looked at on its own particular facts, and no doubt the lines which separate a case which comes within the "sweeping words" as ejusdem generis may vary greatly according to comparatively minute facts. I rather agree that Mr. Mackinnon got somewhere near a definition when he said that the cause must be either violence of the wind or waves, or the entry of water into the hull, or that class of case which includes collision when the ships are navigated, or other perils of a kind such as he suggested, by one ship firing into another, which are peculiar to the use of the ship as a ship. All I can say is that, when you have the case of a vessel being loaded, or a vessel having a boiler loaded into her hold, as in this particular case, or other machinery of a like kind, and there is nothing connected with what may be called perils of a ship as a ship, or of navigation connected with it, it appears to me to be outside the contract of insurance.

Some cases have been cited to us by Mr. Leslie Scott. *Phillips* v. *Barber* (2) was one, and *Cullen* v. *Butler* (3) was another. The

(1) 12 App. Cas. 484. (2) 5 B. & Ald. 161.
(3) (1816) 5 M. & S. 461.

latter is a case, since the language of Lord Herschell in *The Xantho* (1), which may be open to question in the future. As regards *Phillips* v. *Barber* (2), which is, I think, the nearest case in favour of the plaintiffs here, it is one of those cases in which unquestionably the vessel was blown over on her side and damaged by the action of the wind at a time when an operation proper to a ship, and to a ship only, was going on. It may be said that wind might blow down a chimney. So it might, but you must have something, as it seems to me, which is distinctly referable to the cause or to the use of the ship which occasions the operation which does her damage, so as to bring the damage within the words of the sweeping clause. It is obvious from the judgments which were given in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*(3) and the earlier case from which they differed, the case of *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (4), as to which great judges expressed different opinions, that there is no authority for saying where the operation of putting by a crane something into a ship results in an accident by dropping something from the crane and injuring the ship, that an accident so caused is within the perils of the sea as enumerated in the clause, or within the sweeping words which add analogous perils.

I will add nothing as regards clause 3 to that which Buckley L.J. has said. It is a statement of certain named places within which the earlier clause as to the exemption from peril is to apply: whether it was inserted, as Mr. Mackinnon suggests, in order to prevent a question arising as to concealment of the place where the vessel was in regard to which the policy is taken out or not, I have not the least idea. Whatever may be the origin of the clause, we have simply to construe it as it stands, and as it stands it does not add to the list of possible perils against which the policy protects, but does specify, needlessly or properly, it matters not which, places in which the ship may be, and certain conditions as well, as, for example, whether she is with or without a pilot.

I do not propose to discuss clause 7 or the application of the

(1) 12 App. Cas. 503.
(2) 5 B. & Ald. 161.
(3) 12 App. Cas. 484.
(4) 6 Q. B. D. 51.

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Marine Insurance Act, because they have not been much insisted upon here. I think that the reason given by my brother Pickford for treating them as he did is good, and I desire to add nothing to what he has said. The only difficulty in the case arises on what I may call the application of the sweeping clause, and upon the whole I think that, when all the facts are taken together, there is nothing here to bring the present claim either on principle or authority within the class of case upon which the plaintiffs rely.

PHILLIMORE L.J. I agree that clause 3 of the Institute Time Clauses has no material effect here, except that it provides that if an accident of this kind occurring in the course of transhipment at sea would be covered it would also be covered if it occurred in the dock. I agree that clause 7 has no application: for the reason given by Mr. Mackinnon quite early in his argument it does not cover this case. If it did in any way cover it, I should agree that the decision in *Jackson* v. *Mumford* (1) was right as the law then was. I am not quite certain that I should not require further consideration, if it became necessary, as to the effect of the Marine Insurance Act upon *Jackson* v. *Mumford*. (1) But it is quite unnecessary to do that, because clause 7 seems to me to be so far away from this case, and I cannot consider this particular peril as ejusdem generis with clause 7.

With regard to the rest of the case I confess I have some little doubt, but after Pickford L.J. (Pickford J. as he then was) and my colleagues have seen their way clearly I do not see my way to dissent. But it is a matter of great weight, and I confess to a feeling of uneasiness that it has not been thoroughly investigated, and, notwithstanding the very able arguments of the learned counsel here at the Bar, I am not quite certain that this matter has been considered in all its bearings. It is that which leads me to express my doubt rather than anything else. I accept ex animo the wider definition given by Buckley L.J. It is the application of it as to which I doubt. The wider of those two definitions would make collision which did not let in sea water but did damage only to the upper works either a peril of the sea or

(1) 8 Com. Cas. 61.

a peril ejusdem generis: that, I think, is what the House of Lords intended to decide in the case of *The Xantho* (1), although upon re-reading the case carefully I see it could be supported upon the ground that the consequence of that particular collision was the incursion of sea water. If a collision which only does damage to the upper works and does not let in sea water is within perils of the sea by reason of the words "ejusdem generis," I have doubt as to whether this particular injury might not be of the same nature: and putting it in another way, taking again Buckley L.J.'s definition, as ships are made to plough the sea and not to lie by the wall, and as they plough the sea with cargoes or seeking cargoes, anything in the nature of preparing ships for an adventure by putting cargo upon them might be considered to be the same thing as preparing the ship for her adventure by putting her in a dry dock or on the gridiron for repair. Therefore I have my doubts, but, as I have said, I do not think them sufficient to cause me to dissent.

Appeal dismissed.

Solicitors for plaintiffs: *Lightbound, Owen & MacIver.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 12 App. Cas. 503.

W. J. B.

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1914
July 10, 14.

[IN THE COURT OF APPEAL.]

THOMAS GABRIEL & SONS *v.* CHURCHILL & SIM.

[1912 G. 880.]

Principal and Agent—Sale of Goods—Broker receiving Del Credere Commission—Non-performance of Contract by Buyer—Solvency of Buyer—Liability of Broker.

The obligation of a del credere agent on a sale of goods to an undisclosed buyer does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. It does not extend further than that, where there is an ascertained amount or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission.

Grove v. *Dubois* (1786) 1 T. R. 112 considered.

Decision of Pickford J. [1914] 1 K. B. 449 affirmed.

Appeal from a decision of Pickford J. in an action tried in the Commercial Court without a jury; reported [1914] 1 K. B. 449.

The following statement of facts is taken in substance from the judgment of Pickford J.:—The claim in this action is against the defendants as del credere brokers. The plaintiffs are timber merchants and the defendants are wood brokers, and the action arises out of a sale of timber made by the defendants as brokers for the plaintiffs. The name of the purchaser was not at the time of the sale disclosed to the plaintiffs, but the purchaser was in fact Millar's Karri and Jarrah Company, Limited, a company of unimpeachable solvency. The defendants gave the plaintiffs a sold note which was in the following terms: "Sold for account of Messrs. Thomas Gabriel & Sons to our principals about 380 loads Blackbutt scantlings as per specification at foot at two shillings and nine pence per foot cube. Cost freight and insurance to London. Delivery as soon as possible and to follow on after delivery of 2000 setts contract 7th February 1907. To be paid for by nett cash on arrival of each shipment. Any question arising under this contract which cannot be settled by the brokers hereto shall

then be submitted to arbitration in the usual manner. (Signed) Churchill & Sim, Brokers. The goods to be at buyer's risk in respect of fire directly they leave the ship's deck. Brokerage and guarantee 2½ per cent." The bought note was in these words: "Sold to Messrs. Millar's Karri and Jarrah Company (1902), Limited, for account of our principals": then followed the same description of the goods and the same terms as in the sold note, except that the bought note said "Brokerage ½ per cent." The notes did not disclose to the plaintiffs the name of the buyers, nor did they disclose to Millar's Karri and Jarrah Company the name of the sellers. The defendants took the brokerage and guarantee, or what is called a del credere commission, from the plaintiffs in respect of the transaction. The plaintiffs got into default in delivering under the contract, and it was arranged that they should pay a sum of 200*l.* in respect of claims arising out of that delay, and it was also arranged that the plaintiffs would deliver, and the buyers would accept, the balance of the timber under a penalty of 250*l.* to be paid by the plaintiffs if they did not deliver the balance on March 1, 1911, the contract having been made in 1908. The contract was varied to that extent and became a contract by which the plaintiffs agreed to deliver the balance of the goods and agreed to pay a penalty if they were not delivered by March 1, 1911. The timber was not all delivered by March 1, 1911, and the buyers declined to pay to the extent of 250*l.*, because they said they were entitled as against the price that might be due for the goods to set off 250*l.* which was owing by the plaintiffs under the contract as altered. That dispute having arisen and the names of the buyers being by that time known to the plaintiffs, the buyers were willing to have the matter settled either by arbitration or by the submission of a case for the opinion of counsel or of some person of standing in the trade. The plaintiffs declined to agree to that unless the brokers, the defendants, were made parties to the arbitration or the case. The defendants took up the position, which they still adhere to, that they were not personally liable to the plaintiffs in respect of the performance of the contract; thereupon the plaintiffs brought this action against them, alleging that by a custom in the timber trade where a merchant sells timber through a broker to an

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unnamed principal, and the broker is paid a del credere commission by the seller, the broker is responsible for the due performance of the contract and for the payment of the bills on their due date, and that the liability of the broker is not limited to guaranteeing the solvency of the undisclosed principal.

Pickford J. found that the custom had not been proved, and held that a broker who on a sale of goods to an undisclosed buyer receives a del credere commission from the seller is not liable to pay the seller for the goods if the buyer is solvent but has refused to pay for the goods on the ground that the seller has not duly performed the contract, and that the broker is liable to pay the seller only if, owing to the insolvency of the buyer or some other analogous cause, the seller is unable to recover the price from the buyer.

The plaintiffs appealed.

Schiller, K.C., and *Douglas Hogg*, for the plaintiffs. The acceptance by a broker of a del credere commission imposes on him a liability to pay the amount on the due date irrespective of the buyer's solvency or insolvency, in other words, a liability to guarantee the due performance of the contract by the buyer, whether the latter be insolvent or not. This is the result of *Grove* v. *Dubois* (1), in which case Lord Mansfield C.J. said (2) that a commission del credere "is an absolute engagement to the principal from the broker, and makes him liable in the first instance." Later cases have criticized that statement as going too far, but only in saying that the agent's liability is that of a principal. Lord Ellenborough, in *Morris* v. *Cleasby* (3), said that the agent's liability was only secondary, but he also said that "the guarantor is to answer for the solvency of the vendee, and to pay the money if the vendee does not"; there is nothing in that passage to suggest that the default of payment by the vendee must be due to his insolvency. In *Couturier* v. *Hastie* (4) Parke B. said that brokers "by reason of their charging a del credere commission" assume "responsibility for the solvency and performance of their contracts

(1) 1 T. R. 112.
(2) Ibid. at p. 115.
(3) (1816) 4 M. & S. 566, at p. 574.
(4) (1852) 8 Ex. 40, at p. 56.

by their vendees," which passage was cited with approval by Blackburn J. in *Fleet* v. *Murton*. (1) In *Ex parte White* (2) it is true that the question was one of proof in bankruptcy, but Mellish L.J., in dealing quite generally with the question of del credere agency, said that a del credere agent "guarantees that those persons to whom he sells shall perform the contracts which he makes with them." The del credere agent could of course raise as a defence to the seller's action against him any ground of defence that was open to the buyer, whom he could bring in as a third party and get judgment against him. [They also cited Story on Agency, 9th ed., pp. 36, 253, 404; Bullen and Leake, 3rd ed., p. 66; Kent's Commentaries, 12th ed., p. 624; Leake on Contracts, 6th ed., p. 364; *Hornby* v. *Lacy* (3); *Ex parte Bright* (4); *Thompson* v. *Perkins* (5); *Leverick* v. *Meigs* (6); *Lewis* v. *Brehme* (7); *Bramwell* v. *Spiller*. (8)

George Wallace, K.C., and *A. H. Chaytor*, for the defendants, were not called upon.

BUCKLEY L.J. I think that this appeal fails. For the determination of the case it is not necessary to decide what the obligation of a del credere agent is. It is only necessary to decide negatively that this obligation is not so extensive as to constitute him a person with whom a seller may litigate any dispute that arises out of a contract and determine what is the sum which is due in respect of the contract which is the subject of the del credere agency. The appellants' contention on the contrary is based on *Grove* v. *Dubois* (9), on which I will say a word in a moment.

The facts are simple. The plaintiffs are timber merchants; the defendants are wood brokers. A contract was made on January 23, 1908, by which a sold note was given by the defendants to the plaintiffs, the defendants not disclosing the buyer. The sold note expressed that the defendants had sold for the plaintiffs,

(1) (1871) L. R. 7 Q. B. 126, at p. 132.
(2) (1871) L. R. 6 Ch. 397, at p. 403.
(3) (1817) 6 M. & S. 166.
(4) (1879) 10 Ch. D. 566.
(5) (1823) 3 Mason (U.S.) 232, at p. 240.
(6) (1824) 1 Cowen (N.Y.), 645.
(7) (1870) 33 Maryland, 412.
(8) (1870) 21 L. T. 672.
(9) 1 T. R. 112.

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who are principals, certain goods at certain prices, delivery as soon as possible, to follow on after delivery of certain setts under a previous contract, to be paid for by net cash on arrival of each shipment; any question arising under this contract which cannot be settled by the brokers hereto shall then be submitted to arbitration in the usual manner. The contract was performed to a certain extent, deliveries took place under it, the plaintiffs then fell into default in delivering, and certain varied terms were arrived at. An arrangement was made to pay a certain sum of 200*l.* in respect of claims arising out of delay. A date was fixed, March 1, 1911, upon which the plaintiffs were to complete delivery under a penalty of 250*l.* if they failed. Under the contract thus varied default was made; the last delivery was not effected by March 1, 1911; one shipment arrived at a later date. A dispute arose between the parties whether the penalty was payable or not. The buyers were willing to refer to arbitration under the contract, the plaintiffs declined to do so except on certain terms which were not assented to, and thereupon the defendants took up the position that they were not personally liable to the plaintiffs in respect of the performance of the contract. The plaintiffs then brought this action against them, alleging that they were personally liable under the contract.

It will be noticed from what I have said that no ascertained sum has been arrived at as between the vendors and the vendees as to what is the amount due. There is a dispute pending as to what is the sum. The contention before us is that the vendor is entitled to sue the del credere agent and to ascertain for the first time in that proceeding what is due and to settle in that proceeding matters in dispute between the vendors and vendees as to what the amount is. The contention to that effect is raised on what Lord Mansfield C.J. said in *Grove* v. *Dubois*. (1) His language as to the nature of a del credere contract was this: "It is an absolute engagement to the principal from the broker and makes him liable in the first instance. There is no occasion for the principal to communicate to the underwriter, though the law allows the principal for his

(1) 1 T. R. 112.

benefit to resort to him as a collateral security. But the broker is liable at all events." That was language that affirmed that the del credere agent was under an absolute engagement in respect of which he was liable in the first instance, that he was liable, I suppose, for the performance of the contract, an expression which is found in some of the later cases, that his liability was not confined to a liability to make good the event of insolvency of the buyer or the impossibility of suing the buyer by reason of his being abroad or anything of that kind, but that he was liable as a principal in the matter. From that it would flow, I suppose, that he would stand in the position of a sub-seller to the ultimate buyer and would be entitled to retain any profit made upon the sub-sale. That of course is inconsistent with the general idea as regards the engagements subsisting between seller and del credere agent and buyer. Lord Mansfield's language in *Grove* v. *Dubois* (1) has been criticized in *Morris* v. *Cleasby* (2), *Hornby* v. *Lacy* (3), and *Couturier* v. *Hastie*. (4) In the first case, *Morris* v. *Cleasby* (2), Lord Ellenborough said this, after reading what I have read from *Grove* v. *Dubois* (1): "With all the respect which is due to Lord Mansfield and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor and to have a tendency to introduce uncertainty and confusion into the law on this subject." Lord Ellenborough in *Hornby* v. *Lacy* (5) says: "I own I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports that if the vendee does not pay the factor will; it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee. A somewhat different doctrine seems to have originated with *Grove* v. *Dubois*. (1) A kind of magic effect was there given to a commission del credere

(1) 1 T. R. 112.
(2) 4 M. & S. 566.
(3) 6 M. & S. 166.
(4) 8 Ex. 40.
(5) 6 M. & S. at p. 171.

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changing the relative position of the owner and buyer; and what is reported to have fallen from Chambre J. in a later case is referable to the same authority; but this was set right, as I think, in the judgment in *Morris* v. *Cleasby* (1), which was given after much consideration, and I may add with the concurrence of two of our learned brethren on this bench now unhappily no more." I need not refer with particularity to the case of *Couturier* v. *Hastie*. (2) The decision in *Grove* v. *Dubois* (3) is criticized in Story on Agency in a note to s. 33, where the learned author says this: "It was laid down in *Grove* v. *Dubois* (3) that a commission del credere amounts to an absolute engagement to the principal from the factor and makes him liable in the first instance. But the doctrine of that case on this point seems incorrect. A factor with a del credere commission is liable to the principal, if the buyer fails to pay or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name notwithstanding the del credere commission; so that the latter amounts to no more than a guaranty." I do not propose to travel through more of the authorities. They have all been most carefully reviewed by Pickford J. in the judgment from which this appeal is brought. The proposition which the learned judge affirms at the end of his judgment seems to me absolutely correct. After pointing out that it is not necessary for him to determine whether the obligation of a del credere agent extends beyond the case of insolvency to a case of inability, by reason of a debtor being beyond the seas or something of that kind, to obtain immediate payment, and that it is not necessary to decide what his obligations are as regards making payment in default of payment by the buyer, he goes on to say this: "I think it is quite clear that it" (that is, the obligation of the del credere agent) "does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. I think that, according to the authorities, it cannot extend further than that where there is an ascertained amount

(1) 4 M. & S. 566. (2) 8 Ex. 40.
(3) 1 T. R. 112.

or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission." To that I assent. The liability of the del credere agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the del credere agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

On these grounds I think that the judgment under appeal is right, and that this appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. I think myself that this is a novel effort, very gallantly made and supported with much care and learning, to put the position of a del credere agent where it has never been before. I think it has always been understood, both by men of commerce and by men of law, to be a liability to be called upon by the principal to pay the ascertained sum when due under a contract from the other contracting party. The case that has been put here is summarized in his judgment by Pickford J. at p. 454, where he says: "The question which I have to decide is one of principle whether the seller is entitled to call upon the del credere broker to litigate any disputes that may have arisen between the seller and the buyer, and not only to pay an ascertained sum which the buyer has refused to pay, but also to ascertain by setting up the buyer's defences how much is to be paid." That was what he had to decide, and in my judgment he decided it rightly on principle and rightly on authority. I cannot help thinking that it would generally be correct to say that the del credere undertaking or guarantee relates to the solvency of the contracting party, but I am not going, any more than Pickford J. did, so to tie it down, because I can conceive of a case in which it would be impossible

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to say that the buyer, though he may be temporarily embarrassed, was not able to pay, and if in fact he did not pay a liquidated sum on the particular day, I think it could quite conceivably be right to say that recourse to the agent is within the intention and meaning of a del credere agency. The seller may say to the agent "You, who have taken the del credere commission, have given me a buyer who does not produce the cash which is unquestionably due to me on a certain day. You say if I can press it on the buyer he can pay, but the process of squeezing is a difficult and a troublesome one; you have agreed that he shall pay me that liquidated sum." I am prepared to hold my mind open as to whether that would not be a proper case in which to call upon the del credere agent to fulfil his duty; and I think that that was what was perhaps in the minds of those judges who have not absolutely confined themselves to solvency as the question to be considered, but have also considered performance of the contract. At the same time, from such inference as I can draw from one's knowledge and experience, I cannot help thinking that the popular view is not far wrong; certainly if you asked nine people out of ten who were in a position to express an opinion they would say that the del credere agent guarantees the solvency of the buyer. Lord Ellenborough in the case of *Hornby* v. *Lacy* (1) says this: "I own that I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports that, if the vendee does not pay, the factor will." That is putting it in general terms that would include non-payment simply; but what he goes on to say in the same sentence, and what I think is the general idea, is, "It is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency." I do not think that so great a judge would have used that phrase, as he did, in the commencement of his judgment, if he had not thought, as I, following him, think, that the central idea is that "I guarantee to give you a client who can pay when the time comes." But I am not prepared to say that the liability of the agent will not go a little further and

(1) 6 M. & S. 166.

be enforceable when there is an ascertained sum so as to be an undertaking "If he will not pay, I am called upon on my guarantee to pay." The question that we have heard argued with so much care is a totally different one; it is this: "Is the agent to be treated as a person who says to his principal 'I turn my face to the smiter when the other side, the contracting party, has a number of disputes with you about what is due; sue me, I take upon myself all the burden of these vexed questions though I may not even know of the correspondence between you and him. I do not know even the rights of the parties; I cannot say whether he has a good answer to your claim by reason o prior contracts and dealings by set-off or counter-claim.'" It is impossible, I think, that a business man ordinarily would take such a view, and I do not think that is the view of the law. I am far from saying that you might not have in any given trade or market a custom by which a del credere agent may be made to take upon himself a larger liability and that you might not prove a custom under which the person who says "I am going to do business as a del credere agent" may be holding himself out as a person who undertakes a larger liability, but if I am to construe the term "del credere agent" apart from special custom, apart from usage in a particular market, I do not think that it includes anything like that which it must include in order to justify the success of the appellants in this case.

PHILLIMORE L.J. I agree. It has been said that this point which the learned judge has decided, on which we have heard a good deal of argument, was not the point really raised on the pleadings. I am not quite sure how far the point was raised by the pleadings, but looking at the course of the trial, looking to the correspondence which was put in without objection, I am sure that it was open to Pickford J. to decide that which he has now decided, namely, whether on the particular facts of this case—and that is all I am going on—the del credere agent was liable to pay. If the decision in *Grove* v. *Dubois* (1) really established what the position of a del credere

(1) 1 T. R. 112.

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agent is, the plaintiffs would be right. A great many people have thought that *Grove* v. *Dubois* (1) was right; apparently the current of American decisions is that way. I think, so far as we are concerned in this country, that it is pretty well established that *Grove* v. *Dubois* (1) went too far. *Morris* v. *Cleasby* (2) and *Hornby* v. *Lacy* (3) were cited, as Pickford J. said, without disapproval in *Couturier* v. *Hastie*. (4) No later case in England has been brought to our notice in which any suggestion has been made that the doctrine in *Grove* v. *Dubois* (1) was the right view. When you come to think of it, if the doctrine of *Grove* v. *Dubois* (1) was right, the vendor can sue the del credere agent not merely for the price of the goods but for the refusal of the ultimate vendee to accept, and I find no case in which that view has been accepted. If *Grove* v. *Dubois* (1) were out of the way, then the del credere agent is not responsible as a principal to his vendee; he is responsible only in virtue of the relation which arises between them, namely, that he is an agent for making a contract with some unknown vendor and also that he guarantees something. What exactly he guarantees, I do not propose to say. I think it is quite likely that he does more than guarantee solvency, but what I do think is that he does not guarantee the performance in such a case as this. He does not guarantee performance where, for instance, the vendee refuses to take delivery or accept the goods; he does not guarantee performance where the vendee and the vendor have, no doubt through him (because the correspondence all passed through him and not between the principals direct), made a fresh arrangement. Here the arrangement made was that the vendors were willing to pay a sum of money and that they should enter into a contract with regard to the promptitude of future delivery. The question of construction of that contract may be wrongly raised by the vendee, but from that moment forward the only thing the vendors could possibly look to the del credere agent for was the assurance that the vendee, when the contract was ultimately fought out with him and these points on the subsequent contract had been raised

(1) 1 T. R. 112.
(2) 4 M. & S. 566.
(3) 6 M. & S. 166.
(4) 8 Ex. 40.

and determined, would prove solvent. On these grounds I think this appeal fails.

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Appeal dismissed.

Solicitors for plaintiffs: *Drake, Son & Parton.*

Solicitors for defendants: *Coward & Hawksley, Sons & Chance.*

W. J. B.

[COURT OF CRIMINAL APPEAL.]

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June 29, 30; *July* 1.

THE KING *v.* CHARLES HILDYARD THORNTON WHITAKER.

Criminal Law—Bribery—Conspiracy—Public Officer—Ministerial Officer—Colonel of a Regiment—Canteen—Competing Caterers — Corrupt Payments.

It is a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept a bribe as an inducement to him to shew favour or forbear to shew disfavour to any person towards whom an impartial discharge of the officer's duty demands that he should shew no favour or that he should shew disfavour.

It is also a misdemeanour at common law for such an officer to conspire with others that he shall receive such a bribe.

A colonel in command of a regiment in His Majesty's Army is a ministerial officer within the meaning of this rule.

Therefore where a colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant of the regimental canteen:—

Held, that he was guilty of the misdemeanours at common law (1.) of bribery and (2.) of conspiracy to bribe.

APPEAL against conviction and application for leave to appeal against sentence.

The appellant, Lieutenant-Colonel Charles Hildyard Thornton Whitaker, was convicted of conspiracy at the Central Criminal Court and sentenced to six months' imprisonment in the second division.

From a transcript of the shorthand notes taken at the trial the following facts appeared:—

The appellant was at all material times the officer commanding the Second Battalion of the King's Own Yorkshire Light

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Infantry. He had been serving with his regiment in the South African war. At the end of that war he was ordered with his regiment to Malta.

A system prevails in the Army by which, in addition to the rations supplied by the State, soldiers can obtain groceries and other necessaries from the regimental institute or canteen, a certain portion of each soldier's pay being set aside and spent under the advice of the commanding officer in supplying the canteen. There are three systems on any one of which a canteen may be conducted. The material one in the present case is the enant system, by which a firm of caterers or contractors, or their agent, selected by the commanding officer, becomes the tenant of the canteen. The tenant has the monopoly of supplying the canteen, in return for which he pays a certain sum per month for each hundred men in the mess to the commanding officer, who spends the money for the benefit of the soldiers. A keen competition exists between rival firms of caterers for this monopoly, and the evidence shewed that the firms or their agents having secured the privilege were ready and willing to pay considerable sums to quartermasters, sergeant-majors, cook sergeants, and other subordinate officers in order to retain it. These payments were made by the agents out of the commission paid to them by their principals and with the knowledge of the principals.

Messrs. Lipton Limited were a firm of caterers carrying on a large business and having their head office in the City Road, London. One Archibald Minto was at the head of their general stores department. One James Ross Ness was their agent at Malta.

When the appellant was ordered with his regiment to Malta he received a great number of offers from rival firms for the monopoly of supplying the canteen. In December, 1902, a contract was signed between the appellant and J. R. Ness on behalf of Lipton Limited. This contract was renewed in May, 1903.

A firm of brewers, Messrs. Style & Winch, Limited, of Maidstone, supplied beer to the canteen at Malta. Ness acted as the agent of this firm in Malta, and a Colonel Fiennes also interested himself in their behalf. The firm had been supplying a canteen

in Crete, but were in danger of losing that contract. At the instigation of Colonel Fiennes the appellant in 1903 went on leave to Crete, his travelling expenses being paid by Ness. As the result of the appellant's recommendation Messrs. Style & Winch secured a renewal of the contract to supply beer to the canteen in Crete.

On February 13, 1904, the contract of December, 1902, for the supply of the canteen in Malta by Lipton Limited was again renewed. On February 18, 1904, a cheque for 120*l.* was drawn by Ness on the National Bank of Scotland payable to the appellant. The appellant had one account with Messrs. Beckett & Co., bankers at Beverley in Yorkshire, and another account with Messrs. Cox & Co., of Charing Cross, London. The cheque of February 18 was indorsed "Pay to my account Beckett & Co. Chas. H. T. Whitaker, Lieut.-Colonel," and was paid into the appellant's account with Messrs. Beckett & Co. on February 29.

On March 4, 1904, the appellant and his regiment were ordered to Crete. A modification of the contract of December, 1902, was arranged between the appellant and Ness for the supply of the canteen at Crete by Lipton Limited for the years 1904 and 1905. A cheque for 120*l.* dated September 6, 1904, was drawn by Ness on the National Bank of Scotland payable to the appellant and was paid into his account on September 30.

In March, 1905, the appellant and his regiment were ordered from Crete to Sheffield. A new contract was made between the appellant and Ness for the supply of the canteen at Sheffield by Lipton Limited. A cheque for 150*l.* dated March 31, 1905, was drawn by Ness on the National Bank of Scotland payable to the appellant. It was crossed "Cox & Co.," and indorsed "Payable Cox & Co. to be placed to my credit. Charles H. Whitaker, Lieut.-Colonel." It was paid into the account of the appellant with Messrs. Cox & Co. on April 8, 1905.

A cheque for 150*l.* dated October 16, 1905, was drawn by Ness on the National Bank of Scotland payable to the appellant. The amount was placed to the credit of the appellant with Messrs. Beckett & Co. on October 27.

On October 18, 1905, Ness wrote a letter to Minto. This

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letter was addressed to Messrs. Lipton Limited, London. It was dated "Poste Restante, Wiesbaden, 18 October, 1905," and was in these terms:—

"Dear Sirs,

"Colonel Whitaker writes me to-day for his six-monthly cheque stating that as he wishes the matter kept as privately as possible, he would like me to send the cheque as before. This I have done to-day, 150*l.* by National Bank of Scotland cheque No. $\frac{0}{10}$ 370569.

"He adds 'I suppose the contract will require renewal, let me hear soon about this, I have not yet had the pleasure of meeting Mr. Minto but hope to see him soon when I next go to London.'

"Will you please attend to 'contract renewal' as mentioned above.

"Yours truly,

"Jas. R. Ness.

"Archibald Minto, Esq."

Minto had an account with the National Bank of Scotland. On November 1, 1905, he paid into Ness's account at the same bank the sum of 150*l.* in bank notes. A paying in slip was produced which bore partly in print and partly in Minto's handwriting the words "pay to the credit current account James R. Ness 150*l.* sterling Archibald Minto," and, in print, the words "bank notes."

The indictment charged—

In count 1 that the appellant and Minto on February 1, 1904, and on divers other days between the said date and July 19, 1906, did unlawfully conspire together and with James Ross Ness and with divers other persons whose names were unknown that divers sums of money and divers valuable securities should be corruptly given by Minto and Ness and Lipton Limited to the appellant in his official capacity, he then being a public and ministerial officer, to wit, a commissioned officer in His Majesty's service and colonel commanding the Second Battalion of the Yorkshire Light Infantry, and that the same sums of money and valuable securities should be corruptly

accepted by the appellant in his said official capacity as inducement to the appellant in violation of his official duty to do and omit to do divers acts, to wit, to shew favour and to forbear to shew disfavour to Minto and Ness and Lipton Limited in relation to contracts for catering between Lipton Limited and officers commanding units in the Army, the appellant and Minto and Ness then knowing the said acts and omissions to be in violation of the official duty of the appellant;

In count 2 that on a date named in September, 1904, the appellant being such public and ministerial officer as aforesaid did unlawfully corruptly take for himself a gift of 120*l.* from Minto and Ness and Lipton Limited as an inducement to him in violation of his official duty to shew favour and abstain from shewing disfavour to Minto and Ness and Lipton Limited in relation to the said catering contracts, all of them knowing the appellant to be acting in violation of his official duty;

In count 4 that on a date named in April, 1905, the appellant being such public and ministerial officer as aforesaid did unlawfully corruptly take for himself a gift of 150*l.* from Minto and Ness and Lipton Limited as an inducement to him in violation of his official duty to shew favour and abstain from shewing disfavour to Minto and Ness and Lipton Limited in relation to the said catering contracts, all of them knowing the appellant to be acting in violation of his official duty.

The appellant gave evidence at the trial. He admitted having received the sums specified in the indictment, but claimed them as his due in return for recommending Lipton Limited and Messrs. Style & Winch to the officers commanding other regiments.

Healy, K.C., and *A. S. Comyns Carr*, for the appellant. The indictment charges no offence known to the common law. The appellant is described as "being a public and ministerial officer, to wit, a commissioned officer in the public service of our Lord the King, namely, Colonel commanding the Second Battalion of the Yorkshire Light Infantry Regiment." In Stephen's Digest of the Criminal Law, 5th ed., p. 97, ch. 13, it is stated in art. 136 that "Every one who gives or offers to any person holding any

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judicial office, and every person holding any judicial office who accepts any bribe, commits a misdemeanour"; and in art. 137 that "Every one commits a misdemeanour who by any means endeavours to force, persuade, or induce any public officer not being a judicial officer to do or omit to do any act which the offender knows to be a violation of such officer's official duty." In the Laws of England by Lord Halsbury, vol. ix., p. 484, s. 965, it is stated that "Every person is guilty of a misdemeanour at common law who bribes a ministerial officer or, being a ministerial officer, accepts a bribe, where the object of the bribe is to induce such officer to do, or to omit to do, any act which to his knowledge is in violation of his official duty."

In Coke Inst. III., ch. 68, p. 145, it is said that "Bribery is a great misprision (1.) when any man in judiciall place (2.) takes any fee or pension, robe, or livery, gift, reward (3.) or brocage (4.) of any person, that hath to do before him any way (5.), for doing his office, or by colour of his office, but of the King only, unless it be of meat and drink, and that of small value, upon divers and grievous punishments." On p. 147, note (2) to the words "When any man in judiciall place," &c., the following passage occurs: "For the difference between bribery and extortion is, that bribery is only committed by him, that hath a judiciall place, and extortion may be committed both by him that hath a judiciall place, or by him that hath a ministeriall office." "Bribery," says Blackstone, Com., vol. iv., p. 139, "is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office." Hawkins in Pleas of the Crown, 7th ed. (Leach), vol. ii., ch. 67, p. 73; 8th ed. (Curwood), vol. i., p. 414, almost repeating the words of Coke, says: "Bribery in a strict sense is taken for a great misprision of one in a judicial place taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the King only. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known

rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing a thing which deserves the severest of punishments. Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature."

The officers then whom it is unlawful to bribe are (1.) judicial officers, (2.) ministerial officers. A colonel is certainly not as such a judicial officer. Is he a ministerial officer? The Seventh Report of the Commissioners on Criminal Law, p. 153, ch. IV., On Offences against the Executive Power, generally, s. 1, contains certain prefatory articles. By art. 1 the term "officer" signifies any person invested with authority to execute, and legally bound to execute, any public duty. By art. 2 it is provided that the term "officer" shall not be deemed to extend to any member of either House of Parliament, as such; and that no ecclesiastical, naval, or military officer shall be liable to the penalties of any article of that chapter in respect of the breach of any ecclesiastical, naval, or military law or discipline, the cognizance, correction, and punishment whereof respectively belong properly to any ecclesiastical Court, or to any court-martial or other naval or military tribunal. By the Army Discipline and Regulation Act, 1879 (42 & 43 Vict. c. 33), s. 23, every person subject to military law who takes any fee or advantage in respect of, or is in any way interested in, the sale of provisions or merchandise brought into places under his command, shall on conviction by court-martial be liable to suffer imprisonment or such less punishment as is in the Act mentioned. The offence with which the appellant has been charged is one touching the internal administration of the Army and punishable by court-martial. Therefore the appellant is not a ministerial officer within the meaning of that article. Furthermore the authorities above cited shew that the bribery of, or acceptance of bribes by, a ministerial officer is only indictable where the bribe is given to induce the officer to act in violation of his official duty, that is to say, his duty in relation to the disposal of public offices: *Rex* v. *Vaughan*. (1) The Sale

(1) (1769) 4 Burr. 2494, 2500.

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of Offices Act, 1551 (5 & 6 Edw. 6, c. 16), was passed to give statutory sanction to the common law. That statute was held not to apply to military officers: *Berrisford* v. *Done* (1); *Parsons* v. *Thompson* (2); Russell on Crimes, 7th ed., vol. i., pp. 619, 620. The colonel of a regiment does not hold an office at common law, and therefore bribery of such an officer is not an offence at common law.

A conspiracy to commit a merely military offence, punishable only by court-martial, is not an indictable conspiracy at common law.

The letter of October 18, 1905, was not admissible in evidence against the appellant: *Reg.* v. *Blake.* (3) Without that letter there was no evidence of conspiracy.

Sir J. Simon, A.-G., R. D. Muir, Travers Humphreys, and *Branson,* for the Crown. The main contention of the appellant is that to bribe an officer in the King's Army is not an offence known to the common law. That contention cannot be supported. It is an offence at common law to bribe any public officer to act otherwise than in accordance with his duty. What then constitutes a public officer? "In my opinion," said Best C.J. in *Henly* v. *Mayor of Lyme* (4), "every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer." The Chief Justice then gives as examples of public officers bishops, clergymen, and lords of manors in respect of their manor courts, and continues (5): "If a man takes a reward,—whatever be the nature of that reward, whether it be in money from the Crown, whether it be in land from the Crown, whether it be in lands or money from any individual for the discharge of a public duty, that instant he becomes a public officer." It is a crime to bribe the First Lord of the Treasury: *Rex* v. *Vaughan* (6); so it was held a crime for the clerk to the officer who had charge of French prisoners to take a bribe from a prisoner: *Rex* v. *Beale* (7); it is a crime

(1) (1682) 1 Vern. 98.
(2) (1790) 1 H. Bl. 322.
(3) (1844) 6 Q. B. 126.
(4) (1828) 5 Bing. 91, at p. 107.
(5) Ibid. at p. 108.
(6) 4 Burr. 2494.
(7) (1718) cited in *Rex* v. *Gibbs* (1800) 1 East, at p. 183; see note on p. 1300, post.

to bribe a member of a corporation to give his vote for the election of a mayor: *Rex* v. *Plympton* (1); or to bribe electors on the election of an assistant overseer: *Reg.* v. *Lancaster*. (2) The offence is not confined to bribing judicial officers: Blackstone, Com., 21st ed., vol. iv., p. 139, note 30.

By the Fifth Report of the Commissioners on the Criminal Law (1840), p. 40, art. 1, the term "officer" is used to signify any person duly appointed and invested with authority to administer any part of the executive power of the Crown, or to execute any other public duty imposed by law, whether it be judicial, ministerial, or mixed. To this article there is appended a note to the effect that "offences committed by ecclesiastical or naval or military officers are usually inquired of and punished according to the peculiar rules of ecclesiastical or naval or military law, and not by indictment or information in the ordinary courts of criminal jurisdiction . . . . Where however an offence is not purely of an ecclesiastical, naval or military character, but constitutes an offence punishable in the ordinary criminal courts, it is cognizable there, although it may have been committed under colour of discharging an ecclesiastical, naval, or military duty—as where an ecclesiastical officer is guilty of extortion." By art. 2 the term "judicial officer" signifies any judge, magistrate, or other officer invested with authority to decide matters submitted to him in the course of justice according to right. By art. 3 the term "ministerial officer" means any other than a judicial officer.

By art. 35, on p. 47, "Whosoever shall by any means endeavour to force, persuade, or induce any ministerial officer to do, or omit to do, any act in violation of his official duty, such offender knowing the same to be contrary to the duty of such officer shall incur the penalties" to be specified. To this article there is a note that "the comprehensive definition of this high offence contained in the above article seems to be fully warranted by the authorities. 'Bribery,' says Blackstone J., 4 Com. 139, in treating of offences against public justice, 'is where a judge or other person concerned in the administration of justice takes any undue reward to influence his behaviour in office.' See also

(1) (1725) 2 Ld. Raym. 1377.

(2) (1890) 16 Cox, C. C. 737.

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1 Hawk. P. C. 168; 3 Inst. 147. But we should observe that the offence of offering a bribe is by no means confined to corruptly influencing judicial officers. The functions of the executive system, in all its parts, ministerial and judicial, cannot possibly be exercised purely, and effectually, if the temptation to sacrifice duty to gain be not rigorously excluded by means of penal laws . . . . It is upon this principle that it has been held to be a misdemeanour to offer a sum of money to the First Lord of the Treasury for the purpose of obtaining an office or appointment under Government: *Rex* v. *Vaughan*. (1) The reasons delivered by Lord Mansfield for the decision of the Court in that case are just and important. He observes: 'A minister trusted by the King to recommend fit persons to offices would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation. A terrible consequence would result to the public if everything that such an officer is concerned in advising the disposal of should be set up to sale.' There are many other instances of a similar nature. Most of the impeachments against ministers (as observed by Lord Mansfield in the same case) have been for taking money to procure offices grantable by the Crown. In many other instances of inferior note, such practices have been held to be indictable at common law, and others have been subjected to special punishment by statute. It is an indictable offence at common law to offer money to a corporator to vote for a mayor of a corporation." Art. 36 is in these words: "Whosoever, being a ministerial officer, shall take, or agree to take, any bribe offered or promised with intent to induce him unlawfully to do, or omit to do, any act in violaton of his official duty, shall incur the penalties" to be specified. This article is repeated in the Seventh Report, where it appears in ch. IV., s. 4, art. 7, on p. 159.

Public officers then may be divided into judicial and ministerial officers, and ministerial officers are all those who are not judicial. A colonel in the Army is a public ministerial officer. It matters not that his office rests on a statutory basis. No one could doubt that it would be a misdemeanour to bribe the President of the Local Government Board, whose office is created by statute.

(1) 4 Burr. 2494.

Then if it is an offence for a colonel in the Army to receive a bribe to induce him to shew undue favour it is a fortiori a crime for him to conspire with others that such a bribe may be received by him. The facts relating to the payments by Ness to the appellant raised a prima facie case against the latter, and made the letter of October 18, 1905, admissible in evidence. When that was admitted a conspiracy was proved. This conspiracy being a conspiracy to do an act fraudulent and corrupt was indictable in itself, apart from the question whether it is indictable to bribe the colonel of a regiment: *Reg.* v. *Warburton* (1); *Reg.* v. *Aspinall* (2); *Reg.* v. *De Kromme.* (3)

Comyns Carr in reply.

July 1. The judgment of the COURT (Lawrence, Lush, and Atkin JJ.) was delivered by

LAWRENCE J. In this case the appellant was convicted on an indictment charging him with a misdemeanour. He was tried at the Central Criminal Court and sentenced to a term of imprisonment of six months in the second division. He appeals from that conviction and sentence. The facts of the case are shortly these: The appellant was the officer commanding a regiment, the Yorkshire Light Infantry, stationed at Malta. In his capacity as colonel of the regiment it was his duty to determine the form in which the canteen of the regiment should be carried on. There are three systems on which the canteen may be conducted. The appellant chose the tenancy system by which the contractor for the supply becomes a tenant with a position in the barracks and has a monopoly of the custom of the regiment. The contractor pays for this monopoly in the form of rebates which are applied for the benefit of the regiment as the colonel or other officer may direct. The colonel on behalf of the regiment determines the form in which the trade shall be carried on and enters into a contract with the contractor where the tenancy system is adopted. In this case the appellant entered into a contract with Ness, who was the agent for Lipton Limited at Malta. The appellant was indicted with Archibald

(1) (1870) L. R. 1 C. C. R. 274. (2) (1876) 2 Q. B. D. 48.
(3) (1892) 17 Cox, C. C. 492.

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Minto, who was the manager of Lipton Limited in England. They were charged with conspiring to act corruptly in the management of the canteen. The appellant during his stay at Malta and subsequently at Sheffield received considerable sums of money from Ness as agent for Lipton Limited amounting to 540*l*. It was in evidence that canteen contractors were minded, when they got the opportunity, to pay money in the shape of bribes to persons who had influence in selecting contractors. This has been called a practice. The evidence, however, does not warrant that term, although there is sufficient to shew that the commercial morality of canteen contractors is on a low plane. In order to secure the position they are not above paying sums of money to those who have the disposal of it. The appellant received sums of money at times during the period while he was at Malta, Crete, and Sheffield. Contracts were entered into in December, 1902, February, 1904, a modification of the 1902 contract was arranged for the years 1904 and 1905 for Crete, and a fresh or modified contract for Sheffield was made in 1905. The dates of the payments were February 18, 1904, 120*l*.; that is close to the time when the contract of February 2, 1904, was entered into; another payment of 120*l*. was made about six months later; a further payment of 150*l*. was made on March 31, 1905, and a further payment of 150*l*. on October 16, 1905. The contracts were contracts for the tenancy of the canteen, sometimes for one year and sometimes for half a year, but generally for one year.

In addition to these facts there was a letter from Ness to Minto dated October 18, 1905. That letter has been impugned as not being admissible in evidence against the appellant. It was clearly evidence of a conspiracy between Ness and Minto to bribe some one to shew favour or forbear to shew disfavour in the words of the indictment. This letter was dated October 18, 1905, from Wiesbaden; it was addressed to Lipton Limited. [The learned judge read the letter as set out above, and continued:]

That is evidence against Minto that he and Ness were conspiring to pay money to the appellant with a view to inducing him to recommend Lipton Limited as contractors for the canteen. It was argued that this letter was not admissible in evidence against the appellant, and no doubt there was a stage in the

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hearing of the case at which it was not admissible against the appellant as evidence of the statements contained in it. It was always admissible against Minto, and the fact that it was sent is one of the facts in the case that cannot be disputed. Beyond question it is a genuine document. It was argued that the statements contained in it never became evidence against the appellant. We do not assent to that contention. When it was proved that this money was paid to the appellant and that it was paid by Ness, that Ness's banking account was fed by payments in bank notes made by Minto for Lipton Limited, these facts raised the presumption that the appellant was doing something for Ness and Minto in respect of which he was being paid. That called upon the appellant to explain the circumstances in which he was receiving payment from Lipton Limited. A cloud of suspicion is raised both by payments made to other persons in inferior positions and by the unexplained payment of large sums at dates approximating to the dates of these various contracts. These facts shifted the onus and called upon the appellant for explanation. Once the contents of the letter became admissible, counsel for the appellant quite properly called his client, who gave evidence. He admitted having received the money; he gave no explanation except that he was recommending Lipton Limited and a firm of brewers who were supplying his canteen to the officers commanding other regiments; he admitted that he was recommending these firms without disclosing the fact that he was being paid sums of money in return for his recommendation. From a social point of view this conduct was very immoral and dishonest. The appellant sought to distinguish between what he did towards other regiments and what he did towards his own. Of course the distinction is perceptible, but in my view the position that the colonel of one regiment owes no duty to another regiment, which seems to be the appellant's unexpressed contention, is entirely fallacious. He may at any moment be called upon to command or to act with other regiments and he does owe towards other regiments a duty, not so intimate as that towards his own, but still a duty in his capacity as an officer in the Army. For these reasons I am of opinion that the letter was admissible in evidence against the appellant.

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The next question raised was whether the indictment discloses any indictable offence. We have listened to what was called a historical treatment of the law of conspiracy. We cannot say that it has afforded us any help. The examination of codes or drafts of codes and even references to the older text-books afford no sound ground of authority on which we can base the decision of this appeal. Attention must be called to the terms of the indictment in order to shew the reasons for thinking that it discloses a charge of conspiracy at common law. It charges that the appellant and Minto unlawfully conspired together and with Ness that sums of money should be corruptly given by Minto, Ness, and Lipton Limited to the appellant in his official capacity, he then being a public and ministerial officer, to wit, a commissioned officer in His Majesty's service, and that the sums of money should be corruptly accepted by the appellant in his said official capacity as inducement to him in violation of his official duty to shew favour and forbear to shew disfavour to Minto and Ness and Lipton Limited in relation to contracts for catering between Lipton Limited and officers commanding units in the Army.

First it was said that the words "shew favour" and "forbear to shew disfavour" are taken from s. 1 of the Prevention of Corruption Act, 1906. The fact, if it be a fact, that they were has not the effect of making the count bad. The words are English words and do not cease to be so because they occur in an Act of Parliament. Being English words they have and must receive their meaning in English. If in their ordinary meaning they go to impute a misdemeanour they must have that effect. There is nothing in that point.

Then it was argued that the appellant was not "a public and ministerial officer." A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. The addition of the words "and ministerial" does not affect the matter. In our view he is also a ministerial officer. The Attorney-General was right in his contention that the word "ministerial" is here

used in contrast with "judicial"; every officer who is not a judicial is a ministerial officer. No other word would aptly qualify the position of the appellant as a public officer, and it is clear that the colonel of a regiment is a public ministerial officer. The count then stands, subject to the next objection.

It was then said that, with the exception of judicial officers and certain others holding subordinate positions in the administration of justice, it is not an offence to corrupt a public officer except when the bribe is given to obtain or procure an office. That is not the law. There is ample authority to the contrary. When an officer has to discharge a public duty in which the public is interested, to bribe that officer to act contrary to his duty is a criminal act. To induce him to shew favour or abstain from shewing disfavour where an impartial discharge of his duty demands that he should shew no favour or that he should shew disfavour, is to induce him to act contrary to his duty; where this is done corruptly it is an indictable misdemeanour at common law which abhors corruption and fraud. In the case of *Rex* v. *Vaughan* (1) a criminal information for misdemeanour was granted against the defendant for offering a bribe to the Duke of Grafton, who was First Lord of the Treasury, in order to obtain the reversion of the office of clerk to the Supreme Court of the island of Jamaica. Lord Mansfield C.J. said (2): "A minister trusted by the King to recommend fit persons to offices would betray that trust, and disappoint that confidence, if he should secretly take a bribe for that recommendation. A terrible consequence would result to the public, if everything that such an officer is concerned in advising the disposal of, should be set up to sale. I am therefore for making the rule absolute. He may demur, or move in arrest of judgment, or appeal to a higher judicature. I am clear, that this is a misdemeanour, and punishable as such." Then later on in his judgment he said (3): "If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him; and the judge taketh it not; yet this is an offence punishable by law, in the party that offers it. 3 Inst. 147. So also a promise of money to a

(1) 4 Burr. 2494. (2) 4 Burr. at p. 2499.
(3) Ibid. at p. 2500.

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corporator, to vote for a mayor of a corporation; as in *Rex* v. *Plympton*. (1) And so also must be an offer to bribe a Privy Councillor, to advise the King. Therefore it appears to me that this is a misdemeanour." Yates J. said (2): "No doubt, this is an offence at common law." Aston and Willes JJ. concurred. That is an authority that a person in the position of a trustee for the performance of public functions would commit a misdemeanour if he took a bribe for the corrupt exercise of his public duty. The case of bribing a corporator to vote for a certain person as mayor is confirmed by *Reg.* v. *Lancaster* (3), where it was held that bribery at the election of an assistant overseer was a misdemeanour at common law. It is a complete fallacy to say that corruption of voters or electors comes within the principle which makes bribery with a view to procuring an office a misdemeanour. That is not the principle. The offence is in bribing the voter to vote in accordance with the wishes of the briber and to exercise his vote corruptly and not according to his views of what is right and proper. Then there is the case of *Rex* v. *Beale* (4), where the clerk to the officer having charge of certain French prisoners of war at Porchester Castle took bribes from certain prisoners in order to procure their exchange out of their turn; he was found guilty and punished on an indictment. That was a strong case, because the prisoners injured through this default of duty on the part of the clerk were not British subjects; only of its magnanimity our common law threw its protection round them and treated them as though they were. Therefore the clerk owing a duty to the Sovereign to let the prisoners take their proper turn was guilty of a misdemeanour when for corrupt reasons he let some of them go out of their turn. Upon the same principle for a firm of contractors corruptly to influence a colonel of a regiment to shew favour to them in the matter of a contract for the supply of a canteen is a misdemeanour, and a misdemeanour of very grave importance. The colonel is a trustee whose duty it is to consider beyond everything the interests of the men under his command. For

(1) 2 Ld. Raym. 1377.
(2) 4 Burr. at p. 2501.
(3) 16 Cox, C. C. 737.
(4) Cited 1 East, 183. See note on p. 1300, post.

him to put himself in a position where his duty and his interests are in conflict so that he is not in a position to decide as a perfectly free man upon the merits of competing tenders is a misdemeanour and a serious one.

It is not denied on behalf of the appellant that if the counts for bribery are good the counts for conspiracy are good also. But counsel for the Crown have argued and rightly argued that, whether the counts for bribery are good counts at common law or not, the count for conspiracy is a good count for misdemeanour at common law. In our view that is so. To make a good count for conspiracy it is not necessary that the agreement should be an agreement to commit a crime; it is enough if it be an agreement to do an act which is unlawful or wrongful in the sense of tortious. At any rate this is so where the agreement is to do an act of fraud or corruption. There is authority for saying that an agreement to commit a mere trespass is not necessarily a misdemeanour. If that be law, as to which doubts have been expressed by eminent judges, it is clear that where the tort is one of fraud or corruption an agreement to commit it is a misdemeanour at common law. The authorities for that are *Reg.* v. *Warburton* (1) and *Reg.* v. *Aspinall.* (2) The last named was a case of a conspiracy to obtain a quotation on the Stock Exchange of the shares in a company by means of false pretences. Brett J.A. in giving judgment said: "An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy: see *Reg.* v. *Warburton.* (1) There may be and probably are others." (3) There are other authorities which support the proposition that a count charging an agreement fraudulently to do anything wrongful to a third person is a misdemeanour at common law. We need say no more upon the objections taken to the indictment.

As to Mr. Healy's appeal to us to reduce the sentence we cannot accede to it. The offence is a serious one and we cannot say that the sentence is excessive. If clemency is to be shewn,

(1) L. R. 1 C. C. R. 274. (2) 2 Q. B. D. 48.
(3) Ibid. at p. 59.

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as to which we offer no opinion, it is for the Minister charged with the exercise of the prerogative of mercy to consider whether this is a proper case in which it should be exercised. The appeal will be dismissed.

Appeal dismissed.

Solicitors for appellant: *Long & Gardiner.*
Solicitor for the Crown: *The Director of Public Prosecutions.*

NOTE.—The reporter has been favoured with a transcript of portion of the record of *Rex* v. *Beale* (Crown Roll 384, Roll 22, in the Record Office) from which the following has been extracted:—

On October 2, 1797, at the general quarter session holden at the Castle of Winchester in the county of Southampton an indictment was presented that an open and public war was and was being prosecuted and carried on by the persons exercising the powers of Government in France and the people of France against our Lord the King at Porchester in the county of Southampton and that during the war to wit on November 4, 1796, at Porchester one Etienne Joseph Boutruche being a Frenchman and an enemy was taken a prisoner of war and on that day was conveyed to and confined in a prison at Porchester Castle where there were 500 other prisoners; that one Joseph Holmwood was the agent on behalf of the King for taking care of prisoners of war confined in the said prison and that John Beale was clerk to the said Joseph Holmwood and as such clerk was in the service and pay of the King and employed as such clerk in the prison; that during the time the said Etienne Joseph Boutruche was so confined as a prisoner and whilst John Beale was employed as clerk 150 prisoners were about to be exchanged for certain subjects of the King who had been taken prisoners of war by the King's enemies; that John Beale "so being such clerk and so employed as aforesaid well knowing all and singular the premises but being a person of depraved and corrupt mind and disposition . . . . did unlawfully wickedly and corruptly accept receive and take of and from the said Etienne Joseph Boutruche a bribe recompence and reward of a sum of money to wit the sum of ten pounds and ten shillings of lawful money of Great Britain for him the said John Beale corruptly to procure him the said Etienne Joseph Boutruche . . . . to be of the number of the persons . . . . to be so exchanged as aforesaid contrary to the duty of the said John Beale as such clerk as aforesaid in contempt of our said Lord the King and his laws to the evil and pernicious example of all others in the like case offending and against the peace of our Lord the King his Crown and Dignity." There was a similar charge with reference to a second prisoner named Blin, the bribe in his case being three guineas. The indictment was moved by certiorari into the Court of King's Bench. Beale pleaded Not guilty. He was tried at the Assizes for the county of Southampton held before Perrin and Thompson BB. and found guilty. He was then brought up and

committed to the custody of the Marshal of the Marshalsea until the Court—i.e., the Court of King's Bench at Westminster—had given its judgment; "whereupon," the record continues, "all and singular the premises being seen and fully understood by the Court here"—i.e., at Westminster—"and mature deliberation had thereupon it is considered and adjudged by the said Court here that he the said John Beale for his offences aforesaid whereof he is indicted and convicted as aforesaid do pay a fine to our Sovereign Lord the King of 100*l.* of lawful money of Great Britain and that he the said John Beale be imprisoned in the custody of the said Marshal for the space of twelve calendar months now next ensuing."

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W. H. G.

END OF VOL. III.

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An action for damages based upon a felonious act on the part of the defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shewn for his not having been prosecuted, and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted. SMITH *v.* SELWYN **C. A. 98**

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Sect. 8 of the Sale of Food and Drugs Act, 1875, provides that in respect of certain sales a person shall not be guilty of an offence under s. 6 of selling to the prejudice of the purchaser an article of food which is not of the nature, substance, and quality of the article demanded, if at the time of delivering the article he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article, to the effect that the same is mixed.

A purchaser having asked for cream was supplied with a mixture of cream and boric acid. The mixture was poured from a can into an earthenware pot. Affixed to the pot was a label on which were legibly printed the words "Preserved cream containing boric acid not exceeding 0·5 per cent." The pot having been filled was placed on the counter and at once covered with a plain paper bag. The purchaser could not and did not see that the pot bore any label. The pot was placed in the bag for the convenience of the purchaser, and there was no intention of concealing the label from him:—

Held, that the vendor, having failed to bring to the mind of the purchaser the fact that there was a label upon the pot, had not supplied to the person receiving the article a notice to the effect that the same was mixed within the meaning of s. 8.

Pearks, Gunston & Tee v. *Houghton* [1902] 1 K. B. 889 approved; *Jones* v. *Jones* (1894) 58 J. P. 653 dissented from. BATCHELOUR *v.* GEE - - - - - - - **Div. Ct. 242**

2. —— *Sale to Prejudice of Purchaser—Person selling—Limited Company—Principal Shareholder—Managing Director—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.

A shop assistant sold to and to the prejudice of a purchaser an article of food which was not of the nature, substance, and quality of the article demanded. The occupier of the shop and proprietor of the business carried on there

ADULTERATION—*continued.*
was a limited company trading in its registered name. The general manager, who was a director and also the secretary of the company, resided on the premises and occasionally conducted the business of the shop in person. In his absence his wife took charge, assisted by the shop assistant. The business was carried on under the exclusive and unrestricted control of the general manager, who was practically the only shareholder in the company. He was not in the shop at the time of the sale in question.

The general manager having been convicted of an offence under s. 6 of the Sale of Food and Drugs Act, 1875:—

Held, that the facts shewed the shop assistant to be the servant of the company and not of the general manager, and that the conviction was wrong.

Salomon v. *Salomon & Co.* [1897] A. C. 22 followed. BOOTH *v.* HELLIWELL - **Div. Ct. 252**

3. —— *Warranty—Notice to Warrantor of Intention to rely on Warranty—Time within which Notice must be sent—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20.

Sect. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, provides as follows: "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person":—

Held, that the words "within seven days after service of the summons" do not apply to the notice to be sent to the warrantor, but merely apply to the notice to be sent to the purchaser, and that as regards the notice to the warrantor it is sufficient if it has been sent before the magistrate comes to determine whether the warranty is a good defence. MARCUS *v.* CROOK - - - **Div. Ct. 173**

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See under RATES.

ATTORNEY-GENERAL—Certiorari—Time limit —Fiat of Attorney-General—Practice—Licensing Acts—Order of confirming authority - - - - - - **222**
See CROWN OFFICE.

AUTHORITY—Charge—Authority to sign per pro.—Banker and customer—Misuse of authority - - - - - - **356**
See BILL OF EXCHANGE.

BANK.
See under BANKER.

BANK PASS-BOOK—Entries in bank pass-book —Admissibility as evidence negativing allegations of false pretence—Criminal law — False pretences — Evidence — Indictment alleging false pretence that prisoner was carrying on general business—Receipts acknowledging payment for articles purchased by him - **1112**
See CRIMINAL LAW. 4.

BANKER — Banker and customer — Cheque — Authority to sign per pro.—Misuse of authority—Forgery—Crossed cheque—Bank in good faith receiving payment for customer—Negligence—Ratification
See BILL OF EXCHANGE. **356**

BANKRUPTCY—*Appeal—County Court—Practice—When "money involved does not exceed 50l."—Bankruptcy Rules*, 1886, *r.* 129.

Rule 129, sub-r. 1, of the Bankruptcy Rules, 1886, provides that "No appeal shall be brought, (*a*) without the leave of the Court, or of the Court of Appeal, ... from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l*." :—

Held, that the word "involved" in the sub-rule meant "involved in the appeal," but that in considering what was the money or money's worth involved the Court ought to have regard to all the proceedings.

Upon an application by the trustee in bankruptcy for an order that the appellant should pay to the trustee a sum of 126*l*., the proceeds of the sale of certain goods which had been paid to the appellant, upon the ground that the goods were in the possession, order, and disposition of the bankrupt at the commencement of the bankruptcy or that the payment of a part of that sum to the appellant was a fraudulent preference, the county court judge only made an order declaring that the payment of 13*l*., part of the sum of 126*l*., was a fraudulent preference :—

Held (reversing the decision of the Divisional Court), that it was "apparent from the proceedings that the money or money's worth involved" did not exceed 50*l*., within the meaning of r. 129 of the Bankruptcy Rules, 1886, and that therefore the appellant could not appeal without leave.

In re Everson [1904] 2 K. B. 619 distinguished.
In re ARNOLD. *Ex parte* HEXT - **C. A. 1078**

2. —— *Bankruptcy Notice — Counter-claim exceeding Amount of Judgment Debt and which Debtor could not set up in Action in which Judgment obtained—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

By s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy if "a creditor has obtained a final judgment against him for any amount, and . . . . has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

A judgment creditor served a bankruptcy notice upon the debtor in respect of the judgment debt. The debtor after the service of the bankruptcy notice obtained an assignment to himself of a debt due from the judgment creditor to a firm of which the debtor was a member which was alleged by the debtor to exceed the amount of the judgment debt, and applied to set aside the bankruptcy notice on the ground that he had a counter-claim which exceeded the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained :—

Held that, even assuming that the debtor could, had he so chosen, have obtained the assignment in time to set up the counter-claim in the action, the bankruptcy notice must be set aside inasmuch as the debtor could not as matters stood at the time the action was proceeding have set up the counter-claim. *In re* A DEBTOR (NO. 37 OF 1914) - - - **Div. Ct. 726**

3. —— *Bankruptcy Notice against Married Woman—Carrying on Trade or Business—Debt contracted before Commencement of Bankruptcy and Deeds of Arrangement Act*, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 12—*Retrospective Operation of Act.*

Where a married woman carried on business and after the coming into operation of the Bankruptcy and Deeds of Arrangement Act, 1913, a final judgment was obtained against her in respect of a debt incurred before the Act :—

Held, that the judgment was a good founda-

BANKRUPTCY—*continued.*

tion for proceedings against her by a bankruptcy notice.

A married woman who owned and managed a private hotel sold it to a company, formed to acquire it, in consideration of shares therein, and became managing director thereof. She subsequently acquired or became interested in two other hotels which were transferred to companies in which she obtained large holdings of shares and of which she became managing director. She then promoted another company to acquire a site and build a fourth hotel. She was nominally vendor to this company, and a large proportion of the share capital was to be allotted to her in consideration of her services in the formation of the company, of which she was also to be the managing director. This company was not a success, and the hotel was never built. In connection with its promotion she incurred a debt in respect of which judgment was obtained and a bankruptcy notice issued against her by the judgment creditors :—

Held, that she was "carrying on business" within the meaning of s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913, and was consequently liable to bankruptcy proceedings thereunder. *In re* CLARK. *Ex parte* POPE & OWLES - - - - - - **C. A. 1095**

4. —— *Scheme of Arrangement with Creditors —Approval of Court—"Reasonable security" for payment of 7s. 6d. in the Pound—Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 3, *sub-s.* 9.

Where a proposal for a scheme of arrangement of a debtor's affairs is submitted for the approval of the Court, and facts are proved, on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court, by s. 3, sub-s. 9, of the Bankruptcy Act, 1890, "shall refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

The Court has no discretion to approve the proposal unless it is satisfied that the scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound within a reasonable time. In such a case the fact that the creditors have by the statutory majority accepted the scheme is immaterial.

In re Paine [1891] W. N. 208 and *In re Burr* [1892] 2 Q. B. 467 followed.

Observations of Vaughan Williams J. in *In re Bottomley* (1893) 10 Morrell, 262, discussed. *In re* WEBB. *Ex parte* BOARD OF TRADE **C. A. 387**

5. —— *Voluntary Settlement — Uncle and Nephew—Gift by Uncle of Chattels to be fixed to Freehold of Hotel leased to Nephew—Reduction of Rent payable by Nephew—Alienation of Gift—"Settlement of property"—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 47.

A bankrupt, within two years of the date of his bankruptcy, had purchased a valuable clock and caused it to be affixed to the front of an hotel of which his nephew was then about to become the lessee and occupier. The nephew

BANKRUPTCY—*continued.*

arranged with his lessor that in consideration of the clock being allowed to become part of the freehold the rent to be paid by him for the premises should be reduced by 10*l.* a year. The trustee in bankruptcy contended that the transaction constituted a voluntary settlement which was avoided by s. 47 of the Bankruptcy Act, 1883. Horridge J. held that the nephew was liable to pay to the trustee the value of the clock as at the date of the purchase of the same by the bankrupt :—

Held, on appeal, that the property in the clock was never in the nephew, and there was no transfer of it to him and therefore no settlement upon him within the meaning of the section.

Decision of Horridge J. reversed.

In re Plummer [1900] 2 Q. B. 790 followed. *In re* BRANSON. *Ex parte* MOORE - **C. A. 1086**

—— Contract—Consideration—Public policy—Policy of Bankruptcy Acts—Contract for good consideration by undischarged bankrupt to pay in full debt provable in bankruptcy—Validity of contract *See* CONTRACT. **36**

BANKRUPTCY RULES, 1886, r. 129 - - **1078**
See BANKRUPTCY. 1.

"BAR" — Licensing Acts—Child — Exclusion from "bar" of licensed premises—Part of premises "mainly used" for the sale and consumption of liquor *See* LICENSING ACTS. 1. **321**

BASTARDY — *Affiliation Order — Child born Abroad — Jurisdiction of Justices — Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

The fact that a bastard, the child of English parents resident and domiciled in England, was born abroad is not a bar to bastardy proceedings, since there is no necessity to consider any but English law in order to ascertain the status of the child :—

So *held* by Bankes and Lush JJ., Avory J. dissenting.

Reg. v. *Blane* (1849) 13 Q. B. 769 discussed and distinguished. REX *v.* HUMPHRYS (HEREFORD JUSTICES). *Ex parte* WARD - **Div. Ct. 1237**

2. —— *Evidence—Corroboration—Conviction for having had Unlawful Carnal Knowledge—Proof of Conviction—Evidence of Conduct of Accused—Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

Upon the hearing of a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, the evidence adduced in corroboration of that of the complainant was the evidence of a person who deposed that he had been present at the trial and conviction of the alleged father of the complainant's child upon an indictment charging him with having had unlawful carnal knowledge of the complainant, and who also deposed to the fact that when before the committing justices the alleged father gave evidence that the complainant was a fast girl and that that was the cause of her then condition, and that on his trial at the assizes no suggestion was made that the

BASTARDY—*continued.*
complainant was a fast girl, nor was the evidence of the alleged father to that effect repeated :—

Held, by Buckley L.J. and Kennedy L.J. (Phillimore L.J. doubting), that the conviction was not sufficiently proved, and that the evidence as to it was not corroboration of the complainant's evidence in a material particular as required by the statute.

Held, further, that the evidence as to the conduct of the alleged father in giving evidence before the justices that the complainant was a fast girl and in not giving evidence to that effect at the assizes was corroboration of the complainant's evidence in a material particular.

Decision of the Divisional Court [1914] 1 K. B. 1 affirmed on different grounds. MASH *v.* DARLEY - - - - - - **C. A. 1226**

BILL OF COSTS—Solicitor.
See under SOLICITOR.

BILL OF EXCHANGE — *Banker and Customer —Cheque—Authority to sign per pro.—Misuse of Authority—Forgery—Forgery Act*, 1861 (24 *&* 25 *Vict. c.* 98), *s.* 24—*Crossed Cheque—Bank in Good Faith receiving Payment for Customer— Negligence — Ratification — Bills of Exchange Act*, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 25, 82.

A banker who in good faith collects a cheque signed per pro. is not negligent within the meaning of s. 82 of the Bills of Exchange Act, 1882, merely because he does not inquire into the drawer's authority.

Sects. 25 and 82 of the Bills of Exchange Act, 1882, are distinct from one another and have reference to different states of things, s. 25 to rights and liabilities while a bill is current, and s. 82 to rights and liabilities after it has been discharged.

A cheque signed per pro. by a person having authority so to sign cheques for specified purposes is not a forgery within s. 24 of the Forgery Act, 1861, because it is drawn for purposes outside and in fraud of the authority.

Reg. v. *White* (1847) 1 Den. C. C. 208 distinguished.

A., having authority to draw and sign cheques per pro. for the purposes of the plaintiff's business, paid in cheques so signed, for his own purposes and in fraud of the plaintiff, during a number of years, to his own account with the defendants, who, in good faith and without objection by the plaintiff, collected them in ordinary course and placed the proceeds to A.'s credit. The plaintiff sued the defendants for the amount of the cheques as damages for conversion or, alternatively, as money had and received.

Held, that, in regard to crossed cheques collected after the first year or two, the defendants, having during one or two years collected cheques for A. without any protest from the plaintiff, were justified in assuming that A. was acting within his authority, and were protected by s. 82 of the Bills of Exchange Act, 1882, as having acted without negligence.

Held, also, upon the facts, that in regard to cheques collected during the first year or two the defendants were not liable because the plaintiff had subsequently, either himself or through his accountants, ratified the acts of A.

Decision of Lord Coleridge J. [1913] W. N. 84 reversed. MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK, LIMITED - **C. A. 356**

—— Promissory note—Note given for goods supplied to makers—Surety—Admissibility of evidence - - - **907**
See PROMISSORY NOTE.

BOARD OF TRADE—Shipping—Steerage passenger — Contract ticket—Form of—"Form approved by the Board of Trade"—Exception of negligence on back of ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act, 1894 - - - **731**
See SHIPPING. 6.

BORROW—Partnership—Trading firm—Implied authority of partner to borrow money for partnership purposes—What is a trading firm for this purpose - **1192**
See PARTNERSHIP.

BREACH OF PEACE—Apprehended breach of peace—Recognizances to be of good behaviour—Jurisdiction of justices to order—Conditions of jurisdiction - **229**
See JUSTICES. 1.

BRIBERY — Conspiracy—Public officer—Ministerial officer—Colonel of a regiment—Canteen—Competing caterers—Corrupt payments - - - - - **1283**
See CRIMINAL LAW. 1.

BRIDGE — *Canal made across Highway — Highway carried by Bridge over Canal— Statutory Duty to keep Bridge "in sufficient repair"—Standard of Repair—Worcester and Birmingham Canal Act*, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

By an Act passed in 1791 a canal company were empowered to make a canal and it was provided that the company should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal, and of such dimensions and in such manner as the commissioners appointed under the Act should adjudge proper; "and all such . . . . bridges . . . . shall from time to time be supported, maintained, and kept in sufficient repair" by the company.

The canal was made in 1812, and was made across several highways within a certain district; and the company constructed bridges over the canal to carry each of such highways.

In an action against the company for a declaration that they were liable under the provisions of the Act of 1791 to keep the bridges in repair so as to be sufficient to bear the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character and needs of the district served by the said highways :—

Held, that the standard of repair which the company were bound to observe was not the

BRIDGE—*continued.*
standard existing at the time of the passing of the Act or the construction of the bridges, but was the standard existing at the present time, that is, the standard of the present traffic.
Decision of Phillimore J. [1913] 1 K. B. 422 reversed. ATTORNEY-GENERAL (WORCESTER CORPORATION) *v.* SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION COMPANY - - - - - - - **C. A. 1**

BROKER—Sale of goods—Broker receiving del credere commission—Non-performance of contract by buyer—Solvency of buyer—Liability of broker - **1272**
See PRINCIPAL AND AGENT. 2.

BUILDINGS—London—General line of buildings in street—Buildings erected beyond the general line - - - - - **852**
See LONDON. 1.

—— Revenue—Duties on land values—Structures—Embankment—Improvement of value of land as building land or for purposes other than agriculture - - - **196**
See REVENUE. 7.

BY-LAWS—Streets—New street - - **796**
See STREETS. 1.

CANAL—Bridge—Canal made across highway—Highway carried by bridge over canal—Statutory duty to keep bridge "in sufficient repair"—Standard of repair
See BRIDGE. **1**

CANTEEN—Bribery—Conspiracy—Colonel of a regiment—Competing caterers—Corrupt payments - - - - **1283**
See CRIMINAL LAW. 1.

CAPTURE—Insurance (Marine)—Insurance of cargo against capture—Constructive total loss—Anticipation of capture—Sale of cargo by assured - - **1121**
See INSURANCE (MARINE). 1.

CARGO—Insurance (Marine)—Insurance of cargo against capture—Constructive total loss—Anticipation of capture—Sale of cargo by assured - - **1121**
See INSURANCE (MARINE). 1.

—— Shipping—Charterparty—Timber cargo—Freight payable per cubic fathom—Measurement—Alternative methods—Wrong method adopted—Remeasurement, Cost of—Liability of charterer
See SHIPPING. 4. **587**

CARRIAGE OF GOODS—Railway—Condition in consignment note - - - **567**
See RAILWAY. 1.

—— Steam vessels—Carriage partly by sea and partly by land - - - - **554**
See RAILWAY. 2.

CASE STATED—Point not taken before justices raised in Divisional Court - - **160**
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CASES:—

—— *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Company* - [1913] 1 K. B. 422.
Reversed - - **[1914] 3 K. B. 1**

—— *Barnett* v. *Howard* - [1900] 2 Q. B. 784
Followed. WOOD *v.* LEWIS
[1914] 3 K. B. 73

—— *Bennett Steamship Company* v. *Hull Mutual Steamship Protecting Society* [1913] 3 K. B. 372.
Affirmed - - - **[1914] 3 K. B. 57**

—— *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* [1913] 3 K. B. 850.
Applied. ADAM STEAMSHIP COMPANY *v.* LONDON ASSURANCE CORPORATION
[1914] 3 K. B. 1256

—— *Bottomley, In re* - (1893) 10 Morrell, 262
Observations of Vaughan Williams J. in, discussed. *In re* WEBB. *Ex parte* BOARD OF TRADE **[1914] 3 K. B. 387**

—— *British Oil and Cake Mills, Limited* v. *Port of London Authority* [1914] 1 K. B. 5.
Affirmed - - **[1914] 3 K. B. 1201**

—— *Burr, In re* - [1892] 2 Q. B. 467
Followed. *In re* WEBB. *Ex parte* BOARD OF TRADE **[1914] 3 K. B. 387**

—— *Butler* v. *Wildman* (1820) 3 B. & Ald. 398
Distinguished. KACIANOFF *v.* CHINA TRADERS INSURANCE COMPANY, LIMITED - - **[1914] 3 K. B. 1121**

—— *Capital and Counties Bank* v. *Warriner* (1896) 1 Com. Cas. 314.
Followed. ANT. JURGENS MARGARINE-FABRIEKEN *v.* LOUIS DREYFUS & Co.
[1914] 3 K. B. 40

—— *Catt* v. *Tourle* - (1869) L. R. 4 Ch. 654
Considered. LONDON COUNTY COUNCIL *v.* ALLEN - - **[1914] 3 K. B. 642**

—— *Cavalier* v. *Pope* [1905] 2 K. B. 757; [1906] A. C. 428.
Applied. RYALL *v.* KIDWELL & SON
[1914] 3 K. B. 135

—— *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1913] 3 K. B. 442.
Affirmed - - **[1914] 3 K. B. 772**

—— *Clapp* v. *Carter* (1914) 7 B. W. C. C. 28
Followed. POTTER *v.* JOHN WELCH & SONS, LIMITED **[1914] 3 K. B. 1020**

—— *Codling* v. *John Mowlem & Co., Limited* [1914] 2 K. B. 61.
Affirmed - - **[1914] 3 K. B. 1055**

—— *Cowes District Council* v. *Southampton Steam Packet Co.* [1905] 2 K. B. 287.
Considered. GENERAL ESTATES COMPANY *v.* BEAVER **[1914] 3 K. B. 918**

CASES—*continued.*

—— *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245.
Decision of the C. A. in, has not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217. VELAZQUEZ, LIMITED *v.* INLAND REVENUE COMMISSIONERS - - **[1914] 3 K. B. 458**

—— *Dawson v. McGroggan* [1903] 1 I. R. 92
Distinguished. LYELL *v.* LORD HOTHFIELD - - - **[1914] 3 K. B. 911**

—— *De La Warr (Earl)* v. *Miles* (1881) 17 Ch. D. 535.
Distinguished. LYELL *v.* LORD HOTHFIELD - - - **[1914] 3 K. B. 911**

—— *Dunning* v. *Owen* [1907] 2 K. B. 237; 76 L. J. (K.B.) 796.
Distinguished. MELLOR *v.* LYDIATE **[1914] 3 K. B. 1141**

—— *Evans* v. *Gwendraeth Anthracite Colliery Company* [1913] 3 K. B. 100.
Reversed - - **[1914] 3 K. B. 23**

—— *Everson, In re* - - [1904] 2 K. B. 619
Distinguished. *In re* ARNOLD. *Ex parte* HEXT - - **[1914] 3 K. B. 1078**

—— *Frith* v. *Owners of S.S. "Louisianian"* [1912] 2 K. B. 155.
Undistinguishable. NASH *v.* OWNERS OF S.S. "RANGATIRA" **[1914] 3 K. B. 978**

—— *General Estates Co.* v. *Beaver* [1913] 2 K. B. 433.
Affirmed - - **[1914] 3 K. B. 918**

—— *Gibson v. Wishart* [1914] W. N. 232; 7 B. W. C. C. 348.
Followed. BAGLEY *v.* FURNESS, WITHY & Co., LIMITED - **[1914] 3 K. B. 974**

—— *Gieblier* v. *Manning* [1906] 1 K. B. 709; 75 L. J. (K.B.) 463.
Judgment of Lord Alverstone C.J. in, explained. KATES *v.* JEFFERY **[1914] 3 K. B. 160**

—— *Grove* v. *Dubois* - - (1786) 1 T. R. 112
Considered. THOMAS GABRIEL & SONS *v.* CHURCHILL & SIM **[1914] 3 K. B. 1272**

—— *Hill v. Wright* - - (1896) 60 J. P. 312
Not followed. GODMAN *v.* CROFTON **[1914] 3 K. B. 803**

—— *Inland Revenue Commissioners* v. *Clay. Inland Revenue Commissioners* v. *Buchanan* [1914] 1 K. B. 339.
Affirmed - - **[1914] 3 K. B. 466**

—— *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217.
Referred to. VELAZQUEZ, LIMITED *v.* INLAND REVENUE COMMISSIONERS **[1914] 3 K. B. 458**

CASES—*continued.*

—— *Ingram & Royle, Limited* v. *Services Maritimes du Tréport, Limited* [1914] 1 K. B. 541.
See INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED - - **[1914] 3 K. B. 28**

—— *Jones* v. *Jones* - - (1894) 58 J. P. 653
Dissented from. BATCHELOUR *v.* GEE **[1914] 3 K. B. 242**

—— *Kacianoff* v. *China Traders Insurance Co., Limited* [1913] 3 K. B. 407.
Affirmed - - **[1914] 3 K. B. 1121**

—— *Knight* v. *Halliwell* (1874) L. R. 9 Q. B. 412
Judgment of Blackburn J. in, followed. KATES *v.* JEFFERY - **[1914] 3 K. B. 160**

—— *"Knight of St. Michael" (The)* [1898] P. 30.
Distinguished. KACIANOFF *v.* CHINA TRADERS INSURANCE COMPANY, LIMITED - - **[1914] 3 K. B. 1121**

—— *Luker* v. *Dennis* - (1877) 7 Ch. D. 227
Considered. LONDON COUNTY COUNCIL *v.* ALLEN - - **[1914] 3 K. B. 642**

—— *Lyell* v. *Kennedy* - (1884) 27 Ch. D. 1
Distinguished. LAMBERT *v.* HOME **[1914] 3 K. B. 86**

—— *Lyne* v. *Leonard* - (1868) L. R. 3 Q. B. 156
Followed. MAW *v.* HOLLOWAY **[1914] 3 K. B. 594**

—— *Mash* v. *Darley* - - [1894] 1 K. B. 1
Affirmed on different grounds. **[1914] 3 K. B. 1226**

—— *Metropolitan Ry. Co.* v. *London County Council* [1911] A. C. 1.
Distinguished. CLODE *v.* LONDON COUNTY COUNCIL - **[1914] 3 K. B. 852**

—— *Midwood* v. *Manchester Corporation* [1905] 2 K. B. 597.
Followed. CHARING CROSS ELECTRICITY SUPPLY COMPANY *v.* HYDRAULIC POWER COMPANY **[1914] 3 K. B. 772**

—— *Morison* v. *London County and Westminster Bank, Limited* [1913] W. N. 84.
Reversed - - **[1914] 3 K. B. 356**

—— *Moss* v. *Great Eastern Ry. Co.* [1909] 2 K. B. 274.
Followed. TAYLOR *v.* CRIPPS **[1914] 3 K. B. 989**

—— *Mountain* v. *Parr* - [1899] 1 Q. B. 805
Applied. TAYLOR *v.* CRIPPS **[1914] 3 K. B. 989**

—— *Newton* v. *Cubitt* (1862) 12 C. B. (N.S.) 32
Considered. GENERAL ESTATES COMPANY *v.* BEAVER - **[1914] 3 K. B. 918**

—— *Nordon* v. *Defries* - (1882) 8 Q. B. D. 508
Overruled. LAMBERT *v.* HOME **[1914] 3 K. B. 86**

CASES—*continued.*

—— *Paine, In re* - - [1891] W. N. 208
Followed. *In re* WEBB, *Ex parte* BOARD OF TRADE [1914] **3 K. B. 387**

—— *Pearks, Gunston & Tee* v. *Houghton* [1902] 1 K. B. 889.
Approved. BATCHELOUR *v.* GEE
[1914] **3 K. B. 242**

—— *Pennell* v. *Uxbridge Churchwardens* (1862) 31 L. J. (M.C.) 92.
Approved. GODMAN *v.* CROFTON
[1914] **3 K. B. 803**

—— *Plummer, In re* - - [1900] 2 K. B. 790
Followed. *In re* BRANSON, *Ex parte* MOORE - - [1914] **3 K. B. 1086**

—— *Reg.* v. *Blane* - - (1849) 13 Q. B. 769
Discussed and distinguished. REX *v.* HUMPHRYS - - [1914] **3 K. B. 1237**

—— *Reg.* v. *White* - (1847) 1 Den. C. C. 208
Distinguished. MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK, LIMITED - - [1914] **3 K. B. 356**

—— *Rex* v. *Kensington Income Tax Commissioners* [1913] 3 K. B. 870.
Reversed - - [1914] **3 K. B. 429**

—— *Ryall* v. *Kidwell & Sons* [1913 3 K. B. 123
Affirmed. - - [1914] **3 K. B. 135**

—— *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330.
Doctrine of, applicable. CHARING CROSS ELECTRICITY SUPPLY COMPANY *v.* HYDRAULIC POWER COMPANY
[1914] **3 K. B. 772**

—— *Salomon* v. *Salomon & Co.* [1897] A. C. 22
Followed. BOOTH *v.* HELLIWELL
[1914] **3 K. B. 252**

—— *Scott* v. *Carritt* - - (1900) 82 L. T. 67
Distinguished. CLODE *v.* LONDON COUNTY COUNCIL - [1914] **3 K. B. 852**

—— *Simpson* v. *Inland Revenue Commissioners* [1914] 2 K. B. 842.
Distinguished. MATTHEWS *v.* INLAND REVENUE COMMISSIONERS
[1914] **3 K. B. 192**

—— *Slatford* v. *Erlebach* [1912] 3 K. B. 155
Distinguished. INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED - [1914] **3 K. B. 28**

—— *Stott (Baltic) Steamers, Limited* v. *Marten* [1914] 1 K. B. 442.
Affirmed - - [1914] **3 K B. 1262**

—— *Strutt* v. *Clift* - - [1911] 1 K. B. 1,
Distinguished. PHELON & MOORE LIMITED *v.* KEEL - [1914] **3 K. B. 165**

—— *Sutton v. Great Northern Ry. Co.* [1909] 2 K. B. 791.
Followed. TAYLOR *v.* CRIPPS
[1914] **3 K. B. 989**

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—— *Swanston* v. *Twickenham Local Board* (1879) 11 Ch. D. 838.
Followed and applied. METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY
[1914] **3 K. B. 787**

—— *Syred* v. *Carruthers* (1858) E. B. & E. 469
Approved. GODMAN *v.* CROFTON
[1914] **3 K. B. 803**

—— *Thomas Gabriel & Sons* v. *Churchill & Sim* [1914] 1 K. B. 449.
Affirmed - - [1914] **3 K. B. 1272**

—— *Tulk* v. *Moxhay* - - (1848) 2 Ph. 774
The doctrine of, inapplicable. LONDON COUNTY COUNCIL *v.* ALLEN
[1914] **3 K. B. 642**

—— *United States Steel Products Co.* v. *Great Western Ry. Co.* [1913] 3 K. B. 357.
Reversed - - [1914] **3 K. B. 567**

—— *Usher's Wiltshire Brewery* v. *Bruce* [1914] 2 K. B. 891.
Dictum of Sir Samuel Evans, President, in, considered. SMITH *v.* INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES
[1914] **3 K. B. 674**

—— *Velazquez, Limited* v. *Inland Revenue Commissioners* [1914] 2 K. B. 404.
Affirmed - - [1914] **3 K. B. 458**

—— *Watney, Combe, Reid & Co., Limited* v. *Berners* [1913] 3 K. B. 427.
Affirmed - - [1914] **3 K. B. 288**

—— *Webster* v. *Cohen Brothers* (1913) 6 B. W. C. C. 92.
Followed. POTTER *v.* JOHN WELCH & SONS, LIMITED - [1914] **3 K. B. 1020**

—— *Western Electric Co.* v. *Great Eastern Ry. Co.* [1913] 3 K. B. 15.
Affirmed - - [1914] **3 K. B. 554**

—— *Western Steamship Company, Limited* v. *Amaral Sutherland & Co.* [1913] 3 K. B. 366.
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COMMON—*Rights of Common of Pasture—Contentious User—Claim to Ownership of Soil—Prescription—Lost Grant—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 1.

In order that a title by prescription to a right of common of pasture may be acquired under s. 1 of the Prescription Act, 1832, by actual enjoyment by the person claiming right thereto without interruption for the periods mentioned in the statute, the claim must be grounded upon acts acquiesced in or consented to by the owner of the land over which the right of common is claimed and shewing a claim to the right of common of pasture, and not a claim to the ownership of the soil itself.

The doctrine of lost grant applies only where the enjoyment cannot be otherwise reasonably accounted for.

Earl De La Warr v. *Miles* (1881) 17 Ch. D. 535 and *Dawson* v. *McGroggan* [1903] 1 I. R. 92 distinguished. LYELL *v.* LORD HOTHFIELD
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CONTRACT—*Consideration—Public Policy—Policy of Bankruptcy Acts—Contract for Good Consideration by Undischarged Bankrupt to pay in full Debt provable in Bankruptcy—Validity of Contract.*

A contract by an undischarged bankrupt, in consideration of a small loan, to pay in full a debt of a large amount due from him at the commencement of and provable in his bankruptcy, is not void as being contrary to public policy or the policy of the Bankruptcy Acts, but is a valid and enforceable contract. WILD *v.* TUCKER - - - - - - **Atkin J. 36**

—— "Contract of service"—Injury by accident—Compensation—Voluntary help given to farmer in hay harvest—No money payment—Gift of beer or food—Illegal contract—Truck Acts - - - **543**
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—— Note given for goods supplied to makers—Oral agreement by surety—Admissibility of evidence—Bill of exchange
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—— Railway—Carriage of goods.
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CONTRACT—*continued.*

—— Shipping—Steerage passenger—Contract ticket—Form of—"Form approved by the Board of Trade"—Exception of negligence on back of ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act, 1894
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—— Workmen's compensation.
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CONVEYANCE—Conveyance on sale—Revenue—Stamp—Agreement for purchase of property—Sub-sales of part—Conveyance direct by vendor to sub-purchaser—Conveyance of remaining portion to purchaser—Ad valorem duty - **303**
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COPYRIGHT—*Cinematograph Film—Announcement by Posters and Handbills of Exhibition of Film—Authorization of Performance—Infringement of Copyright—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 1, *and s.* 6.

By s. 1, sub-s. 2, of the Copyright Act, 1911, it is enacted that "For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform . . . the work or any substantial part thereof in public, . . . and shall include the sole right to authorize any such acts as aforesaid."

By s. 2, sub-s. 1, "Copyright in any work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright . . . ."

By s. 6, sub-s. 1, "Where copyright in any work has been infringed the owner of the copyright shall . . . . be entitled to all such remedies . . . . as are or may be conferred by law for the infringement of a right."

By an agreement dated September 8, 1913, the plaintiffs, the Fenning Film Service, Limited, agreed to let a certain cinematograph film to the defendants for a period of one week for exhibition as to three days at the Strand Theatre, Wolverhampton, and as to the other three days at the Cinema de Luxe, Walsall. The defendants agreed not to exhibit or suffer to be exhibited the film or any part of it at any place other than the two above-mentioned theatres.

The defendants in fact exhibited or suffered to be exhibited the film at places other than the two above-mentioned theatres and also announced their intention by means of posters and handbills circulated in or about the town of Bilston of exhibiting the film at a theatre called the Alhambra in that town:—

Held, that, in addition to the plaintiffs' right to damages for the breach of contract, the defendants by the advertising at Bilston had, within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911, authorized a performance of the work,

COPYRIGHT—*continued.*
and that therefore there had been an infringement by the defendants of the plaintiffs' copyright in the film within the meaning of s. 2, sub-s. 1, of the Act for which the plaintiffs were entitled to recover damages under s. 6. FENNING FILM SERVICE, LIMITED *v.* WOLVERHAMPTON, WALSALL AND DISTRICT CINEMAS, LIMITED
Horridge J. 1171

CORROBORATION — Evidence — Bastardy — Proof of conviction - - - **1226**
See BASTARDY. 2.

COSTS—*Separate Issues—Decision by Judge upon Issue of Fact and Point of Law in favour of Plaintiffs—Appeal by Defendants on Point of Law but not on Issue of Fact—Judgment of Court of Appeal for Defendants with Costs—Costs of Issue found in Plaintiffs' Favour—Taxation—Practice—Rules of the Supreme Court, Order LXV., rr.* 1, 2.

In an action for damages for loss of plaintiffs' goods shipped on defendants' ship and destroyed by fire on voyage, Scrutton J. at the trial found on the facts that defendants' ship was unseaworthy at commencement of voyage and that the unseaworthiness caused the loss; and decided as a point of law that s. 502 of the Merchant Shipping Act, which in ordinary circumstances would have protected the defendants from liability, was excluded by certain exceptions in the bill of lading, and gave judgment for the plaintiffs ([1913] 1 K. B. 538). The defendants appealed on the point of law, but not on the facts. The Court of Appeal reversed Scrutton J.'s decision on the point of law and gave judgment for the defendants with costs without giving any directions as to the plaintiffs' costs of the issue of fact ([1914] 1 K. B. 541). On the taxation the plaintiffs claimed that the taxing Master should tax their costs of the issue on which they had succeeded, and allow them. The taxing Master refused, and on a summons to vary, Bailhache J. held that the taxing Master was not debarred by the order of the Court of Appeal from taxing these costs. The defendants appealed:—

Held by the Court of Appeal, that the taxing Master had no jurisdiction to go behind the order and divide the costs of separate issues where no direction as to the costs of such issues had been given by the order of the Court.

Decision of Bailhache J. reversed.

Slatford v. *Erlebach* [1912] 3 K. B. 155 distinguished. INGRAM & ROYLE, LIMITED *v.* SERVICES MARITIMES DU TRÉPORT, LIMITED
C. A. 28

2. —— *Taxation—Joint Defendants in Action of Libel—Defendant severing in Pleading—Judgment against both Defendants with Costs—Liability of Defendants for Costs of Plea of Justification pleaded by one Defendant only—Practice—Rules of the Supreme Court, Order LXV., r.* 1.

In an action of libel against two defendants one defendant admitted his liability and pleaded an apology, the other pleaded justification. At the trial a verdict was found against both defendants for 750*l.*, and judgment was entered for the plaintiffs for that sum, with costs to be taxed:—

Held, that the defendant who pleaded the plea of justification was alone liable for the costs occasioned to the plaintiffs by and in consequence of that plea, and that the other defendant was not liable for those costs.

Order of Rowlatt J. affirmed. HOBSON *v.* SIR W. C. LENG & CO. ("SHEFFIELD TELEGRAPH") - - - - - **C. A. 1245**

3. —— *Two Defendants—Costs of Successful Defendant payable by Unsuccessful Defendant—Practice.*

A plaintiff who was injured in a collision between a motor cab and an omnibus joined the owners of both vehicles as defendants in an action to recover damages for injuries sustained. He obtained a verdict with damages against the motor cab company, but the omnibus company obtained a verdict in their favour. The judge made an order for payment to the plaintiff by the motor cab company of the plaintiff's costs against the omnibus company and of the costs which the omnibus company recovered against the plaintiff:—

Held, that the judge had a discretion to make the order, although before the issue of the writ the motor cab company had not intimated to the plaintiff their intention to throw the responsibility for the accident on the other defendants.

There is no rule to the effect that, in order to justify an order on an unsuccessful defendant to pay a successful co-defendant's costs, the unsuccessful defendant must, before the issue of the writ, have given notice to the plaintiff that he is going to throw the blame on the other defendant; it is a question in all cases whether it was a reasonable and proper course for the plaintiff to join both the defendants in the action. BESTERMAN *v.* BRITISH MOTOR CAB COMPANY, LIMITED - - - - **C. A. 181**

—— Coal mine—Supply of explosives—Cost of distribution — "Actual net cost to owner"—Coal mine - - - **23**
See MINE. 2.

—— Costs in criminal cases—Offence committed in one county and tried in another—"County in which offence is supposed to have been committed" - - **310**
See CRIMINAL LAW. 2.

—— Railway and Canal Commission—Power of registrar to award costs in interlocutory proceedings - - - - - **1195**
See RAILWAY. 3.

—— Revenue—Land values—Provisional valuation—Appeal from referee—Order to pay costs—Rule of Court - - **192**
See REVENUE. 10.

—— Solicitors' costs.
See under SOLICITOR.

—— Workmen's compensation—Qualifying fee of doctor—Examination prior to commencement of proceedings - - **549**
See EMPLOYER AND WORKMAN. 10.

COSTS IN CRIMINAL CASES ACT, 1908, s. 4 *See* CRIMINAL LAW. 2. 310

COUNTER-CLAIM—Bankruptcy notice—Counter-claim exceeding amount of judgment debt and which debtor could not set up in action in which judgment obtained *See* BANKRUPTCY. 2. 726

COUNTY COURT — Bankruptcy — Practice — Appeal—When "money involved does not exceed 50*l*." - - - - 1078 *See* BANKRUPTCY. 1.

—— Employer and workman. *See* under EMPLOYER AND WORKMAN.

COUNTY COURT RULES, 1913 and 1914, Order LIII., r. 43 - - - - - 549 *See* EMPLOYER AND WORKMAN. 10.

COVENANT — *Restrictive Covenant — Covenant restricting User of Land—Covenant not running with the Land at Law—Covenantee having no Adjoining Land—Sale of Land by Covenantor—Purchaser having Notice of Restrictive Covenant—Right of Covenantee to enforce Covenant against Purchaser.*

An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of *Tulk* v. *Moxhay* (1848) 2 Ph. 774 does not apply.

The owner of certain land in the county of London applied to the plaintiffs, the London County Council, under s. 7 of the London Building Act, 1894, for their sanction to his laying out a new street on the land. The plaintiffs agreed to give their sanction on condition that the owner entered into a covenant not to build on a plot of land which lay across the end of the proposed street, so as to afford facilities for the continuation of the proposed street. The owner accordingly executed a deed whereby he covenanted with the plaintiffs for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land into whosesoever hands the same might come, not to erect or cause or permit to be erected upon the plot any building, structure, or other erection without the plaintiffs' consent. The plaintiffs did not possess nor were they interested in any neighbouring land for the benefit of which the covenant was imposed. It was admitted that the covenant did not run with the land at law. The owner subsequently sold the plot to the defendant, who had notice of the restrictive covenant. The defendant proceeded to build houses on the land without the plaintiffs' consent :—

Held, that the plaintiffs were not entitled to enforce the covenant against the defendant, who was the assignee of the covenantor.

Catt v. *Tourle* (1869) L. R. 4 Ch. 654 and *Luker* v. *Dennis* (1877) 7 Ch. D. 227 considered. LONDON COUNTY COUNCIL *v.* ALLEN C. A. 642

COVENANT—*continued.*

CREAM — Adulteration — Cream mixed with boric acid—Sale to prejudice of purchaser—Notice by label - - 242 *See* ADULTERATION. 1.

CREDITORS — Scheme of arrangement with creditors — Approval of Court — "Reasonable security" for payment of 7*s.* 6*d.* in the pound - - 387 *See* BANKRUPTCY. 4.

CRIMINAL LAW — *Bribery — Conspiracy — Public Officer—Ministerial Officer—Colonel of a Regiment — Canteen — Competing Caterers — Corrupt Payments.*

It is a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept a bribe as an inducement to him to shew favour or forbear to shew disfavour to any person towards whom an impartial discharge of the officer's duty demands that he should shew no favour or that he should shew disfavour.

It is also a misdemeanour at common law for such an officer to conspire with others that he shall receive such a bribe.

A colonel in command of a regiment in His Majesty's Army is a ministerial officer within the meaning of this rule.

Therefore where a colonel of a regiment accepted from a firm of caterers sums of money paid to induce him to accept their representative as tenant of the regimental canteen :—

Held, that he was guilty of the misdemeanours at common law (1.) of bribery and (2.) of conspiracy to bribe. REX *v.* WHITAKER C. C. A. 1283

2. —— *Costs in Criminal Cases—Offence committed in one County and tried in another—"County in which the offence is supposed to have been committed"—Costs in Criminal Cases Act*, 1908 (8 *Edw.* 7, *c.* 15), *s.* 4.

By s. 57 of the Offences against the Person Act, 1861, the offence of bigamy "may be dealt with, inquired of, tried, determined, and punished in any county . . . . where the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county."

By s. 4 of the Costs in Criminal Cases Act, 1908, the costs of prosecution of offences are payable "out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed."

Where an offence of bigamy is committed in one county and the offender is apprehended in another the fact that the authorities of the county where the offender was apprehended have elected to commit him for trial in that county, and that he has been tried there, does not render that county liable to pay the costs of the prosecution as being the county in which the offence

CRIMINAL LAW—*continued.*

"is supposed to have been committed" within the meaning of s. 4 of the Act of 1908. REX *v.* LONDON COUNTY COUNCIL - **Div. Ct. 310**

3. —— *Demanding Money with Menaces—Threat to publish Attacks upon a Commercial Company — Evidence — Evidence of previous Offence — Admissibility—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 45.

The appellants, partly through an agent, made threats to the chairman of a company that attacks upon the company would be published in a paper, which would have the effect of reducing the market price of the shares, and the agent demanded payment of 600*l.* in gold as the price of refraining from such attacks:—

Held, that the appellants could properly be convicted, under s. 45 of the Larceny Act, 1861, of the offence of demanding money "with menaces with intent to steal the same."

Evidence was admitted at the trial to prove that a few months previously a transaction similar in all respects to that charged had been carried out by the same agent and a sum of money paid to him in gold:—

Held, that this evidence was properly admitted. REX *v.* BOYLE AND MERCHANT **C. C. A. 339**

4. —— *False Pretences—Evidence—Indictment alleging False Pretence that Prisoner was carrying on Genuine Business—Receipts acknowledging Payment for Articles purchased by him —Entries in Bank Pass-book—Admissibility as Evidence negativing Allegation of False Pretence.*

The prisoner was charged with having obtained goods by false pretences. The false pretence alleged in the indictment was that he had pretended that he was carrying on a genuine and bona fide business as a manufacturers' agent and merchant:—

Held, that receipts sworn to by the prisoner as having been given to him as acknowledgments of payments for goods purchased by him other than those the subject of the charge, and entries in his bank pass-books shewing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine and bona fide business. REX *v.* SAGAR - **C. C. A. 1112**

5. —— *Fraudulent Conversion of Property —First Disclosure of Acts by Accused as Voluntary Witness in Cross-examination in Civil Action—Protection from Prosecution—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 85.

When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him "in consequence of any compulsory process" of a Court of law, within the meaning of s. 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence under the Larceny Act, 1901, in respect of the act so disclosed. REX *v.* NOEL - **C. C. A. 848**

6. —— *Murder — Provocation necessary to constitute Manslaughter—Prisoner sane, but hot-*

CRIMINAL LAW—*continued.*

tempered and sensitive, with Defective Control and Want of Mental Balance.

The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (e.g., a person afflicted with defective control and want of mental balance) of his self-control. REX *v.* LESBINI - - - - - - **C. A. 1116**

—— Action, Cause of—Felony—Stay of proceedings until defendant prosecuted - **98**
See ACTION.

—— Bastardy laws.
See under BASTARDY.

CROWN OFFICE — *Certiorari — Time Limit— Fiat of Attorney-General—Practice—Licensing Acts—Order of Confirming Authority—Crown Office Rules*, 1906, *rr.* 20, 21.

Rule 21 of the Crown Office Rules, 1906, provides, among other things, that no writ of certiorari shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justices of the peace, unless the writ be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made:—

Held, that this provision applies to the issue of a writ of certiorari at the instance of the Attorney-General on behalf of the Crown. REX *v.* AMENDT - - - - - **Div. Ct. 222**

CROWN OFFICE RULES, 1906, rr. 20, 21 - **222**
See CROWN OFFICE.

DAMAGE AND DAMAGES — Highway — Premises abutting thereon—Right of access —Advertisement on wall of premises— Obstruction—Interference with private right—Injunction - - - **822**
See HIGHWAY. 3.

—— Railway—Carriage of goods.
See under RAILWAY.

—— Running down clause—Damage in consequence of collision—Construction of clause - - - - - - **827**
See INSURANCE (MARINE). 5.

—— Ship—Charterparty—Demurrage — Period of demurrage not specified—Detention of ship beyond reasonable time - **55**
See SHIPPING. 1.

DEBTS — Bankruptcy — Bankruptcy notice against married woman—Carrying on trade or business — Debt contracted before commencement of Bankruptcy and Deeds of Arrangement Act, 1913— Retrospective operation of the Act
See BANKRUPTCY. 3. **1095**

—— Contract for good consideration by undischarged bankrupt to pay in full debt provable in bankruptcy — Contract— Consideration—Validity of contract— Public policy—Policy of Bankruptcy Acts - - - - - - - **36**
See CONTRACT.

DEBTS—*continued.*

—— Debts owing by persons resident abroad—Revenue—Stamp Act—Agreement—"Property locally situate out of the United Kingdom"—Ad valorem duty *See* REVENUE. 15. **458**

DEDUCTIONS — Revenue — Income tax — Sched. D—Trade profits—Money exclusively expended for purposes of trade—Voluntary gratuity to retiring law reporter—Finding of fact—Evidence *See* REVENUE. 5. **674**

DEEDS OF ARRANGEMENT ACT, 1913, s. 12—Retrospective operation of Act - **1095** *See* BANKRUPTCY. 3.

DEFAMATION — *Libel — Annual Meeting of Licensing Justices—Application for Renewal of Licence—Notice of Objection—Privileged Occasion—Licensing (Consolidation) Act*, 1910 (10 *Edw. 7 & 1 Geo. 5, c. 24), s. 16.*

Licensing justices when dealing with an objection to the renewal of an old on-licence are not a Court within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged.

The plaintiff, who was the holder of an old on-licence, was an applicant at the general annual licensing meeting for the renewal of his licence. The defendant, a private individual, gave notice of his intention to oppose the plaintiff's application on the ground that, as he alleged, the plaintiff was not a fit and proper person to hold such a licence. The defendant served a copy of his notice of objection on the plaintiff, on the clerk to the licensing justices, on the superintendent of police, and on the owners of the premises. In an action by the plaintiff claiming damages in respect of the alleged defamatory statements contained in the defendant's notice of objection, the defendant pleaded that, as he was taking a necessary and proper step in a judicial proceeding, the publication of the notice of objection was absolutely privileged:—

Held, (1.) that the licensing justices were not a Court in law; (2.) that, even if they were held to be a Court in law, the defendant, in objecting to the renewal of the licence, did not come within the category of persons on whose behalf privilege could be claimed; and (3.) that, even if the defendant came within the category of persons who could claim privilege, such privilege did not extend to the notices of objection served on the superintendent of police and on the owners of the premises. ATTWOOD *v.* CHAPMAN - - - - - - - **Avory J. 275**

DEFENDANTS—Practice—Costs — Two defendants — Costs of successful defendant payable by unsuccessful defendant **181** *See* COSTS. 3.

DEL CREDERE COMMISSION—Broker receiving—Sale of goods—Non-performance of contract by buyer — Solvency of buyer—Liability of broker - - **1272** *See* PRINCIPAL AND AGENT. 2.

DELIVERY ORDER—Sale of goods—Document of title — Delivery order created and issued by owner of goods—Whether a "transfer" — Delivery order not for specific goods - - - - - **40** *See* SALE OF GOODS.

DEMANDING MONEY WITH MENACES—Threat to publish attacks upon a commercial company—Evidence of previous offence—Admissibility - - **339** *See* CRIMINAL LAW. 3.

DEMURRAGE — Shipping — Charterparty — Period of demurrage not specified—Detention of ship beyond reasonable time—Damages - - - - - **55** *See* SHIPPING. 1.

DENTIST—*Unregistered Person—Company proposing to carry on Business of Dentistry by Unregistered Persons — Title of Company — "United Dental Service"—Unlawful Object—Discretion of Registrar of Companies to refuse Registration—Dentists Act*, 1878 (41 *& 42 Vict. c. 33), s. 3.*

Application was made for the registration, under the Companies Act, 1908, of a company with the name of "The United Dental Service, Limited." One of the objects of the company was "to carry on the practice, profession, or business of practitioners in dentistry in all its branches," which it was intended to carry on by practitioners not registered under the Dentists Act, 1878 —

Held, that the use of the proposed name by the company when carrying on business by unregistered practitioners would not constitute an offence under s. 3 of the Dentists Act, 1878, and that therefore the object of the company was not unlawful; and that the Registrar of Companies had no power to refuse registration upon the ground that the name of the company would be calculated to deceive people into the belief that the business was carried on by registered practitioners. REX *v.* REGISTRAR OF COMPANIES. *Ex parte* BOWEN **Div. Ct. 1161**

DIRECTOR—Company. *See* under COMPANY.

DISBURSEMENTS—Solicitor — Bill of costs—Solicitor and client—Unpaid items—No statement in bill that unpaid—"Set out a separate heading in the bill" — Statement in accompanying letter — Payment "before commencement of taxation"—Disallowance on taxation - - - - - **841** *See* SOLICITOR.

DISCOVERY — *Documents — Privilege — Documents coming into Existence in Contemplation of Litigation—Documents obtained for the Purpose of Advice from Solicitor—Practice.*

On October 28, 1913, the plaintiffs' vessel, which was insured with the defendants, went ashore on Perim Island, and the defendants instructed the Salvage Association to protect their interests in the matter. On October 30 the plaintiffs gave notice of abandonment, which the defendants refused to accept. On January 26, 1914, the plaintiffs brought an action to recover

DISCOVERY—*continued.*

for a constructive total loss of the vessel, and the action was transferred to the commercial list. The defendants agreed that the plaintiffs' right to give notice of abandonment and claim a total loss should be decided on the footing that the writ was issued on October 30, 1913. In their list of documents the defendants claimed privilege for cables and correspondence which passed between the Salvage Association and their agent on the spot and which came into existence on and after October 30, the day on which notice of abandonment was given, "such cables and correspondence being with regard to the subject-matter of this litigation and expressing or for the purpose of obtaining advice or evidence to be used in it or for the purpose of leading to the obtaining of evidence to enable the defendants' solicitors properly to conduct the action on their behalf":—

Held, that the documents, though not obtained by the defendants' solicitor, were privileged from production within the decision in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* [1913] 3 K. B. 850. ADAM STEAMSHIP COMPANY, LIMITED *v.* LONDON ASSURANCE CORPORATION - - - - - - C. A. 1256

2. ——*Inspection of Documents—Privilege—Transcript of Shorthand Notes of Proceedings in Previous Actions—Note taken in Anticipation of Future Litigation—Reproduction of Material publici juris—Practice.*

A transcript of the shorthand notes of proceedings in open Court in a previous action, being a mere reproduction in a physical form of material which is publici juris, is not privileged from inspection.

So *held* by Cozens-Hardy M.R. and Buckley L.J., Channell J. dissenting.

Nordon v. *Defries* (1882) 8 Q. B. D. 508 overruled.

Lyell v. *Kennedy* (1884) 27 Ch. D. 1 distinguished. LAMBERT *v.* HOME - C. A. 86

DISTRIBUTION—Cost of—"Actual net cost to the owner"—Coal mine—Supply of explosives - - - - - - 23
See MINE. 2.

DOCKS—*Port Rates—Exemption—Goods imported for Transhipment only—Goods exported "coastwise"—Transhipment in Port of London for Rochester—Conveyance "by sea only"—Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68), *s.* 13—*Port of London (Port Rates on Goods) Provisional Order Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. c.*), *Schedule*, *s.* 9.

Sect. 13, sub-s. 1, of the Port of London Act, 1908, provides that, subject to the provisions of that section, all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port shall, subject to any exemptions or rebates contained in a provisional order under the section, be liable to port rates, provided that "the provisional order . . . . shall provide for exempting from such rates goods imported for transhipment only . . . ."

Sect. 13, sub-s. 5: "For the purpose of this section goods shall not be treated as having been imported or exported coastwise unless imported from or exported to a place seaward of a line drawn from Reculvers Towers to Colne Point . . . ."

Sect. 9 of the provisional order in the schedule to the Port of London (Port Rates on Goods) Provisional Order Act, 1910, provides that "No port rates shall be charged by the Authority on transhipment goods which expression wherever used in this Order means and includes goods imported for transhipment only . . . . For the purposes of this section the expression 'goods imported for transhipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise" which are certified and proved within the period and in the manner provided by the section to have been intended for transhipment and to have been shipped again as soon as practicable within the Port of London for conveyance by sea to such other port.

Goods belonging to the plaintiffs were imported by steamer into the Port of London from beyond the seas, and the plaintiffs delivered to the collector of the Port Authority a certificate under s. 9 of the provisional order stating that the goods were intended for transhipment to the port of Rochester, on the river Medway, by sailing craft. Rochester was within the Reculvers line but not within the Port of London. The Port Authority declined to accept the certificate, and the plaintiffs paid the port rates on the goods under protest. The goods were put over the side from the steamer into a sailing barge and conveyed to Rochester. The plaintiffs sued to recover the amount of the port rates:—

Held by Kennedy and Phillimore L.JJ., Buckley L.J. dissenting, that the expression "coastwise" in s. 9 of the provisional order was used in its ordinary sense unaffected by the meaning attached to the words "goods imported or exported coastwise" in s. 13, sub-s. 5, of the Act of 1908; that the conveyance to Rochester down the river Thames and up the river Medway was a conveyance "by sea only" to another port "coastwise" within the meaning of s. 9; and that therefore the goods, having been imported for the purpose of being so conveyed, were exempt from port rates.

Judgment of Pickford J. [1914] 1 K. B. 5 affirmed. BRITISH OIL AND CAKE MILLS, LIMITED *v.* PORT OF LONDON AUTHORITY C. A. 1201

DOCTOR—Workmen's compensation—Qualifying fee of doctor—Examination prior to commencement of proceedings - 549
See EMPLOYER AND WORKMAN. 10.

DOCUMENTS—Discovery.
See under DISCOVERY.

—— Sale of goods—Delivery order—Document of title—Delivery order created and issued by owner of goods—Whether a "transfer"—Delivery order not for specific goods - - - - 40
See SALE OF GOODS.

DUTY—Inland Revenue.
See under REVENUE.

EASEMENT — London — Water — Metropolitan Water Board — Compulsory powers—Laying main pipes—Protection of railway company—Acquisition of easement
See LONDON. 2. **787**

ELECTION—Workmen's compensation—Option **1055**
See EMPLOYER AND WORKMAN. 11.

EMBANKMENT — Revenue — Duties on land values—Buildings—Structures - **196**
See REVENUE. 7.

EMPLOYER AND WORKMAN — *Compensation—Accident—Right of Approved Society to take Proceedings in Workman's Name—Obligation to state whether Application is made by Workman or by Society—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

On the hearing of an application for compensation under the Workmen's Compensation Act, 1906, the county court judge is not entitled, as a condition precedent to hearing the application, to ascertain from counsel whether he appears for the applicant or for an approved society. He should hear the evidence and ascertain in that way whether it is really the workman's application. ALLEN *v.* FRANCIS - **C. A. 1065**

2. —— *Compensation—Accident arising out of and in Course of Employment—Farm Bailiff—Act in Course of Duty independently done—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A farm bailiff, whose practice was to go round the farm buildings every evening at about 8 o'clock when his day's work was finished in order to see that all was secure, on one occasion after doing so, as usual, went to a neighbouring town for the purpose of shopping, and returned to his home at about 11 o'clock, when he again went round the premises. Being desirous of obtaining the key of one of the buildings, which he had earlier left inside a cowshed, he remembered that the key of the cowshed was in his own house, which was distant about three minutes' walk. In order to avoid the walk he vaulted on to the window sill of the cowshed and, leaning through the window, endeavoured to reach the key which he required. In so doing he overbalanced himself and fell upon the floor of the shed, sustaining injuries from which he died :—

Held, that the accident arose out of and in the course of the deceased's employment. The obtaining of the key was part of his duty, and the fact that he endeavoured to discharge that duty by imprudently taking a short cut did not deprive his dependants of the right to compensation under the Workmen's Compensation Act. PEPPER *v.* SAYER - - - - **C. A. 994**

3. —— *Compensation—Accident arising out of and in Course of Employment—Railway—Porter — Incapacity for Work — Light Work given by Employers at old Rate of Wages—Temporary Cessation of Work owing to Strike—Absence of Right to Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *ss.* 1 (*b*) *and* 3.

The applicant, a goods porter in the service of a railway company, was injured by an accident arising out of and in the course of his employment and for a time totally incapacitated for work. The company paid him the full compensation required by the Workmen's Compensation Act until he partially recovered, when they gave him light work as a mess-room attendant at his former rate of wages. Owing to a labour strike the company were temporarily unable to find work for all their staff, and for four unconsecutive days the applicant was unemployed and received no wages. He claimed compensation under the Act in respect of the four days :—

Held, that his non-employment did not arise from incapacity to work owing to his injuries from the accident and that he was consequently not entitled to compensation. WOODHOUSE *v.* MIDLAND RAILWAY COMPANY - **C. A. 1034**

4. —— *Compensation—Accident arising out of and in Course of Employment—Ship—Intoxicated Sailor—Shore Leave—Returning to Duty—Fall from Ship's Gangway—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

While the appellants' ship was lying in harbour at the quayside, one of the sailors in their employment on board the ship went ashore with leave. He returned in a drunken condition late at night. In order to get on board he had to go up a gangway from the quay to the ship. The gangway was properly fixed and lighted. In going up it he let go his hold of the hand ropes and fell on the quay, receiving injuries from which he died. On the application of the widow of the deceased, the county court judge held that the accident arose out of and in the course of the employment, and awarded compensation under the Workmen's Compensation Act, 1906 :—

Held, on appeal, by Cozens-Hardy M.R. and Swinfen Eady L.J., Pickford L.J. dissenting, that the accident arose entirely through the man's drunkenness, and that the case could not be distinguished in principle from *Frith* v. *Owners of S.S.* "*Louisianian*" [1912] 2 K. B. 155. NASH *v.* OWNERS OF S.S. "RANGATIRA" **C. A. 978**

5. —— *Compensation — Agreement to pay Weekly Sum—Record of Memorandum—Doubt whether Injured Man is a "Workman" — "Settled by agreement"—Refusal of Registration — Jurisdiction — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3 ; *Sched. II.*, *par.* 9.

The applicant met with an accident whilst in the employment of the respondents. For some time he received 1*l.* a week compensation from the respondents' agents, and an agreement was then come to in the form of a receipt as follows : "Received this 16th day of March 1912 from the Shipping Federation Limited on behalf of the owners of the '*Lloyds*' the sum of 5*l.* being weekly compensation at the rate of 20/-

per week from 10/2/12 to 16/3/12 inclusive under the Workmen's Compensation Act 1906 under which Act I elect to claim for personal injury by accident sustained by me on or about the 6th day of December 1911. This weekly payment is to be continued during my total disablement resulting from the accident in accordance with the provisions of the above mentioned Act, the amount of any payment due during partial disablement to be settled hereafter." This was signed by the applicant (described as a "bargemaster") and sealed by the federation, and bore a sixpenny agreement stamp as well as a penny receipt stamp. The federation stopped payment on the ground that the applicant was not a "workman" within the Act. The applicant applied to the registrar to record a memorandum of the agreement, but the latter refused to do so on the ground that the applicant was not a workman:—

Held, that as the genuineness of the agreement was not questioned, no fraud or mutual mistake was alleged, and it was settled by the agreement, within s. 1, sub-s. 3, that the applicant was a workman within the Act, the learned judge had no jurisdiction to refuse to record the agreement. GOODSELL *v.* OWNERS OF SAILING BARGE "LLOYDS" - - - **C. A. 1001**

6. ——*Compensation—Agreement to redeem Weekly Payments — County Court — Duty of Registrar to record—Genuineness of Agreement —Adequacy of Amount—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., s.* 9 (*d*)—*Consolidated Workmen's Compensation Rules, July*, 1913, *r.* 45; *Form* 38.

Where there has been an agreement between employer and workman that the employer shall redeem by a lump sum weekly payments of compensation payable to the workman under the Workmen's Compensation Act, 1906, it is prima facie the duty of the registrar of the county court under Sched. II., s. 9, of the Act to record a memorandum of the agreement on being satisfied of its genuineness. If the adequacy of the sum is called in question, it is the duty of the registrar, proceeding under proviso (*d*) to that section, to inquire whether the sum is adequate. This is so notwithstanding that Form 38 in the Appendix to the Consolidated Workmen's Compensation Rules, July, 1913, indicates that the registrar may refer the matter to the county court judge on the mere objection of the workman to the registration of the agreement on the ground of the inadequacy of the sum. REX *v.* BOW COUNTY COURT (REGISTRAR OF). *Ex parte* SCOTTISH SHIRE LINE, LIMITED - - - - **Div. Ct. 266**

7. —— *Compensation—Basis of Calculation —"Average weekly earnings"—Casual Labourer —Concurrent Contracts of Service—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (1.) (*a*) (i.) *and* (2.) (*a*).

The deceased, a workman employed by the Port of London Authority, having met with an accident which resulted in his death, his widow applied for compensation under the Workmen's Compensation Act, 1906. Liability was admitted and 150*l.* paid into Court by his em-

ployers. The deceased had worked for them for three years as a casual labourer; there was no obligation on him to work for them, nor on them to employ him. During the three years preceding the accident he had worked for them on an average forty-two weeks in each year at wages alleged by the employers to amount to 18*s.* 9*d.* a week. During the last twelve months he had also earned 67*l.* 7*s.* 10*d.* at 1*l.* 5*s.* 2*d.* a week as a casual labourer in the employment of the Cunard Thompson Line. The county court judge held that there were concurrent contracts of service, and that the deceased's wages for both employments during the last twelve months had averaged 2*l.* 3*s.* 11*d.*; and he awarded the widow 300*l.* compensation:—

Held, that there were no concurrent contracts of service and the average weekly earnings of the deceased must be calculated under Sched. I., pars. (1.) (*a*) (i.) and (2.) (*a*); that these paragraphs must be read together and that the words in (2.) (*a*) "the rate per week at which the workman was being remunerated" meant remunerated by the same employer; and that the case must go back for assessment of the compensation. CUE *v.* PORT OF LONDON AUTHORITY - - - - - - **C. A. 892**

8. —— *Compensation—"Contract of service" —Quarryman—Injury by Accident—Voluntary Help given to Farmer in Hay Harvest—No Money Payment—Gift of Beer or Food—Illegal Contract—Truck Acts*, 1831 (1 *&* 2 *Will.* 4, *c.* 37) *and* 1887 (50 *&* 51 *Vict. c.* 46)—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a quarryman, was accustomed occasionally during hay harvest to assist a farmer in the evening in getting in his crops. He did not receive any money payment for his services, but the farmer gave him beer and sometimes a supper when the work was over. While thus engaged in carrying hay he fell from the top of a load and was injured, and thereby incapacitated for work. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge awarded him compensation:—

Held, on appeal, that there was no contract of service express or implied between the parties. If there was such a contract it would have been illegal under the Truck Acts, and could not constitute a "contract of service" within the meaning of s. 13 of the Workmen's Compensation Act, 1906. The applicant was not, therefore, entitled to compensation. KEMP *v.* LEWIS **C. A. 543**

9. —— *Compensation — Contracting-out Scheme — Injury by "Accident" — Industrial Disease—Miners' Nystagmus—Date of Disablement— Compensation for Injury — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 3, 8.

By s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, where it is certified that a workman is suffering from a disease mentioned in one of the schedules to the Act and is disabled from earning his full wages and the disease is due to the nature of any employment in which he was employed within twelve months before

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the date of disablement, he is entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment. The disablement is to be treated as the happening of an accident. Compensation is recoverable from the employer who last employed the workman during the twelve months before disablement in the employment to the nature of which the disease was due. The date of the disablement is the certified date of its commencement.

For more than a year before January 5, 1912, a miner had been in the employment of a firm of colliery owners. He was a member of a scheme the provisions of which were under s. 3 of the Workmen's Compensation Act, 1906, substituted for the provisions of that Act. The scheme was by its terms intended to be in substitution for the Act and to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of the member's employment.

On January 5, 1912, the miner left the employment of the firm. Subsequently he was certified as disabled from earning full wages from a disease of the class described in s. 8, sub-s. 1, of the Act, January 6, 1912, being certified as the date of disablement:—

Held, that the word "accident" in the scheme had the same meaning as in the Act and included disablement from disease described in s. 8, sub-s. 1, of the Act.

Held, also, that the provisions of the scheme were to be read with those of s. 8 of the Act, and that the firm were liable to pay compensation, notwithstanding that on the date of disablement the miner had left their employment. LEAF *v.* FURZE - - - - - - **Div. Ct. 1068**

10. —— *Compensation — Costs — Qualifying Fee of Doctor—Examination prior to Commencement of Proceedings—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 4; *Sched. II., par.* 7—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 113—*County Court Rules*, 1903 *and* 1904, *Order* LIII., *r.* 43—*Consolidated Workmen's Compensation Rules*, 1913, *r.* 76.

A workman met with an accident and received compensation under the Workmen's Compensation Act, 1906, during incapacity. He found himself unable to resume full work and his solicitors wrote to his employers asking for suitable work and compensation. The latter repudiated liability and the workman filed a request for arbitration. After the letter but before the filing of the request the applicant was examined by a doctor on behalf of the employers. The doctor gave evidence at the hearing and the learned judge made an award in favour of the employers and ordered the applicant to pay the costs, including the qualifying fee of the doctor. The applicant appealed from the latter part of the order on the ground that the doctor's examination was made before proceedings were commenced and not with a view to giving evidence:—

Held, that there was no ground for saying

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that a qualifying fee could not be paid for an examination made before the filing of the request for arbitration; that the question was within the discretion of the learned judge; and that on the facts he was right. JONES *v.* D. DAVIES & SONS, LIMITED - - **C. A. 549**

11. —— *Compensation — Fatal Accident — Death of Workman—Claim by Children—Payment of Compensation—Action by Widow for Negligence—Option—Election—Fatal Accidents Act*, 1846 (9 & 10 *Vict. c.* 93) — *Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*).

The plaintiff, who was the widow of a workman killed by accident arising out of and in the course of his employment, brought an action under the Fatal Accidents Act, 1846, against the defendants, who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants the plaintiff and six children; that all the dependants except the plaintiff had claimed under the Workmen's Compensation Act, 1906, against the defendants, and that an award had been made apportioning the total sum of 300*l.* equally between the children. The defendants by their defence, after denying the alleged negligence, pleaded that the plaintiff had by letters from her solicitor made a claim on them on behalf of herself and her children for compensation in respect of the death of her husband; that the defendants, having by letter admitted liability under the Workmen's Compensation Act, 1906, had paid into the county court the maximum amount payable under the Act, namely, 300*l.*; that the children by their next friend had applied to the county court for an order for the investment and allotment of the sum of 300*l.* between the dependants, and that the county court judge by his award had allotted 50*l.* to each of the children and directed that 45*l.* out of each sum of 50*l.* should be invested, and that out of the residue the sum of 18 shillings a week together with the interest on the invested money should be paid to the plaintiff for the benefit of the children; that the plaintiff throughout was cognizant of the facts and approved of and concurred in the application and attended the hearing and thereat renounced her rights and interest in the sum of 300*l.* in favour of her children, and that the award was made with her consent. The defence stated that the defendants would therefore contend that this action was barred and was not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906. It appeared that in the application for allotment the next friend named the plaintiff as a dependant, but applied for a division among the children only and expressly stated that the plaintiff did not claim under the Act of 1906.

An order having been made in chambers for the decision in the first instance of the point of law raised on the pleadings:—

Held, that on the facts as stated the plaintiff had made herself a party to the claim for com-

EMPLOYER AND WORKMAN—*continued.*

pensation under the Workmen's Compensation Act, 1906, and was therefore precluded by s. 1, sub-s. 2 (*b*), from claiming damages against the defendants independently of the Act.

Judgment of Atkin J. [1914] 2 K. B. 61 affirmed. CODLING *v.* JOHN MOWLEM AND COMPANY, LIMITED - - - **C. A. 1055**

12. —— *Compensation — Fatal Accident — Death of Workman due to Accident—Failure to give Notice of Accident—"Reasonable Cause"—Action by Widow against Employers under Fatal Accidents Act*, 1846 (*Lord Campbell's Act*) (9 *&* 10 *Vict. c.* 93)—*Verdict for Defendants—Assessment of Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 4; *s.* 2.

By s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906, "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation . . . .":—

Held (affirming the decision of Channell J.), that an action under the Fatal Accidents Act, 1846 (Lord Campbell's Act), was an action "for injury caused by any accident" within the meaning of sub-s. 4 of s. 1 of the Act of 1906.

On January 7, 1913, a workman met with an accident through a door falling on his head and causing him to bite his tongue. He immediately reported the matter verbally to the foreman of the works, but stated that he was not severely injured. The accident was also reported to one of the employers who happened to be present at the works at the time. On January 11 the workman was attended by his own doctor, who found that he was suffering from an open discharging wound in the tongue. The doctor continued to attend the workman from time to time. The difficulty of taking food increased, but the workman continued to work until July 14. On July 22 he died of cancer of the tongue resulting from the original injury. No notice of the accident beyond that above stated was given by the workman to the employers. His widow subsequently brought an action against the employers under the Fatal Accidents Act, 1846, for the benefit of herself and her children. At the trial the jury returned a verdict for the employers on the ground that the deceased man had been guilty of contributory negligence. Application was thereupon made to the judge to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906:—

Held (reversing the decision of Channell, J.), that no "reasonable cause" within the meaning of s. 2 of the Act of 1906 had been shewn for the failure of the workman to give notice of the accident to his employers, and that the widow was therefore not entitled to compensation under the Act.

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Semble. The only two grounds which the Court will accept as evidencing a "reasonable cause" for failure to give the notice of the accident to the employer as required by s. 2 of the Act of 1906 are either that the injury from the accident was latent or that the accident was of to trivial a nature that it would be unreasonable to expect the workman to give notice of it.

Webster v. *Cohen Brothers* (1913) 6 B. W. C. C. 92 and *Clapp* v. *Carter* (1914) 7 B. W. C. C. 28 followed. POTTER *v.* JOHN WELCH & SONS, LIMITED - - - - - - **C. A. 1020**

13. —— *Compensation — Fisherman — Workman — Seaman — Fishing Vessel — Share of Stocker Money — Remuneration by Share in Gross Earnings—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2—*Running Agreement—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict.* 60), *s.* 400.

By s. 7 of the Workmen's Compensation Act, 1906, the Act applies to seamen, but by sub-s. 2 "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits of the gross earnings of the working of such vessel."

A fisherman who receives liver money and stocker money in addition to his wages receives them from the owners of the vessel out of her gross earnings, and they form part of his remuneration although wages are the only things mentioned in his running agreement. He is therefore remunerated by a share in the gross earnings within s. 7, sub-s. 2, of the Act of 1906 and is not entited to compensation under that Act.

In cases where the stocker money and liver money are so small as to be of no importance it is open to the county court judge to find that the fisherman was not remunerated by a share of gross earnings. BURMAN *v.* ZODIAC STEAM FISHING COMPANY. WILLIAMS *v.* OWNERS OF STEAM TRAWLER "DUNCAN." MCCORD *v.* OWNERS OF STEAM TRAWLER "CITY OF LIVERPOOL" - - - - **C. A. 1039**

14. —— *Compensation—Omission of Workman to take Proceedings to enforce Claim—Right of Approved Society to take Proceedings in his Name—"Unreasonably refuse or neglect"—Injury arising out of and in the Course of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1—*National Insurance Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 11, *sub-s.* 2.

By the National Insurance Act, 1911, s. 11, sub-s. 2, "Where an insured person appears to be entitled to any . . . . compensation or damages . . . . and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society . . . . concerned . . . . (*a*) at its own expense to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society . . . . as trustee for the insured person . . . ."

Held, that the word "neglects" in the subsection connotes the not doing of something which there was a legal or moral obligation to do, or the not doing of that which a person has

been requested to do by another who had a right to make the request.

In January, 1913, a workman met with an accident whilst working in a mine. He was away from his work in consequence of the accident for three weeks, during which period his employers paid him compensation at the rate of 17*s.* 2*d.* a week. Early in February he returned to his work and worked continuously until the following July, when he was again unwell and underwent an operation. From July 6 to September 22, when he returned to his work, he was paid 10*s.* a week by the approved society of which he was a member. In respect of his second illness he made no claim on his employers and took no proceedings against them for compensation, being satisfied with the 10*s.* a week he received from the approved society. In September, shortly before he returned to work, the approved society sent him a document to fill up and sign in which various questions were asked as to the accident and injury and as to whether he proposed to take proceedings against his employers to recover compensation. The document contained the following note to one of the questions: "In the event of a member through lack of means or other cause neglecting to enforce his claim the society, if of opinion there is a good claim, will take proceedings on his behalf." In his answers the workman stated that in his view his illness in July was not the result of the accident in the previous January, and that he did not propose to take proceedings. In November, 1913, the approved society took proceedings in the workman's name under s. 11, sub-s. 2, of the Act of 1911 to recover compensation :—

Held, that the workman had not unreasonably refused or neglected to take proceedings to recover compensation within the meaning of the sub-section, and therefore that it was not competent to the approved society to take them in his name. RUSHTON *v.* GEORGE SKEY & CO., LIMITED - - - - - - **C. A. 706**

15. —— *Compensation — Partial Incapacity rom Accident—Incapacity caused by Outside Influence—Trade Union's Interference—Average Weekly Earnings — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

In a claim for compensation under the Workmen's Compensation Act, 1906, it appeared that the claimant was employed as a wire stripper at 21*s.* 6*d.* a week, and about fifteen months before the accident he and some other labourers were selected to take charge of some new machines. He worked at a particular machine, shewed that he was thoroughly competent to manage it, and earned 37*s.* 6*d.* a week till he met with an accident and lost two fingers of his right hand. He received compensation during incapacity and then wished to return to his employment at the machine which his employers were willing to restore to him. In the meantime the trade union of the wire workers had interfered and insisted that the employers should remove from the machines all workmen who were only labourers and not skilled workmen and members of the union. The labourers who had been

selected to work the machines were therefore relegated to their former positions and wages, and the claimant was unable to return to work at his machine :—

Held, on a claim by him for compensation, that he was not entitled to compensation on the basis of his earning 37*s.* 6*d.* a week, for the fall in his wages was due to the action of the trade union and not to the accident; and that in the circumstances and in the absence of evidence of his present position the Court could do no more than make a declaration of the employers' liability. THOMPSON *v.* RICHARD JOHNSON & NEPHEW, LIMITED - - - - **C. A. 694**

16. —— *Compensation—Practice—Evidence —Examination of Witness before Registrar— Delegation of Authority—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3; *Sched. II., par.* 4 — *Consolidated Workmen's Compensation Rules*, 1913, *rr.* 29 (1.), 33, 96.

In a claim under the Workmen's Compensation Act, 1906, it appeared that the applicant was employed by the respondent as an errand boy and was injured by an accident, as a result of which his leg had to be amputated. He filed a request for arbitration and applied for an order that he should be examined forthwith before an officer of the Court at the hospital in which he was being treated. The county court judge made an order that he should be examined before the registrar on notice to the respondent, and that a copy of the examination should be used as evidence at the trial of the arbitration. The examination was taken accordingly, but, owing to a misunderstanding, the respondent was not represented at it :—

Held, following *Moss* v. *Great Eastern Ry. Co.* [1909] 2 K. B. 274, that the Court of Appeal had jurisdiction to entertain an appeal from the order; that the reasoning of the decision in *Sutton* v. *Great Northern Ry. Co.* [1909] 2 K. B. 791, following *Mountain* v. *Parr* [1899] 1 Q. B. 805, applied; that the judge was sitting as arbitrator and had not all the powers which he exercised as county court judge; and that he had no power to order evidence to be taken by commission. TAYLOR *v.* CRIPPS - **C. A. 989**

17. —— *Compensation—Seaman—Ship registered in United Kingdom—Registry cancelled— Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 2, 3.

A seaman was employed on a smack which sailed from Lowestoft for Norway on March 18, 1913, and was never heard of again. His dependants claimed compensation under the Workmen's Compensation Act, 1906. The respondent repudiated liability on the ground that he was not the owner of the smack or the employer of the deceased, and that the deceased was not a workman to whom the Act applied. It appeared that the respondent had been the registered owner of the smack, but the registration was cancelled on March 8, 1913, with a view to the sale of the ship by C. (who was alleged to be the true owner) to foreigners. The respondent contended that inasmuch as when the ship sailed she was no longer registered in the United

EMPLOYER AND WORKMAN—*continued.*

Kingdom the deceased was not a member of the crew of a ship registered in the United Kingdom or of any other British ship or vessel of which the owner resided in the United Kingdom within s. 7, sub-s. 1, of the Act. The learned judge refused to accept the submission that the registration had been properly cancelled, and awarded compensation to the dependants :—

Held, that inasmuch as the registration was vacated before the ship sailed the deceased was not within the protection of the Act ; and that, whatever the learned judge might have thought of the merits of the case, it was not open to him to go behind the cancellation of registration. MORTIMER *v.* WISKER - - - **C. A. 699**

18. —*Compensation — Review of Weekly Payment—Retrospective Operation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16.

Upon an application under the Workmen's Compensation Act, 1906, for a review and termination of a weekly payment payable by way of compensation to a workman who has been injured by an accident arising out of and in the course of his employment, where the issue whether the incapacity has ceased and when is fairly raised, there is jurisdiction to make an order terminating the weekly payment as from a date antecedent to the date of the application for review.

Gibson v. *Wishart* [1914] W. N. 232 ; 7 B. W. C. C. 348, followed. BAGLEY *v.* FURNESS, WITHY & CO., LIMITED - - **C. A. 974**

19. — *Compensation — Sub-contracting — Work undertaken by the Principal—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4.

Where in a claim for compensation under the Workmen's Compensation Act, 1906, it is sought to make an employer liable as principal for an accident to a workman employed by a contractor, it is not enough that the work contracted for is necessary for the purposes of the principal's business ; it must be work undertaken by the principal, either for himself or under a contract. Whether the work is undertaken by the principal is in each case a question of fact.

Principals, whose business was manufacturing mouldings of wood, imported large quantities of timber and contracted with R., a deal porter, to stack it in their yard for the purpose of seasoning it. A workman employed by R. was injured by an accident while engaged in stacking the timber. There was evidence that the principals never stacked the wood themselves :—

Held, that the work of stacking wood was not part of the work undertaken by the principals, and that they were not liable to compensate the workman.

Decision of the county court judge affirmed. HOCKLEY *v.* WEST LONDON TIMBER AND JOINERY COMPANY - - - **C. A. 1013**

20. — *Compensation—Weekly Payment—Redemption — Where the Incapacity is permanent — Stability — Basis of Computation —*

EMPLOYER AND WORKMAN—*continued.*

Infant — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 17.

By Sched. I., par. 17, of the Workmen's Compensation Act, 1906, "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto : Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum."

On an application to redeem under par. 17 the fact that the injured man's wages would have increased but for the injury ought not to be taken into consideration in determining whether his incapacity is permanent. The question to be decided is whether his physical condition is stable.

Sched. I., par. 17, deals solely with the actual weekly payment which has continued for six months at the date of the application.

Under Sched. I., par. 17, an infant is in no better position than an adult, and cannot take advantage of par. 16, which applies to reviews of weekly payments only. MARSHALL, SONS & CO., LIMITED *v.* PRINCE - - - **C. A. 1047**

21. — *Minimum Wage—Outworker—False Record of Wages — Trade Boards Act*, 1909 (9 *Edw.* 7, *c.* 22), *s.* 15.

By s. 15, sub-s. 1, of the Trade Boards Act, 1909, an officer under the Act may require the production of records of payments made to outworkers by persons giving out work. By sub-s. 2, if any person produces any record of payments knowing the same to be false he is liable to a penalty :—

Held, that a person may be an outworker within the meaning of this section notwithstanding that he is himself an employer of outworkers. STREET *v.* WILLIAMS - **Div. Ct. 537**

EQUITABLE RELIEF — Infant — Contract — Money lent—Fraudulent misrepresentation as to age - - - - **607**
See INFANT. 1.

EVIDENCE—Bastardy laws.
See under BASTARDY.

—— Criminal law.
See under CRIMINAL LAW.

—— Note given for goods supplied to makers—Oral agreement by surety — Admissibility of evidence—Bill of exchange **907**
See PROMISSORY NOTE.

EVIDENCE—*continued.*

—— Revenue—Income tax—Sched. D—Trade profits — Deductions — Money exclusively expended for purposes of trade—Voluntary gratuity to retiring law reporter—Finding of fact - - 674
See REVENUE. 1.

—— Revenue — Super-tax — Trade profits — Actual amount or average—Trade—Discontinuance—Sale of business 686
See REVENUE. 16.

—— Sanitary inspector, Evidence of appointment and authority to prosecute—Unsound meat - - - - - 160
See JUSTICES. 3.

—— Workmen's compensation—Practice—Examination of witness before registrar—Delegation of authority - - 989
See EMPLOYER AND WORKMAN. 16.

EXAMINATION—Workmen's compensation—Evidence — Examination of witness before registrar — Delegation of authority - - - - - 989
See EMPLOYER AND WORKMAN. 16.

FACTORS ACT, 1889, ss. 1, 2, 10 - - 40
See SALE OF GOODS.

FALSE PRETENCES—Criminal law—Evidence — Indictment alleging false pretence that prisoner was carrying on genuine business—Receipts acknowledging payment for articles purchased by him—Entries in bank pass-book—Admissibility as evidence negativing allegation of false pretence - - - - 1112
See CRIMINAL LAW. 4.

FALSE RECORD OF WAGES—Minimum wage—Outworker - - - - 537
See EMPLOYER AND WORKMAN. 21.

FALSE REPRESENTATION—Old-age pension—Married couple—Means—Two persons charged with same offence—Justices' information - - - - - 239
See JUSTICES. 4.

FARM—Locomotive employed solely for purposes of farm — Carrying produce to market — Highway — Locomotive — Licence—Exemption - - - 255
See HIGHWAY. 1.

FARM BAILIFF—Workmen's compensation 994
See EMPLOYER AND WORKMAN. 2.

FATAL ACCIDENTS—Workmen's compensation—Death of workman—Claim by children — Payment of compensation — Action by widow for negligence—Option—Election - - - - - 1055
See EMPLOYER AND WORKMAN. 11.

—— Workmen's compensation—Death of workman due to accident—Failure to give notice of accident—"Reasonable cause"—Action by widow against employers under Fatal Accidents Act, 1846—Verdict for defendants - - - 1020
See EMPLOYER AND WORKMAN. 12.

FEEDING STUFFS.
See under FERTILISERS AND FEEDING STUFFS.

FELONY—Action, Cause of—Stay of proceedings until defendant prosecuted - 98
See ACTION.

FERRY—*Franchise—Presumption of Lost Grant—Vill to Vill Ferry—Point to Point Ferry—Disturbance — Change of Circumstances — New Traffic.*

The franchise of a ferry from vill to vill is a franchise recognized by the law.

Held (Lush J. dissenting), that such a franchise confers the exclusive right of ferriage throughout the area of the vills.

In an action claiming a declaration that the plaintiffs were entitled to and possessed of an ancient ferry from vill to vill, and an injunction restraining the defendant from disturbing them in the enjoyment thereof:—

Held (Lush J. dissenting), that, upon the evidence, a lost grant to the plaintiffs' predecessors of the franchise of a ferry from vill to vill ought to be presumed.

Held, further (Lush J. dissenting), that, even if the plaintiffs were entitled only to a ferry from point to point, no change of circumstances or new and different traffic had arisen which would justify the defendant in setting up a new ferry in proximity to the plaintiffs' ferry.

Newton v. *Cubitt* (1862) 12 C. B. (N.S.) 32 and *Cowes District Council* v. *Southampton Steam Packet Co.* [1905] 2 K. B. 287 considered.

Judgment of Pickford J. [1913] 2 K. B. 433 affirmed. GENERAL ESTATES COMPANY *v.* BEAVER - - - - - - C. A. 918

FERTILISERS AND FEEDING STUFFS — *Poultry Food—Article artificially prepared—Invoice—Percentages of Oil and Albuminoids—Natural Substance produced by Separation—Fertilisers and Feeding Stuffs Act*, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-s.* 2.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, it is enacted that every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating, in the case of any article artificially prepared otherwise than by being mixed broken ground or chopped, what are the respective percentages (if any) of oil and albuminoids contained in the article.

The respondents sold for use as food for cattle or poultry an article called sharps which contained oil and albuminoids. Sharps are an offal of wheat and are that part of the wheat which remains after the flour and bran have been removed, and are made in the following way:—Wheat is taken in the whole grain and passed by the miller through his mill. The wheat meal thus made is then by mechanical means in the mill passed by air currents through a series of sieves whereby it is separated and divided into three substances, namely, flour, sharps, and bran. The chemical composition of each of these three substances (when made) differs both from that of each other and from that of the original

FERTILISERS AND FEEDING STUFFS—*continued.*
wheat. The mechanical process does not otherwise effect any chemical change:—
Held by Avory and Shearman JJ., Rowlatt J. dissenting, that sharps were not an article which had been artificially prepared within the meaning of the enactment, and, further, that if they were, they were not artificially prepared otherwise than by being ground, and that the respondents were therefore not bound to give to the purchaser an invoice stating the percentages of oil and albuminoids contained in the article. WORCESTERSHIRE COUNTY COUNCIL *v.* NOTLEY BROTHERS - - - - - **Div. Ct. 330**

FILM—Cinematograph film.
See under CINEMATOGRAPH.

FINANCE ACTS.
See under REVENUE.

FISH.
See under FISHERY.

FISHERMAN—Employer and workman—Compensation—Workman—Seaman—Fishing vessel—Share of stocker money—Remuneration by share in gross earnings—Running agreement - - **1039**
See EMPLOYER AND WORKMAN. 13.

FISHERY—*Salmon Fishery—Weir—Apron of a Weir—Trap or Device for taking Fish—Device for catching Salmon—Salmon Fishery Act*, 1873 (36 *&* 37 *Vict. c.* 71), *s.* 15—*Salmon Fishery Act*, 1865 (28 *&* 29 *Vict. c.* 121), *s.* 36.

By s. 15 of the Salmon Fishery Act, 1873, no person shall place upon the apron of any weir any basket, trap, or device for taking fish, except as therein mentioned.

By s. 36 of the Salmon Fishery Act, 1865, any person using within a fishery district any fishing weir, fishing mill dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same, shall be liable to a penalty.

A row of six hatches extended across the entire width of a river. When all these hatches were down the main body of the river passed down a mill stream and under a mill, ultimately returning to the bed of the river below the mill. When the hatches were opened the water flowed through each hatch down a separate sloping surface of masonry into a separate culvert under a road which crossed the river, and so into a pool. Hatches 1 and 2 were permanently closed. When hatches 3 and 4 were open the water passed down the sloping surfaces, then up and along a close boarded wooden platform resting on the bottom of the culverts, and thence into an eel trap. Spent or injured salmon had been found in the trap:—
Held, that the row of hatches constituted a weir, and that the sloping surfaces of masonry opposite the hatches constituted the apron of a weir within the meaning of s. 15 of the Act of 1873, and that a trap or device for taking fish had been placed upon the apron of a weir within the meaning of that section.
Held, also, following *Lyne* v. *Leonard* (1868) L. R. 3 Q. B. 156, that the trap or device was a device for catching salmon within the meaning of s. 36 of the Act of 1865. MAW *v.* HOLLOWAY **Div. Ct. 594**

FISHERY—*continued.*

FISHING NETS—Insurance (Marine)—Collision clause of Lloyd's policy—"Collision with ship or vessel"—Collision with nets of fishing vessel
See INSURANCE (MARINE). 2. **57**

FISHING VESSEL—Workmen's compensation—Fisherman—Workman—Seaman—Share of stocker money—Remuneration by share in gross earnings—Running agreement - - - - - **1039**
See EMPLOYER AND WORKMAN. 13.

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREIGN JUDGMENT—*French Judgment—Whether enforceable in England—Appearance in French Proceedings, whether voluntary—Default Judgment set aside and subsequently restored.*

The plaintiff, who resided and carried on business in Paris, commenced proceedings in the Tribunal of Commerce of the Seine against the defendants, who were merchants carrying on business in London, for breach of contract. A notification of those proceedings was sent to the French Consul in London, who informed the defendants that certain legal documents had been received by him for them and requested them to take them up. The defendants, although they had reason to suspect to what the documents related, declined to take them. Thereafter judgment by default for damages and costs was entered against the defendants in the Tribunal of Commerce, and intimation thereof was given in the same way as in connection with the commencement of the proceedings, but the defendants took no notice thereof until the plaintiff obtained the issue of a saisie-arrêt or conditional order attaching any moneys belonging to them in the hands of the Crédit Lyonnais bank in Paris. The defendants had a sum of 4*l.* or 8*l.* due to them in the bank at the time, and the bank intimated to them that the saisie-arrêt had been issued, whereupon the defendants filed an "opposition" in the Tribunal of Commerce asking that the default judgment should be reopened. The Tribunal of Commerce allowed the "opposition," heard the case on the merits, and gave judgment for the defendants with costs. The plaintiff appealed to the Court of Appeal in Paris, and that Court held that, the first judgment of the Tribunal of Commerce having been executed by the plaintiff, the defendants' "opposition" was too late and was therefore not receivable, and accordingly the plaintiff's appeal was allowed. The plaintiff now sued on the judgment of the Court of Appeal restoring the first judgment of the Tribunal of Commerce:—
Held, that the judgment was enforceable inasmuch as (1.) the defendants had voluntarily appeared in the French proceedings, and (2.) the

FOREIGN JUDGMENT—*continued.*
judgment took its whole force and effect from the decision of the Court of Appeal and was not merely the original default judgment. GUIARD *v.* DE CLERMONT & DONNER **Lawrence J. 145**

FOREIGN POSSESSIONS — Revenue — Income tax—Trade carried on in the City of London—Place of assessment—Jurisdiction to assess at place of residence—Prohibition—Grounds of granting rule *See* REVENUE. 2. **429**

FORGERY—Bill of exchange—Banker and customer—Cheque—Authority to sign per pro.—Misuse of authority—Forgery—Crossed cheque—Bank in good faith receiving payment for customer—Negligence—Ratification - - - **356**
See BILL OF EXCHANGE.

FRANCHISE—Ferry—Presumption of lost grant *See* FERRY. **918**

FRAUDULENT CONVERSION — Fraudulent conversion of property—First disclosure of acts by accused as voluntary witness in cross-examination in civil action—Protection from prosecution *See* CRIMINAL LAW. 5. **848**

FRAUDULENT MISREPRESENTATION — Infant—Contract—Money lent—Fraudulent misrepresentation as to age—Equitable relief - - - - **607**
See INFANT. 1.

—— Principal and agent—Knowledge of agent not imputed to principal - - **722**
See PRINCIPAL AND AGENT. 1.

FREIGHT—Shipping — Charterparty — Timber cargo — Freight payable per cubic fathom — Measurement — Alternative methods — Wrong method adopted — Remeasurement, Cost of—Liability of charterer - - - - - **587**
See SHIPPING. 4.

FRENCH JUDGMENT — Foreign judgment — Whether enforceable in England — Appearance in French proceedings, whether voluntary—Default judgment set aside and subsequently restored **145**
See FOREIGN JUDGMENT.

GAS — *Gas Company — Metropolis — Opening Street to lay Pipes—Obligation of Company to reinstate—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 10—*Resolution by Local Authority to do Work of Reinstatement themselves—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 114—*Accident from Insufficiency of Work—Liability of Gas Company.*

By s. 10 of the Gasworks Clauses Act, 1847, a gas company which breaks open the surface of a street is bound to reinstate it.

By s. 114 of the Metropolis Management Act, 1855, a local authority may do the work of

GAS—*continued.*
reinstatement themselves instead of permitting the gas company to do it.

A borough council in the metropolis, purporting to act under that section, passed a resolution that they would in all cases where any pavement was opened by a gas company in their borough do the work of reinstatement themselves. Subsequently a gas company, having opened the pavement of a street and finished laying their pipes, gave notice to the council that reinstatement was necessary :—

Held, that the resolution did not, upon the mere expiry of a reasonable time after receipt of the notice, ipso facto release the company from the duty imposed by the Gasworks Clauses Act. To effect such release it was necessary that the council should dismiss the company from the control of the reinstatement and in fact take charge of the work themselves. BRAME *v.* COMMERCIAL GAS COMPANY - - **Div. Ct. 1181**

GIFT—Bankruptcy — Voluntary settlement — Uncle and nephew—Gift by uncle of chattels to be fixed to freehold of hotel leased to nephew—Reduction of rent payable by nephew—Alienation of gift —"Settlement of property" - **1086**
See BANKRUPTCY. 5.

GOODS—Railway—Carriage of goods.
See under RAILWAY.

—— Sale of.
See under SALE OF GOODS.

GRANT—Common of pasture, Rights of—Contentious user—Claim to ownership of soil—Prescription—Lost grant - **911**
See COMMON.

—— Ferry — Franchise — Presumption of lost grant—Vill to vill ferry—Point to point ferry - - - - - - - **918**
See FERRY.

GRASS—Revenue—Land value—Duties on—Growing grass - - - - **406**
See REVENUE. 8.

HANDBILLS— Cinematograph film — Infringement of copyright - - - **1171**
See COPYRIGHT.

HAY HARVEST—Injury by accident—Compensation—"Contract of service"—Voluntary help given to farmer in hay harvest—No money payment - **543**
See EMPLOYER AND WORKMAN. 8.

HIGHWAY—*Locomotive — Licence — Exemption — Agricultural Locomotive — Locomotive employed solely for Purposes of Farm—Carrying Produce to Market—Locomotive Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 9, *sub-ss.* 1, 9, 10 ; *s.* 17.

By s. 9, sub-s. 1, of the Locomotives Act, 1898, every locomotive shall be licensed by a county council, provided that this enactment is not to apply to (among other things) any agricultural locomotive. By s. 17 the expression "agricultural locomotive" includes any locomotive the property of one or more owners or occupiers of agricultural land employed solely

HIGHWAY—*continued.*

"for the purposes of their farms," and not let out on hire :—

Held, that a locomotive drawing to market trollies laden with farm produce intended for sale was employed for the purpose of a farm within the meaning of s. 17. LONDON COUNTY COUNCIL *v.* LEE - - - - **Div. Ct. 255**

2. —— *Locomotive—Steam Roller—Locomotive Act*, 1861 (24 *&* 25 *Vict. c.* 70), *s.* 12.

By s. 12 of the Locomotive Act, 1861, the weight of every locomotive, and the name of the owner or owners thereof, shall be conspicuously and legibly affixed thereon ; and any owner not having affixed such weight and such name shall, upon conviction thereof before two justices, forfeit a penalty :—

Held, that a steam roller is a locomotive within the meaning of the above enactment. WATERS *v.* EDDISON STEAM ROLLING COMPANY, LIMITED - - - - - **Div. Ct. 818**

3. —— *Premises abutting thereon—Right of Access—Advertisement on Wall of Premises—Obstruction—Interference with Private Right—Damage—Injunction.*

In an action, in which the claim was admitted, the defendant counterclaimed an injunction in the following circumstances. The plaintiff and the defendant were the respective owners and occupiers of two adjoining houses abutting on a street which was a public highway. The side wall of the defendant's house projected into the street a short distance beyond the front of the plaintiff's house. There was no door or other opening in the side wall. The plaintiff affixed boards at right angles to the front of his house and close to the defendant's side wall covering the wall to a height of twenty-two feet from the pavement. The boards did not constitute an obstruction to the street, but they prevented the defendant from having access to the wall from the street for the purpose of repairing it, and from exhibiting advertisements upon it :—

Held, that the right of access to a highway enjoyed as a private right by the owner of premises adjoining the highway is not limited to the right to pass from the premises to the highway and vice versa, but includes the right of access to a wall of the premises in which there is no door or other opening, and the right to have advertisements on the wall displayed to the uninterrupted view of the members of the public using the highway ; that the act of the plaintiff was a wrongful interference with the private right of the defendant ; and that the defendant was entitled to an injunction restraining the plaintiff from maintaining the boards in the position above described. COBB *v.* SAXBY **Rowlatt J. 822**

—— Bridge — Canal made across highway—Highway carried by bridge over canal —Statutory duty to keep bridge "in sufficient repair"—Standard of repair *See* BRIDGE. **1**

—— "Structure"—Road—Duties on land values *See* REVENUE. 8. **406**

HIRE — Shipping — Charterparty — Hire for fixed period—Provision for cessation of payment of hire—"Loss of time through damage preventing efficient working of vessel for more than forty-eight running hours"—Cessation of payment for first forty-eight hours - - - - **156**
See SHIPPING. 2.

HOUSING, TOWN PLANNING, &c., ACT, 1909, ss. 14, 15 - - - - - **135**
See LANDLORD AND TENANT.

HUMBER CONSERVANCY — Income tax — Statutory payments to, whether taxable —Profits of "inland navigation"—"Annual profits and gains" - **449**
See REVENUE. 3.

HUMBER CONSERVANCY ACT, 1907 - **449**
See REVENUE. 3.

HUSBAND AND WIFE—*Separate Property—Restraint on Anticipation—Date of Contract—"Separate property which at that time or thereafter she is restrained from anticipating"—Married Women's Property Act*, 1893 (56 *&* 57 *Vict. c.* 63), *s.* 1.

A grantor by deed covenanted to pay to a trustee upon trust for a married woman during her lifetime the quarterly sum of 250*l.* on the usual quarter days, such sums to be for her separate use without power of anticipation. The married woman subsequently, in 1909, accepted a bill of exchange, and on December 29, 1913, judgment was recovered against her for the amount of the bill. On December 24, 1913, the grantor under the deed had paid to the trustee the quarterly sum due on the following day :—

Held, on the authority of *Barnett* v. *Howard* [1900] 2 Q. B. 784, that, as at the date of the contract the married woman was restrained from anticipating the quarterly sum, it could not be attached to answer the judgment debt. WOOD *v.* LEWIS - - - - - - **C. A. 73**

—— Bankruptcy notice against married woman —Carrying on trade or business—Deeds of Arrangement Act, 1913, s. 12 - **1095**
See BANKRUPTCY. 3.

—— Income tax—Income of married woman living with her husband—Charge of income tax—Deduction of tax at source —Claim for repayment - - **112**
See REVENUE. 4.

ILLEGITIMATE CHILD—Wilful neglect of—Liability of father — Person having "custody, charge, or care" of child **813**
See INFANT. 2.

INCOME TAX—Inland Revenue.
See under REVENUE.

INCREMENT VALUE DUTY—Sale of fee simple —Gross value—Sale in "open market" by willing seller—Special adaptability to needs of particular purchaser - **466**
See REVENUE. 6.

INDUSTRIAL DISEASE—Workmen's compensation for injury — Contracting-out scheme—Injury by accident—Miners' nystagmus—Date of disablement **1068**
See EMPLOYER AND WORKMAN. 9.

INFANT — *Contract—Money lent—Fraudulent Misrepresentation as to Age—Equitable Relief—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1.

The defendant, an infant, by fraudulently representing that he was of full age, induced the plaintiffs to lend him two sums of 200*l.* each. To an action by the plaintiffs to recover the amount of the advances on the ground that they had been obtained by fraudulent misrepresentation, or in the alternative for money had and received by the defendant to the use of the plaintiffs, the defendant pleaded infancy :—

Held, that the cause of action was in substance ex contractu, that the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiffs. R. LESLIE, LIMITED *v.* SHEILL **C. A. 607**

2. —— *Illegitimate Child—Wilful Neglect of—Liability of Father—Person having "custody, charge, or care" of Child—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1 ; *s.* 38, *sub-s.* 2.

The enumeration in s. 39, sub-s. 2, of the Children Act, 1908, of the persons who are presumed to have the custody, charge, or care of a child is not intended to be an exhaustive enumeration of the persons referred to in s. 12, sub-s. 1, as having the custody, charge, or care. The latter section applies to those who have in fact the custody, charge, or care as well as those who are presumed to have it.

Where an illegitimate child is living with its father and mother, the fact that the mother, who is the child's sole parent and legal guardian, is resident in the house does not prevent the father from having jointly with her the custody, charge, or care of the child within the meaning of s. 38, sub-s. 2, of the Children Act, 1908, so as to render him liable to a penalty under s. 12 if he wilfully neglects it. LIVERPOOL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN *v.* JONES - - - - - **Div. Ct. 813**

—— Workmen's compensation—Weekly payment — Redemption — Where the incapacity is permanent — Stability — Basis of computation - - **1047**
See EMPLOYER AND WORKMAN. 20.

INFORMATION — Old age pension — Married couple—Means—False representation—Two persons charged with same offence
See JUSTICES. 4. **239**

INFRINGEMENT—Copyright.
See under COPYRIGHT.

INJUNCTION — Highway — Premises abutting thereon—Right of access—Advertisement on wall of premises—Obstruction—Interference with private right — Damage - - - - - - **822**
See HIGHWAY. 3.

INLAND REVENUE.
See under REVENUE.

INSPECTION OF DOCUMENTS.
See under DISCOVERY.

INSPECTOR—Eligibility—Coal mine—Inspector appointed by workmen—Check weigher.
See MINE. 1. **1175**

INSTITUTE TIME CLAUSES, cls. 3 and 7 **1262**
See INSURANCE (MARINE). 6.

INSURANCE (MARINE)—*Capture—Insurance of Cargo against Capture—Constructive Total Loss—Anticipation of Capture—Sale of Cargo by Assured.*

By a policy of marine insurance the plaintiffs, who were Russian subjects, insured a cargo of salt beef with the defendants at and from San Francisco to Vladivostok via Nagasaki against (inter alia) capture. During the currency of the policy war between Russia and Japan broke out, and the Japanese fleet was in the Pacific and was stopping and capturing vessels. The Japanese were also blockading Vladivostok. The defendants telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, which was done, and ultimately notice of abandonment was given to the underwriters, who refused to accept it :—

Held, that the risk of capture had never begun to operate, and that the fact that it was anticipated that if the cargo went forward it would be lost by capture did not in the circumstances constitute a constructive total loss.

The "Knight of St. Michael" [1898] P. 30 and *Butler* v. *Wildman* (1820) 3 B. & Ald. 398 distinguished.

Decision of Pickford J. [1913] 3 K. B. 407 affirmed. KACIANOFF *v.* CHINA TRADERS INSURANCE COMPANY, LIMITED - **C. A. 1121**

2. —— *Collision Clause of Lloyd's Policy—"Collision with ship or vessel"—Collision with Nets of Fishing Vessel.*

A steamship ran into the nets attached to and extending from a fishing vessel which was about a mile distant from the steamship ; there was no contact between the hulls of the two vessels :—

Held, that the steamship had not "come into collision with any other ship or vessel" within the meaning of the collision clause attached to the usual form of Lloyd's policy.

Judgment of Pickford J. [1913] 3 K. B. 372 affirmed. BENNETT STEAMSHIP COMPANY *v.* HULL MUTUAL STEAMSHIP PROTECTING SOCIETY - - - - - - **C. A. 57**

3. —— *Concealment of Material Fact — Innocent Mistake as to Materiality—"Held covered" Clause—Effect of.*

A clause in a policy of marine insurance provided that "In the event of any incorrect definition of the interest insured it is agreed to hold the assured covered at a premium (if any) to be arranged" :—

Held, that the fact that the assured knew that the interest insured was incorrectly defined

INSURANCE (MARINE)—*continued.*

did not deprive him of the benefit of the clause if he honestly believed that the correct definition was not a matter which it was material for the underwriters to know. HEWITT BROTHERS *v.* WILSON - - - - **Bailhache J. 1131**

4. —— *Re-insurance—Compromise between Original Assured and Original Insurers — Whether Re-insurers entitled to Benefit of Compromise.*

The plaintiffs who had insured the *Katina* against total and/or constructive total loss only, re-insured the risk with the defendants. The re-insurance policy did not contain the usual clause "to pay as may be paid thereon." During the currency of the policies, the *Katina* stranded and her owner gave notice of abandonment, alleging that she was a constructive total loss. The plaintiffs declined to accept the notice of abandonment, whereupon the owner sued them, but that action was compromised by the plaintiffs paying to the owner a sum less than 100 per cent. of the loss. The defendants were asked to agree to this compromise, but they declined to do so, alleging that there was no constructive total loss in fact. In an action by the plaintiffs against the defendants on the re-insurance policy, it was found as a fact that the *Katina* was a constructive total loss :—

Held, that the defendants were not entitled to the benefit of the compromise made with the owner and were liable to the plaintiffs for the full amount of the re-insurance, but that they were entitled to the benefit of any rights in respect of the abandonment of the *Katina* which they would have had if no compromise had been effected. BRITISH DOMINIONS GENERAL INSURANCE COMPANY, LIMITED *v.* DUDER **Bailhache J. 835**

5. —— *Running down Clause—Damage in Consequence of Collision—Construction of Clause.*

By a clause attached to a time policy of marine insurance upon the hull and machinery of a steamship the underwriters agreed that "if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums . . . . this company will pay the assured" a certain proportion of such sums.

The insured ship by reason of her negligent navigation came into collision with another ship she was overtaking. The impact was very slight and had practically no effect. After the collision the other ship (by reason of attractive forces brought into play between the two vessels from their proximity coupled with the wash of the propeller of the insured ship against the starboard bow of the other after the insured ship got ahead of her) came into collision with a third ship, to which a large amount of damage was done. The owners of the insured ship having been held alone to blame for both collisions became liable to pay, and paid, sums in respect of damages arising out of both collisions. In an action brought by the owners of the insured ship to recover from the insurers the proportion

INSURANCE (MARINE)—*continued.*

underwritten by them of the sums so paid for damages :—

Held, that the collision with the third ship was a consequence of the collision between the insured ship and the other ship within the meaning of the clause, and that therefore the insurers were liable to pay to the owners of the insured ship the proportion they had underwritten of the damages arising out of both collisions. WILLIAM FRANCE FENWICK & CO., LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED - - - - **Bailhache J. 827**

6. —— *Time Policy—"Perils of the seas"—Institute Time Clauses, cls. 3 and 7—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 30; *Sched. I., r.* 12.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke, causing the boiler to fall into the hold of the ship and thereby damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached :—

Held, that the loss was not recoverable under the policy as it was not caused by a peril of the sea, nor was it within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the risks insured by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.

Decision of Pickford J. [1914] 1 K. B. 442 affirmed. STOTT (BALTIC) STEAMERS, LIMITED *v.* MARTEN - - - - - **C. A. 1262**

INSURANCE (NATIONAL)—Workmen's compensation—Omission of workman to take proceedings to enforce claim—Right of approved society to take proceedings in his name - - - **706**
See EMPLOYER AND WORKMAN. 14.

—— Workmen's compensation—Right of approved society to take proceedings in workman's name - - - - **1065**
See EMPLOYER AND WORKMAN. 1.

INTERLOCUTORY PROCEEDINGS—Power of registrar to award costs in - - **1195**
See RAILWAY. 3.

ISSUES—Separate issues—Decision by judge upon issue of fact and point of law in favour of plaintiffs—Appeal by defendants on point of law but not on issue of fact—Judgment of Court of Appeal for defendants with costs—Costs of issue found in plaintiffs' favour—Taxation—Practice - - - - - - **28**
See COSTS. 1.

JOINDER—Railway and Canal Commission—Practice—Joinder of complaints against several defendants in one application
See RAILWAY. 3. **1195**

JOINT DEFENDANTS—in action of libel—Defendant severing in pleading—Costs—Taxation - - - - - - **1245**
See COSTS. 2.

JUDGMENT—Foreign judgment—French judgment—Whether enforceable in England —Appearance in French proceedings, whether voluntary—Default judgment set aside and subsequently restored **145**
See FOREIGN JUDGMENT.

—— Writ — Special indorsement — Liquidated demand—Application for leave to sign final judgment—Sufficiency of affidavit in support - - - - - **1253**
See PRACTICE.

JUDGMENT DEBT — Counter-claim exceeding amount of judgment debt and which debtor could not set up in action in which judgment obtained - - **726**
See BANKRUPTCY. 2.

JURISDICTION— Justices.
See under JUSTICES.

—— Revenue—Income tax—Foreign possessions —Trade carried on in City of London—Place of assessment — Jurisdiction to assess at place of residence—Prohibition —Grounds of granting rule - - **429**
See REVENUE. 2.

—— Summary jurisdiction—Shops.
See under SHOPS.

—— Workmen's compensation—Agreement to pay weekly sum—Record of memorandum—Doubt whether injured man is a "workman"—"Settled by agreement" —Refusal of registration - - **1001**
See EMPLOYER AND WORKMAN. 5.

JUSTICES—*Apprehended Breach of Peace—Recognizances to be of Good Behaviour—Jurisdiction of Justices to order—Conditions of Jurisdiction*—34 *Edw.* 3, *c.* 1.

Where a Court of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement the Court may order him to enter into recognizances and to find sureties for his good behaviour or to be imprisoned in default of so doing.

Whatever the origin of that jurisdiction may be, whether it be derived from the common law, from the commission of conservators of the peace, or from the statute 34 Edw. 3, c. 1, or otherwise, the practice of making such orders for the purpose of preventing apprehended breaches of the peace has been too well established for a long period of years to allow of its propriety being questioned at the present day.

It is not essential to the exercise of that jurisdiction that the conduct of the defendant should have caused any individual person to go in bodily fear. LANSBURY *v.* RILEY
Div. Ct. 229

2. —— *Case stated — Notice of Appeal — Service on Solicitor for Respondent—Acceptance of Service by Solicitor—"Giving notice in writing of such appeal to the other party"—Summary Jurisdiction Act*, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2.

By s. 2 of the Summary Jurisdiction Act, 1857, a party dissatisfied with the determination

JUSTICES—*continued.*

of justices as being erroneous in point of law may apply to the justices to state and sign a case for the opinion of the High Court, and such party, called "the appellant," shall within three days after receiving such case transmit the same to the Court, "first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party," called "the respondent":—

Held, that, where the solicitors to the respondent had authority to accept service of notice of appeal on the respondent's behalf, notice in writing of the appeal was properly given to the respondent when it was given to and accepted by the solicitors on behalf of the respondent.

Syred v. *Carruthers* (1858) E. B. & E. 469 and *Pennell* v. *Churchwardens of Uxbridge* (1862) 31 L. J. (M.C.) 92 approved.

Hill v. *Wright* (1896) 60 J. P. 312 not followed. GODMAN *v.* CROFTON **Div. Ct. 803**

3. —— *Case stated—Point not taken before Justices raised in Divisional Court—Unsound Meat — Information by Sanitary Inspector — Evidence of Appointment and Authority to prosecute—Point as to Evidence of Authority not raised before Justices—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 259; *Sched. I., r.* 10.

Upon the argument of an appeal from justices by way of case stated a point cannot be taken before the Divisional Court upon the facts stated which was not taken before the justices, except upon a question of law which no evidence could alter.

Judgment of Blackburn J. in *Knight* v. *Halliwell* (1874) L. R. 9 Q. B. 412 followed.

Judgment of Lord Alverstone C.J. in *Gieblier* v. *Manning* [1906] 1 K. B. 709; 75 L. J. (K.B.) 463, explained. KATES *v.* JEFFERY
Div. Ct. 160

4. —— *Information — Old Age Pension — Married Couple—Means—False Representation —Two Persons charged with same Offence—Old Age Pensions Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 9, *sub-s.* 1.

One information may be preferred against husband and wife charging them with knowingly making a false representation contrary to the provisions of s. 9, sub-s. 1, of the Old Age Pensions Act, 1908. MACPHAIL *v.* JONES
Div. Ct. 239

—— Adulteration—Sale of food and drugs.
See under ADULTERATION.

—— Bastardy laws.
See under BASTARDY.

—— Child—Illegitimate—Wilful neglect of—Liability of father - - - **813**
See INFANT. 2.

—— Criminal law.
See under CRIMINAL LAW.

—— Crown Office—Certiorari—Time limit—Fiat of Attorney-General—Practice—Licensing Acts—Order of confirming authority - - - - - **222**
See CROWN OFFICE.

JUSTICES—*continued.*

—— Employer and workman—Trade Boards Act, 1909—Minimum wage—Outworker—False record of wages - - **537**
See EMPLOYER AND WORKMAN. 21.

—— Fertilisers and feeding stuffs.
See under FERTILISERS AND FEEDING STUFFS.

—— Food and drugs, Sale of—Adulteration.
See under ADULTERATION.

—— Highway.
See under HIGHWAY.

—— Licensing Acts.
See under LICENSING ACTS.

—— Locomotives.
See under LOCOMOTIVE.

—— Motor car.
See under MOTOR CAR.

—— Patent agent—Description by unregistered person—Offence—"Patent agency"
See PATENT. **400**

—— Sale of food and drugs—Adulteration.
See under ADULTERATION.

—— Salmon fishery—Weir—Apron of a weir—Trap or device for taking fish—Device for catching salmon - - - **594**
See FISHERY.

—— Shops.
See under SHOPS.

—— Streets.
See under STREETS.

JUSTIFICATION—Joint defendants in action of libel—Defendant severing in pleading — Plea of justification — Costs — Taxation - - - - - **1245**
See COSTS. 2.

KITCHEN—Kitchen of restaurant—Shop assistant—Kitchenmaid - - - **325**
See SHOPS. 2.

KITCHENMAID—Shop assistant—Kitchen of restaurant - - - - - **325**
See SHOPS. 2.

KNOWLEDGE—Fraudulent misrepresentation—Knowledge of agent not imputed to principal - - - - - **722**
See PRINCIPAL AND AGENT. 1.

LABEL—Notice by label—Adulteration—Sale to prejudice of purchaser—Cream mixed with boric acid - - - - **242**
See ADULTERATION. 1.

LAND—Lands Clauses Act.
See under LANDS CLAUSES ACT.

LAND—*continued.*

—— Railway — Land compulsorily taken — Special adaptability for railway purposes—Measure of compensation - **629**
See RAILWAY. 4.

—— Restrictive covenant—Covenant restricting user of land - - - - **642**
See COVENANT.

—— Revenue—Land values—Duties on.
See under REVENUE.

LANDLORD AND TENANT — *House let for Habitation — Defective Premises — Undertaking to keep fit for Human Habitation — Accident arising from Defect — Personal Injury to Daughter of Tenant—Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15.

By s. 14 of the Housing, Town Planning, &c., Act, 1909, in any contract made for letting for habitation a house to which the Act applies there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation.

By s. 15, sub-s. 1, s. 14 shall, where applicable, take effect as if the condition implied in that section included an undertaking that the house shall during the holding be kept by the landlord in all respects reasonably fit for human habitation. By sub-ss. 3, 4, and 5, if it appears to the local authority that the implied undertaking is not complied with, the local authority may require the landlord to execute such works as they shall specify as necessary. The landlord may thereupon close the house for human habitation; otherwise the authority may do the necessary work and recover the expense from the landlord as therein provided. By sub-s. 6 the landlord may appeal to the Local Government Board. By sub-s. 9 any remedy given by the section for non-compliance with the undertaking implied by virtue of the section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord either at common law or otherwise:—

Held, that the effect of these enactments is to import into the contract of tenancy an implied undertaking by the landlord towards the tenant alone that the demised premises shall be during the holding in all respects reasonably fit for human habitation, and that a stranger to the contract of tenancy has no remedy for a breach of this implied undertaking.

Cavalier v. *Pope* [1905] 2 K. B. 757; [1906] A. C. 428 applied.

Decision of Divisional Court (Ridley and Avory JJ.) [1913] 3 K. B. 123 affirmed. RYALL *v.* KIDWELL & SON - - - - **C. A. 135**

LANDS CLAUSES ACT—*Mortgaged Land—Part compulsorily taken — Residue injuriously affected by Working of Undertaking—Claim of Compensation for—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 49, 108—114.

Mortgagees of land with a power of sale are entitled under the Lands Clauses Act, 1845, to the rights of owners, including the right, where part of their land is taken, to claim compensation for damage by reason of other land of theirs held therewith being injuriously affected by the

LANDS CLAUSES ACT—*continued.*
exercise of the powers of the special Act. Their rights in that respect are not cut down by the special provisions relating to mortgagees in ss. 108—114. REX *v.* MIDDLESEX (CLERK OF THE PEACE FOR) - - - - **Div. Ct. 259**

LARCENY—Demanding money with menaces—Threat to publish attacks upon a commercial company—Evidence of previous offence—Admissibility - - **339**
See CRIMINAL LAW. 3.

—— Fraudulent conversion of property—Protection from prosecution - - **848**
See CRIMINAL LAW. 5.

LAW REPORTS — Revenue — Income tax — Sched. D—Trade profits—Deductions—Voluntary gratuity to retiring law reporter—Finding of fact—Evidence
See REVENUE. 5. **674**

LEASE—Revenue—Licensed premises—Increase of duty—Sub-lease—Liability of lessor to pay proportion of increase—"Held under a lease" - - - - - **288**
See REVENUE. 11.

—— Reversion duty—Determination of lease—Agreement to grant a lease on performance of conditions - - **1186**
See REVENUE. 12.

LIBEL—Costs—Taxation—Joint defendants in action of libel—Defendant severing in pleading—Plea of justification - **1245**
See COSTS. 2.

—— Defamation—Annual meeting of licensing justices—Application for renewal of licence—Notice of objection—Privileged occasion - - - - - **275**
See DEFAMATION.

LICENCE—Libel—Annual meeting of licensing justices — Application for renewal of licence—Notice of objection—Privileged occasion - - - - - **275**
See DEFAMATION.

—— Licensing Acts.
See under LICENSING ACTS.

—— Locomotive — Exemption — Agricultural locomotive — Locomotive employed solely for purposes of farm—Carrying produce to market - - - **255**
See HIGHWAY. 1.

—— Sale of liquor without licence—Licensing Acts—Principal and agent—Sale by licensed agent on behalf of unlicensed principal—Offence - - - **1141**
See LICENSING ACTS. 3.

LICENSING ACTS — *Child — Exclusion from "Bar" of Licensed Premises—Part of Premises "mainly used" for the Sale and Consumption of Liquor—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 120, *sub-s.* 5.

By s. 120, sub-s. 1, of the Children Act, 1908, "The holder of the licence of any licensed

LICENSING ACTS—*continued.*
premises shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing."

Sub-s. 5: "In this section the bar of licensed premises means any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor."

Semble, per Rowlatt and Shearman JJ., that for the purpose of determining whether a room is "mainly used" for the sale and consumption of intoxicating liquor regard must be had to the user of the room during the whole portion of the day that the house is open, and that if the user as a whole is not mainly for that purpose it is immaterial whether the room is or is not being used for that purpose at the time when the child is found in it. PILKINGTON *v.* ROSS **Div. Ct. 321**

2. —— *Renewal of On-Licence—Objection to Renewal—Reference of Question of Renewal to Compensation Authority—Report of Licensing Justices good on its Face — Allegation that Report wrongly made to Compensation Authority —Prohibition—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19.

Where licensing justices, acting under s. 19, sub-s. 1, of the Licensing (Consolidation) Act, 1910, refer the question of the renewal of an old on-licence to the compensation authority, together with their report thereon, the compensation authority are bound, under s. 19, sub-s. 2, to proceed with the consideration of the report, if it is good on its face, and a writ of prohibition will not lie prohibiting them from doing so on the ground that the licensing justices wrongly referred the question of the renewal of the licence to them. REX *v.* CHESTER LICENSING JUSTICES. *Ex parte* BENNION - **Div. Ct. 349**

3. —— *Sale of Liquor without Licence—Principal and Agent—Sale by Licensed Agent on behalf of Unlicensed Principal—Offence—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-s.* 1.

Sect. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910, prohibits the sale of intoxicating liquor by a person who does not hold a justices' licence authorizing him to hold an excise licence for the sale of that intoxicating liquor.

The appellants were brewers and the owners of a fully-licensed public-house, the business of which was carried on by a resident manager appointed by the appellants under an agreement which required him to conduct the business under such rules and in such manner as the appellants should direct and to account to the appellants for the proceeds. The beer sold at the public-house was the property of the appellants. The justices' licence granted in respect of the premises was in the name of the manager and not of the appellants. Beer was purchased on a certain date on the premises by the respondent, the actual conduct of the sale being carried out by the manager. In respect of this sale of beer the appellants were charged with a contravention of s. 65, sub-s. 1, of the Act of 1910:—

Held, that the appellants had not sold the

LICENSING ACTS—*continued.*

beer to the respondent in contravention of s. 65, sub-s. 1, and were not guilty of the offence charged.

Dunning v. *Owen* [1907] 2 K. B. 237; 76 L. J. (K.B.) 796, distinguished. MELLOR *v.* LYDIATE - - - - - **Div. Ct. 1141**

—— Crown Office — Certiorari — Time limit — Fiat of Attorney-General—Practice—Order of confirming authority - **222**
See CROWN OFFICE.

—— Libel—Annual meeting of licensing justices —Application for renewal of licence—Notice of objection—Privileged occasion
See DEFAMATION. **275**

—— Revenue—Licensed premises—Increase of duty—Lease—Sub-lease — Liability of lessor to pay proportion of increase **288**
See REVENUE. 11.

LLOYD'S POLICY—Collision clause of—"Collision with ship or vessel"—Collision with nets of fishing vessel - - **57**
See INSURANCE (MARINE). 2.

LOCAL GOVERNMENT—Streets—New street—Construction of, in conformity with by-laws—Alteration of street after construction completed - - - **796**
See STREETS. 1.

LOCOMOTIVE—Highway—Licence—Exemption —Agricultural locomotive—Locomotive employed solely for purposes of farm—Carrying produce to market - **255**
See HIGHWAY. 1.

—— Highway—Steam roller - - - **818**
See HIGHWAY. 2.

LONDON—*Buildings—General Line of Buildings in Street—Buildings erected beyond the General Line—Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings.*

The Euston Road was laid out in 1756 under 29 Geo. 2, c. 88, which enacted that no buildings should be erected on new foundations in the road within fifty feet of the highway, and that, if so erected, they should be deemed to be common nuisances. The Metropolis Management Act, 1862, s. 75, enacted that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings if the distance of that line from the highway did not exceed fifty feet. Before 1862 a row of buildings had been erected about fifty feet back from the highway, and a second row of buildings had been erected on the forecourts of those buildings; the fronts of this second row adjoined the inner edge of the pavement, being about eleven feet from the kerb of the roadway. With the view of shewing that they were erected on new foundations and were consequently illegal buildings and common nuisances, maps of the years 1793 and 1819 were put in evidence and received by the tribunal of appeal as evidence of such fact; the maps were not made on the authority of any public body

LONDON—*continued.*

or for any public purpose. In 1867 the Metropolitan Board of Works, with the object of establishing a new and regular building line eleven feet from the road coinciding with the then existing projecting buildings on the forecourts, passed a resolution enabling all persons interested to build up to that line of frontage without restrictions, but no certificate was ever given by the superintending architect defining the eleven feet line as the general line of buildings. In August, 1909, the lessee of the appellants was proceeding to re-erect the building leased to him on the eleven feet line, when it was objected that that line was in advance of the general building line in that part of the road. The superintending architect, being called upon to define the general building line, gave a certificate that it was the old building line lying fifty feet from the road. The tribunal of appeal confirmed his certificate:—

Held, in the Divisional Court, by Ridley J., that, upon the authority of *Scott* v. *Carritt* (1900) 82 L. T. 67, and *Metropolitan Railway* v. *London County Council* [1911] A. C. 1, the superintending architect was bound to disregard the buildings on the forecourts and to hold that they were unlawfully there, and therefore that the certificate of the superintending architect as to the building line was right. By Lush J., that the buildings on the forecourts, which had been sanctioned by the Metropolitan Board of Works, could not be held to be unlawful erections, and that the superintending architect was bound to have regard to them in defining the general building line:—

Held, in the Court of Appeal, first, that the maps were not admissible evidence for the purpose for which the respondents sought to make use of them, and, secondly, that the London County Council could not disregard what had been authorized or approved in 1867 by the Metropolitan Board of Works, followed, as it was, by the erection of new buildings up to the inner edge of the pavement and the heightening of existing buildings.

Scott v. *Carritt* (1900) 82 L. T. 67 and *Metropolitan Railway* v. *London County Council* [1911] A. C. 1 distinguished. CLODE *v.* LONDON COUNTY COUNCIL - - - - - - **C. A. 852**

2. —— *Water—Metropolitan Water Board —Compulsory Powers—Laying Main Pipes—Protection of Railway Company—Acquisition of Easement—Metropolitan Water Board (Various Powers) Act*, 1907 (*7 Edw. 7, c. clxxiv.*), *ss.* 61, 96.

By s. 61, sub-s. 1, of the Metropolitan Water Board (Various Powers) Act, 1907, the Board are empowered to exercise at any place within their limits of supply the like powers with respect to the laying of mains and pipes as are exercisable by local authorities under the provisions of the Public Health Act, 1875, with respect to the laying of mains and pipes within their respective districts for the purpose of water supply. By sub-s. 3 the limits of supply are to be deemed the district of the Board.

By s. 96, sub-s. 6, of the Act of 1907, the Board shall not, without the consent in writing

LONDON—*continued.*
of certain named railway companies under their common seal, acquire any of the lands or property of the railway companies, but the Board may acquire and the railway companies shall if required grant to the Board an easement or right of constructing and maintaining works on, through, in, under, over or along such land and property; and the sum to be paid for the acquisition of such easement or right shall be settled as therein provided.

The Board having laid a main pipe under land of one of the named railway companies within the limits of supply of the Board:—

Held, that the Board were not bound to acquire or pay for any easement or right of constructing or maintaining the main pipe.

Swanston v. *Twickenham Local Board* (1879) 11 Ch. D. 838 followed and applied. METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY
Shearman J. 787

—— Gas company—Opening street to lay pipes—Obligation of company to reinstate—Accident from insufficiency of work—Liability of gas company - - **1181**
See GAS.

—— Port of London—Port rates—Exemption—Goods exported "coastwise"—Transhipment in Port of London for Rochester - - - - - **1201**
See DOCKS.

—— Rates.
See under RATES.

—— Revenue—Income tax—Foreign possessions—Trade carried on in City of London—Place of assessment - - - **429**
See REVENUE. 2.

LOST GRANT.
See under GRANT.

MAGISTRATES.
See under JUSTICES.

MAIN PIPES—Laying main pipes—London—Water—Metropolitan Water Board—Compulsory powers—Protection of railway company—Acquisition of easement
See LONDON. 2. **787**

MAINS—Various companies laying mains under streets—Application of doctrine of *Rylands* v. *Fletcher* as between—Statute—Construction of—Two Acts to be construed together as one Act - - **772**
See NUISANCE.

MANAGING DIRECTOR—Company.
See under COMPANY.

MANDAMUS—Rating—Mandamus to assessment committee to appoint valuer—Poor rate—Metropolis—Reduction of value of tramways through competition of motor omnibuses—Provisional list
See RATES. **481**

MANSLAUGHTER—Criminal law—Murder—Provocation necessary to constitute manslaughter—Prisoner sane, but hot-tempered and sensitive, with defective control and want of mental balance
See CRIMINAL LAW. 6. **1116**

MANUFACTURER—Motor car—General identification mark—Unauthorized user of motor cycle—Failure to keep a record—Offence - - - - - **165**
See MOTOR CAR.

MANURE—Revenue—Land values—Duties on—Unexhausted manure and tillages—Growing grass - - - **406**
See REVENUE. 8.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (VARIOUS POWERS) ACT, 1907, ss. 61, 96 - 787
See LONDON. 2.

MINE—*Coal Mine—Inspection—Inspector appointed by Workmen—Check Weigher—Eligibility—Coal Mines Act*, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 16—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 13.

By s. 13, sub-s. 1, of the Coal Mines Regulation Act, 1887, the persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may station a person (referred to in the Act as a "check weigher") at each place appointed for the weighing of minerals and for determining the deductions, in order that he may on their behalf take a correct account of the weight of the mineral or determine correctly the deductions; and by sub-s. 2 a check weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the management of the mine, but shall be authorized only to take the account or determine the deductions.

By s. 16, sub-s. 1, of the Coal Mines Act, 1911, the workmen employed in a mine may appoint two of their number or any two persons, not being mining engineers, who are or have been practical working miners with not less than five years' experience of underground work, to make periodical inspections of the mine:—

Held, that a person who holds the appointment of check weigher at a mine is not thereby disqualified from being appointed to make, and from making, inspections of the mine under s. 16 of the Act of 1911. DATE *v.* GAS COAL COLLIERIES, LIMITED - **Bailhache J. 1175**

2. —— *Coal Mine—Supply of Explosives—"Actual net cost to the owner"—Cost of Dis*

MINE—*continued.*
tribution—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 61, *sub-s.* 2.

Sect. 61, sub-s. 2, of the Coal Mines Act, 1911, provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner:—

Held, that the "actual net cost to the owner" includes not only the cost of carriage to the owner's magazine, but also the cost of distribution from the magazine to the workman.

Decision of a Divisional Court (Channell J. and Lord Coleridge J.) [1913] 3 K. B. 100 reversed. EVANS *v.* GWENDRAETH ANTHRACITE COLLIERY COMPANY, LIMITED - **C. A. 23**

—— Workmen's compensation — Industrial disease—Miners' nystagmus - **1068**
See EMPLOYER AND WORKMAN. 9.

MISCONDUCT — "Grave misconduct" — Relieving officer—Superannuation allowance - - - - - - - **959**
See POOR LAW.

MISREPRESENTATION— Infant — Contract—Money lent—Fraudulent misrepresentation as to age—Equitable relief - **607**
See INFANT. 1.

—— Principal and agent — Fraudulent misrepresentation — Knowledge of agent not imputed to principal - - **722**
See PRINCIPAL AND AGENT. 1.

MISTAKE—Insurance (Marine) — Concealment of material fact—Innocent mistake as to materiality—"Held covered" clause —Effect of - - - - - **1131**
See INSURANCE (MARINE). 3.

MONEY LENT—Infant—Contract—Fraudulent misrepresentation as to age—Equitable relief - - - - - - - **607**
See INFANT. 1

MORTGAGE—Lands Clauses Act — Mortgaged land—Part compulsorily taken—Residue injuriously affected by working of undertaking — Claim of compensation for - - - - - - - **259**
See LANDS CLAUSES ACT.

MOTOR CAR—*Manufacturer—General Identification Mark—Unauthorized User of Motor Cycle—Failure to keep a Record—Offence—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 2, *sub-s.* 4 (*b*) — *Motor Car Registration and Licensing Order*, 1903, *art. XII.*

Art. XII. of the Motor Car Registration and Licensing Order, 1903, provides that on every occasion on which the general identification mark (which by s. 2, sub-s. 4 (*b*), of the Motor Car Act, 1903, may be assigned to a manufacturer of motor cars) is used, the manufacturer shall keep a record of the distinguishing number on the identification plate and of the name and address of the person driving the car.

The appellants were manufacturers of motor cycles to whom a general identification mark had been assigned. Their stock of motor cycles was placed by them under the charge of a man in their employment. This man took out one of their motor cycles without their knowledge or authority and used it for his own private purposes. No record as required by art. XII. was kept on the occasion of this user of the motor cycle, and the appellants were in consequence charged with the offence of a breach of art. XII.:—

Held, that as the user of the motor cycle was unauthorized by and unknown to the appellants, the failure to keep a record did not render them guilty of the offence charged.

Strutt v. *Clift* [1911] 1 K. B. 1 distinguished. PHELON & MOORE, LIMITED *v.* KEEL **Div. Ct. 165**

MOTOR CAR REGISTRATION AND LICENSING ORDER, 1903, art. XII. - - **165**
See MOTOR CAR.

MOTOR OMNIBUSES—Poor rate—Metropolis—Rating—Reduction of value of tramways through competition of motor omnibuses — Provisional list — Mandamus to assessment committee to appoint valuer - - - - **481**
See RATES.

MURDER—Criminal law—Provocation necessary to constitute manslaughter—Prisoner sane, but hot-tempered and sensitive, with defective control and want of mental balance - - - - **1116**
See CRIMINAL LAW. 6.

NATIONAL INSURANCE.
See under INSURANCE (NATIONAL).

NEGLECT—Illegitimate child—Wilful neglect of—Liability of father - - **813**
See INFANT. 2.

—— "Unreasonably refuse or neglect"—Employer and workman—Compensation—Injury arising out of and in the course of the employment—Omission of workman to take proceedings to enforce claim—Right of approved society to take proceedings in his name - **706**
See EMPLOYER AND WORKMAN. 14.

NEGLIGENCE—Banker and customer—Cheque —Authority to sign per pro.—Misuse of authority—Forgery—Crossed cheque—Bank in good faith receiving payment for customer—Negligence—Ratification
See BILL OF EXCHANGE. **356**

—— Employer and workman—Compensation—Fatal accident—Death of workman—Claim by children—Payment of compensation—Action by widow for negligence—Option—Election - - **1055**
See EMPLOYER AND WORKMAN. 7.

NEGLIGENCE—*continued.*

—— Railway—Carriage of goods—Steam vessels—Carriage partly by sea and partly by land—Contract for through carriage—Exception of negligence—Reasonableness—Alternative rate at railway company's risk during land portion of carriage—Damage to goods during land carriage - - - - - - **554**
See RAILWAY. 2.

—— Shipping — Steerage passenger — Contract ticket — Exception not approved by Board of Trade - - - - - **731**
See SHIPPING. 6.

NOTICE—Adulteration—Notice by label—Sale to prejudice of purchaser—Cream mixed with boric acid - - - - - **242**
See ADULTERATION. 1.

—— Adulteration—Warranty—Notice to warrantor of intention to rely on warranty—Time within which notice must be sent - - - - - - - **173**
See ADULTERATION. 3.

—— Bankruptcy notice.
See under BANKRUPTCY.

—— Covenant — Restrictive covenant — Covenant restricting user of land—Purchaser having notice of restrictive covenant—Right of covenantee to enforce covenant against purchaser - - **642**
See COVENANT.

—— Justices—Case stated—Notice of appeal—Service on solicitor for respondent—Acceptance of service by solicitor - **803**
See JUSTICES. 2.

—— Workmen's compensation—Failure to give notice of accident—Reasonable cause—Death of workman due to accident—Action by widow against employers under Fatal Accidents Act, 1846—Verdict for defendants—Assessment of compensation - - - - - - **1020**
See EMPLOYER AND WORKMAN. 12.

NUISANCE—*Various Companies laying Mains under Streets—Application of Doctrine of* Rylands *v.* Fletcher—*Statute—Construction—Two Acts to be construed together as one Act.*

The plaintiffs were the owners of electric cables which had been laid under certain public streets. The defendants were the owners of hydraulic mains which had been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging the plaintiffs' cables. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read and construed together as one Act":—

Held, (1.) that the doctrine of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330 applies not only to cases in which the dangerous thing has escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursting of their mains notwithstanding that they had been guilty of no negligence.

Midwood v. *Manchester Corporation* [1905] 2 K. B. 597 followed.

(2.) That the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

Decision of Scrutton J. [1913] 3 K. B. 442 affirmed. CHARING CROSS ELECTRICITY SUPPLY COMPANY *v.* HYDRAULIC POWER COMPANY
C. A. 772

OBSTRUCTION — Highway—Premises abutting thereon — Right of access — Advertisement on wall of premises—Interference with private right—Damage—Injunction - - - - - - - **822**
See HIGHWAY. 3.

—— Streets — Regulations for preventing obstruction — Town Police Clauses Act, 1847 - - - - - - - **395**
See STREETS. 2.

OCCUPIER—Duty of occupier of shop to close for weekly half holiday—Whether a company can be occupier—Liability of company to conviction in penalty **315**
See SHOPS. 1.

OFFENCE—Licensing Acts—Sale of liquor without licence—Principal and agent—Sale by licensed agent on behalf of unlicensed principal- - - - **1141**
See LICENSING ACTS. 3.

—— Motor car—Motor cycle - - - **165**
See MOTOR CAR.

OLD AGE PENSIONS — Justices — Information—Old age pension—Married couple—Means—False representation—Two persons charged with same offence - **239**
See JUSTICES. 4.

OLD AGE PENSIONS ACT, 1908, s. 9, sub-s. 1
See JUSTICES. 4. **239**

OPTION—Employer and workman—Compensation—Election - - - - **1055**
See EMPLOYER AND WORKMAN. 11.

OUTWORKER—Minimum wage—False record of wages—Trade Boards Act, 1909 **537**
See EMPLOYER AND WORKMAN. 21.

PARLIAMENT — *Registration — Revising Barrister—To whom Lists of Parliamentary Voters to be delivered—Two Municipal Boroughs in Parliamentary Borough—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 19, 47; *Sched. B — Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 12, *sub-s.* 4.

Sect. 47 of the Representation of the People Act, 1867, provides as follows: "In any borough named in Schedules (B) and (C) to this Act annexed, which is or includes a municipal borough, the mayor of such municipal borough shall be the returning officer . . . ."

Sect. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, provides that: "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that municipal borough to which the writ of election is directed shall be the returning officer: Be it therefore enacted that—In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough, the mayor of which is the returning officer, shall be the town clerk who, under the Registration Acts, is to receive the revised lists of parliamentary voters from the revising barrister . . . .": —

Held, that where at the passing of the Redistribution of Seats Act, 1885, there was, within the boundaries of a parliamentary borough, only one municipal borough to the mayor of which the writ of election had always been directed, his right to continue to receive the writ of election and to act as returning officer is not affected by the fact that after the passing of the Act another municipal borough has been incorporated within the boundaries of the parliamentary borough which has a larger population than the older municipal borough. The town clerk of the older municipal borough is therefore entitled, under s. 12, sub-s. 4, of the Act of 1885, to receive the revised lists of parliamentary voters from the revising barrister.

The parliamentary borough of The Hartlepools was created by, and was named in Sched. (B) to, the Representation of the People Act, 1867. From 1867 till 1887 the municipal borough of Hartlepool was the only municipal borough within the boundaries of the parliamentary borough of The Hartlepools. In 1887 the municipal borough of West Hartlepool was incorporated, and from that time there were two municipal boroughs, namely, Hartlepool and West Hartlepool, within the boundaries of the parliamentary borough of The Hartlepools. Since 1867 the writ of election had always been directed to the mayor of Hartlepool who, at each election, acted as returning officer. At the revision of the lists of parliamentary voters in 1913 the town clerk of West Hartlepool claimed that the revised lists should be delivered to him inasmuch as West Hartlepool was the municipal borough having the largest population within the parliamentary borough, and therefore that the mayor of that borough was entitled, by virtue of s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, to receive the writ of election and to act as returning officer. The revising barrister having delivered the revised lists to the town clerk of Hartlepool as he had done in previous years, a rule was obtained calling upon the revising barrister to shew cause why he should not deliver them to the town clerk of West Hartlepool:—

Held, discharging the rule, that the right of the mayor of Hartlepool, to whom the writ of election had always been directed, had not been prejudicially affected, but had been preserved, by s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, and that as he was the returning officer the town clerk of Hartlepool was entitled to receive the revised lists from the revising barrister. REX *v.* MACASKIE - - **Div. Ct. 62**

PARTNERSHIP — *Trading Firm — Implied Authority of Partner to borrow Money for Partnership Purposes—What is a Trading Firm for this Purpose.*

A firm carrying on the business of cinematographic theatre proprietors is not a trading firm for the purposes of the rule that each member of a trading firm has implied authority to borrow money on the credit of the firm for partnership purposes. HIGGINS *v.* BEAUCHAMP **Div. Ct. 1192**

PASSENGER—Shipping—Steerage passenger—Contract ticket—Negligence—Exception not approved by Board of Trade
See SHIPPING. 6. **731**

PASTURE—Rights of common of pasture—Contentious user—Claim to ownership of soil—Prescription—Lost grant - **911**
See COMMON.

PATENT—*Patent Agent—Description by Unregistered Person—Offence—"Patent Agency"—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 84.

The Patents and Designs Act, 1907, s. 84, sub-s. 1, provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as a patent agent.

The appellant, who was not a registered patent agent, occupied premises on which were affixed the words "Patent Agency" and "Patents, Designs, and Trade Marks":—

Held, that the appellant had not described himself as a patent agent. HANS *v.* GRAHAM **Div. Ct. 400**

PATENT AGENT—Description by unregistered person—Offence—"Patent agency"
See PATENT. **400**

PENALTY—Shop—Whether a company can be occupier—Liability of company to conviction in penalty - - - **315**
See SHOPS. 1.

PILOTAGE—Shipping—Compulsory pilotage—Ship navigating in compulsory pilotage district for the purpose of "making use" of any port—Waiting outside port for orders - - - - - - 1135
See SHIPPING. 5.

PIPES—London—Water—Laying main pipes
See LONDON. 2. 787

POLICE—Streets—Regulations for preventing obstruction—Town Police Clauses Act, 1847 - - - - - - - 395
See STREETS. 2.

POLICY—Insurance (Marine).
See under INSURANCE (MARINE).

POOR LAW—*Relieving Officer—Superannuation Allowance—Resignation "in consequence of any offence of a fraudulent character, or of grave misconduct"—Irregularities in dealing with Money not of a Fraudulent Character—Poor Law Officers' Superannuation Act*, 1896 (59 & 60 *Vict. c.* 50), *s.* 7.

By s. 7 of the Poor Law Officers' Superannuation Act, 1896, an officer or servant in the service or employment of the guardians of a union who ceases to hold office "in consequence of any offence of a fraudulent character or of grave misconduct" shall forfeit all claim to any superannuation allowance under the Act in respect of his previous service :—

Held, that the words "grave misconduct" are not limited by the previous words "any offence of a fraudulent character" so as to be confined to grave misconduct of a fraudulent character, but that in order to constitute "grave misconduct" the misconduct must be of a higher standard than that which would justify an employer in dismissing his servant and must be of a very serious character.

The plaintiff was employed by the defendants as (inter alia) relieving officer and collector. For several years he had been in the habit of using money received by him as the defendants' collector for his own purposes, instead of paying it into their account, and, with the aid of his salary, had paid quarterly to the defendants' account the amount of the money so used by him. Upon being told that the practice must cease he nevertheless continued it, and in particular he did not pay into the guardians' account until June 5, 1912, a sum of money he had collected in April, 1912, and then only by the aid of money he borrowed for the purpose. A sum of money which he had collected during June, 1912, ought to have been paid into the guardians' account on or before July 4, 1912, but the plaintiff failed to make this payment. He also debited the defendants in his books with the sum of 3*s.* a week for thirteen weeks for relief to a man who was in fact dead; and he debited the defendants with a sum of 8*s.* due to the overseer of another union, but did not in fact pay the 8*s.* until about nine months later. There was no suggestion of fraud against the plaintiff, who resigned his office in consequence of these irregularities :—

Held, that although the plaintiff had not committed any offence of a fraudulent character he had been guilty of "grave misconduct" within

POOR LAW—*continued.*

the meaning of the section and was therefore not entitled to any superannuation allowance under the Act in respect of his previous service in the offices of relieving officer and collector. POAD *v.* SCARBOROUGH GUARDIANS - - C. A. 959

POOR RATE.
See under RATES.

PORT OF LONDON ACT, 1908, s. 13 - 1201
See DOCKS.

PORT OF LONDON (PORT RATES ON GOODS) PROVISIONAL ORDER ACT, 1910, Schedule, s. 9 - - - - 1201
See DOCKS.

POSTERS—Handbill—Cinematograph film—Infringement of copyright - - 1171
See COPYRIGHT.

PRACTICE — *Writ — Special Indorsement — Liquidated Demand—Application for Leave to sign Final Judgment—Sufficiency of Affidavit in support—Order XIV., r.* 1.

By Order XIV., r. 1, "Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed . . . ."

In an action in which the writ was specially indorsed with a claim for £ balance of an account for goods sold and delivered, an application for leave to sign final judgment under Order XIV. was supported by the affidavit of a person who stated that he was a clerk and was in the employ of the plaintiffs, and that he was duly authorized by them to make the affidavit, and added that it was within his own knowledge that the debt was incurred and that the debt, to the best of his knowledge and belief, still remained unpaid. The affidavit contained no statement of the means of knowledge of the matters referred to possessed by the deponent :—

Held, that the affidavit was a reasonable compliance with the requirements of Order XIV., r. 1.

Order of Rowlatt J. affirmed. PATHÉ FRÈRES CINEMA, LIMITED *v.* UNITED ELECTRIC THEATRES, LIMITED - - - C. A. 1253

—— Costs.
See under COSTS.

—— Discovery.
See under DISCOVERY.

—— Joinder.
See under JOINDER.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

PRESCRIPTION—Common of pasture, Rights of—Contentious user—Claim to ownership of soil—Lost grant - - - 911
See COMMON.

PRESUMPTION — Lost grant — Common of pasture, Rights of - - - 911
See COMMON.

—— Lost grant—Ferry—Franchise - - 918
See FERRY.

PRINCIPAL AND AGENT—*Fraudulent Misrepresentation—Knowledge of Agent not imputed to Principal.*

The defendant made a statement to the plaintiff's agent, which was untrue to the knowledge of the defendant and of the agent, in order to induce the plaintiff, whom the defendant did not believe to know its untruth, to act upon it. The agent communicated the defendant's statement to the plaintiff, who, relying on the truth of the statement, acted on it to her damage. In an action by the plaintiff against the defendant to recover damages for false and fradulent misrepresentation :—

Held, that the knowledge of the plaintiffs' agent of the untruth of the defendants' statement could not be imputed to the plaintiff, and that the plaintiff was, therefore, entitled to recover damages from the defendant. WELLS *v.* SMITH
Scrutton J. 722

2. —— *Sale of Goods—Broker receiving Del Credere Commission—Non-performance of Contract by Buyer—Solvency of Buyer—Liability of Broker.*

The obligation of a del credere agent on a sale of goods to an undisclosed buyer does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. It does not extend further than that, where there is an ascertained amount or certain sum due as a debt from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission.

Grove v. *Dubois* (1786) 1 T. R. 112 considered.

Decision of Pickford J. [1914] 1 K. B. 449 affirmed. THOMAS GABRIEL & SONS *v.* CHURCHILL & SIM - - - - C. A. 1272

—— Licensing Acts—Sale of liquor without licence—Sale by licensed agent on behalf of unlicensed principal—Offence
See LICENSING ACTS. 3. 1141

—— Workmen's compensation—Sub-contracting—Work undertaken by the principal 1013
See EMPLOYER AND WORKMAN. 19.

PRINCIPAL AND SURETY—Note given for goods supplied to makers—Oral agreement by surety — Admissibility of evidence—Bill of exchange - 907
See PROMISSORY NOTE.

PRIVILEGE — Discovery — Documents coming into existence in contemplation of litigation—Documents obtained for the purpose of advice from solicitor - 1256
See DISCOVERY. 1.

PRIVILEGE—*continued.*

—— Inspection of documents—Transcript of shorthand notes of proceedings in previous actions - - - - 86
See DISCOVERY. 2.

—— Libel—Annual meeting of licensing justices—Application for renewal of licence—Notice of objection—Privileged occasion
See DEFAMATION. 275

PROHIBITION—Licensing Acts—Renewal of on-licence — Objection to renewal — Reference of question of renewal to compensation authority — Report of licensing justices good on its face—Allegation that report wrongly made to compensation authority - - 349
See LICENSING ACTS. 2.

—— Revenue—Income tax—Place of assessment
See REVENUE. 2. 429

PROMISSORY NOTE—*Note given for Goods supplied to Makers—Surety—Oral Agreement that Surety should not be liable if Goods supplied were not equal to Sample—Admissibility of Evidence—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 21, *sub-s.* 2 (*b*).

The plaintiffs sued the defendants on a promissory note made by the defendant company and indorsed at the request of the plaintiffs by the defendant D., who was president of the defendant company. The note was given in part payment of goods supplied by the plaintiffs to the defendant company. The defendant company did not appear at the trial, but the defendant D. appeared and set up an oral agreement made by him with the plaintiffs, contemporaneous with the promissory note, that he was not to be called upon to pay if the goods supplied to the defendant company should be unequal to sample. The goods were retained by the defendant company, but D. proved that they were unequal to sample :—

Held, that the oral agreement relied upon by D. not being an agreement suspending the coming into force of the contract contained in the promissory note, but being an agreement in defeasance of that contract, evidence in support of it was inadmissible, and, therefore, that D. was liable on the promissory note. HITCHINGS AND COULTHURST COMPANY *v.* NORTHERN LEATHER COMPANY OF AMERICA AND DOUSHKESS - - - - - Bailhache J. 907

PROSECUTION—Fraudulent conversion of property — First disclosure of acts by accused as voluntary witness in cross-examination in civil action—Protection from prosecution - - - - 848
See CRIMINAL LAW. 5.

PUBLIC HEALTH—Streets.
See under STREETS.

—— Unsound meat—Information by sanitary inspector — Evidence of appointment and authority to prosecute—Point as to evidence of authority not raised before justices - - - - - 160
See JUSTICES. 3.

PUBLIC POLICY — Contract — Consideration — Policy of Bankruptcy Acts—Contract for good consideration by undischarged bankrupt to pay in full debt provable in bankruptcy—Validity of contract *See* CONTRACT. **36**

RAILWAY—*Carriage of Goods—Condition in Consignment Note—Goods received and held by Railway Company "subject to general lien for any . . . . moneys due to them from the owners of such goods upon any account"—Construction of Condition.*

The plaintiffs, who were the vendors of goods, authorized their agents to deliver the goods to the defendants for carriage to the buyers upon the terms of a consignment note which contained the following condition :—"All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses."

The plaintiffs' agents accordingly delivered the goods to the defendants for carriage to the buyers. The plaintiffs had paid all freight and charges in respect of the carriage of the goods. While the goods were still in possession of the defendants as carriers, the plaintiffs heard of the insolvency of the buyers, and, by their agents, gave notice of stoppage in transitu to the defendants. The buyers, who had meanwhile become owners of the goods by indorsement and delivery of the bill of lading, were indebted to the defendants in the sum of 1171*l.*, which did not include any freight or other charges in respect of the goods. The defendants claimed that under the condition in the consignment note they had a lien as against the plaintiffs in respect of the 1171*l.* due from the buyers :—

Held, that the condition ought to be read as meaning that the defendants were entitled to a lien as against the plaintiffs in respect of the money due from the buyers to the defendants, and not as merely meaning that the defendants should not be bound to deliver the goods to the consignees, the buyers, until the consignees had discharged any debt due in respect of all goods which had been carried for them by the defendants.

Decision of Pickford J. [1913] 3 K. B. 357 reversed. UNITED STATES STEEL PRODUCTS COMPANY *v.* GREAT WESTERN RAILWAY COMPANY - - - - - - - **C. A. 567**

2. —— *Carriage of Goods—Steam Vessels—Carriage partly by Sea and partly by Land—Contract for through Carriage—Exception of Negligence—Reasonableness—Alternative Rate at Railway Company's Risk during Land Portion of Carriage—Damage to Goods during Land Carriage—Great Eastern Railway (Steamboats) Act*, 1863 (26 *&* 27 *Vict. c. ccxxv.*), *s.* 5—*Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7.

The defendants owned steamers trading between Antwerp and Harwich, and they also owned a line of railway from Harwich to North Woolwich. Their special Act, which empowered them to maintain and work the steamers, applied the provisions of the Railway and Canal Traffic Act, 1854, to the steamers and the traffic carried thereon. The plaintiffs were in the habit of having goods consigned to them from Antwerp to North Woolwich via Harwich by the defendants' steamers and railway, and they had signed an agreement requesting that all goods for which there were alternative rates delivered by them or on their account at any of the defendants' stations for carriage by railway might be carried at the reduced rates, and in consideration thereof the plaintiffs agreed to relieve the defendants from all liability for loss, damage, misdelivery, delay, or detention except upon proof that such loss, &c., arose from wilful misconduct on the part of the defendants' servants. Goods of the plaintiffs were shipped on the defendants' steamer at Antwerp for delivery at North Woolwich Station via Harwich at the reduced rate under a bill of lading which had "owner's risk" upon it, and which exempted the defendants from liability for (inter alia) all accidents, loss, and damage whatsoever from any act, neglect, or default of the pilot, master, officers, engineers, or crew in the management or navigation of the ship or otherwise. The goods were damaged during the land journey between Harwich and North Woolwich owing to the negligence of the defendants' servants. There was a higher rate for goods of the same class from Antwerp to North Woolwich under which the goods would have been carried, so far as the land portion of the journey was concerned, at the defendants' risk as common carriers, but the plaintiffs would have had to accept a bill of lading for the sea portion of the journey containing the same negligence clause as that in the bill of lading under which the goods were actually carried :—

Held, that there was evidence to support the finding of a county court judge that, as it was one journey from Antwerp to North Woolwich, and as during the sea portion of that journey there was no alternative rate under which the plaintiffs could have had the goods carried at the defendants' risk as common carriers, the condition relieving the defendants from liability for negligence was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, and that therefore the defendants were liable for the damage to the goods.

The decision of a Divisional Court [1913] 3 K. B. 15 affirmed. WESTERN ELECTRIC COMPANY, LIMITED *v.* GREAT EASTERN RAILWAY COMPANY - - - - - - **C. A. 554**

3. —— *Railway and Canal Commission—Practice—Joinder of Complaints against several Defendants in one Application — Registrar — Power of, to award Costs in Interlocutory Proceedings—Railway and Canal Commission Rules*, 1889, *rr.* 1, 53.

An applicant in the Railway and Canal Commission Court is entitled to join any number of

RAILWAY—*continued.*
defendants and causes of action in one application subject to the power of the Court to strike out any party or matter the joinder of which tends to embarrass or delay, and to order separate trials of such of the issues raised as cannot be conveniently tried together.

So *held* by Bankes J. and the Hon. A. E. Gathorne-Hardy, Sir J. Woodhouse doubting.

The effect of r. 53 of the Railway and Canal Commission Rules, 1889, is to delegate to the registrar the power to award costs of interlocutory applications which was conferred on the Commissioners by s. 19 of the Railway and Canal Traffic Act, 1888. SMITH, STONE & KNIGHT, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY
Railway and Canal Commission 1195

4. —— *Railway Purposes—Land compulsorily taken—Special Adaptability for Railway Purposes—Measure of Compensation.*

Part of the main line of a railway was laid upon land in which the railway company had only a leasehold interest. The lease being about to expire the company obtained statutory powers to acquire it compulsorily. There were in the immediate neighbourhood two collieries, the only means of carrying coals from which to their port of shipment was over this particular piece of railway, and if on the expiry of the lease it had been offered for sale in the market it was possible that the colliery owners might have competed with the railway company for its purchase :—

Held, that for the purpose of assessing the compensation payable to the landowner the arbitrator was entitled to take into consideration the special adaptability for railway purposes arising out of the possible competition between the colliery owners and the railway company, but not that arising from the fact of the existence upon the land of an integral part of the railway company's main line.

Per Rowlatt J. : Where there is no competition or where the price has been raised by biddings to a point at which competition ceases there is no room for the application of the doctrine of special adaptability. SIDNEY *v.* NORTH EASTERN RAILWAY COMPANY - **Div. Ct. 629**

—— London — Water — Metropolitan Water Board—Compulsory powers — Laying main pipes — Protection of railway company—Acquisition of easement - **787**
See LONDON. 2.

—— Railway porter—Workmen's compensation —Accident arising out of and in course of employment—Incapacity for work—Light work given by employers at old rate of wages—Temporary cessation of work owing to strike—Absence of right to compensation - - - **1034**
See EMPLOYER AND WORKMAN. 3.

RAILWAY AND CANAL COMMISSION RULES, 1889, rr. 1, 53 - - - - 1195
See RAILWAY. 3.

RATES—*Poor Rate—Metropolis—Rating—Reduction of Value of Tramways through Competition of Motor Omnibuses—Provisional List—Mandamus to Assessment Committee to appoint Valuer—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47.

The London County Council sent a requisition to the Islington overseers requiring them to send forthwith to the assessment committee a provisional valuation list for the parish containing the hereditament mentioned in the schedule to the requisition, namely, their tramway undertaking within the parish, on the ground that it had been reduced in value within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, owing to the competition of motor omnibuses. The requisition came before the assessment committee, whose determination thereon, as stated in a letter from their clerk, was as follows: "My committee having fully considered and taken advice upon the matter have come to the conclusion that there is no prima facie evidence of such a reduction as is contemplated by the section and therefore decline to accede to the council's request." The London County Council thereupon obtained a rule nisi for a mandamus directed to the assessment committee requiring them to make a provisional list, and they filed affidavits in which it was stated that since September 30, 1911, there had been a continuous reduction in each half-year of the gross receipts from the tramways in the parish and a great reduction in the receipts per car mile. An affidavit was filed on behalf of the assessment committee in which it was stated that the receipts from the tramways in the parish shewed an increase in the two years 1910-11 and 1911-12 over those in 1909-10, the year in which the quinquennial valuation list was made, and a decrease in 1912-13, which decrease, however, left the receipts in that year higher than those in 1909-10 ; and that in each year there was a continuous increase in car miles :—

Held by the Court of Appeal (Kennedy and Swinfen Eady L.JJ., Vaughan Williams L.J. dissenting), reversing the decision of the Divisional Court, that no prima facie case of a reduction in value resulting from a cause of a permanent as distinguished from a temporary or fluctuating nature had been made out, and that therefore the assessment committee were right in declining to accede to the council's request.

Held, further, that the words "increased or reduced in value" in s. 47 meant increased or reduced in value in the course of the year as compared with the value of the hereditament appearing in the quinquennial valuation list, or in that list as revised by a supplemental list, and not with the value as at the commencement of the year, and that upon this ground also no prima facie case had been made out for a provisional list.

Per Kennedy L.J. : The assessment committee, before appointing a person to make a provisional list upon the requisition of a ratepayer who alleges a reduction in value of his hereditament from a cause within the meaning of s. 47, are bound to inquire whether there is a prima facie case for the existence of such reduction in value as a condition precedent to the exercise of their

RATES—*continued.*
jurisdiction under the section; and the Court ought not to interfere with the conclusion of the assessment committee upon matters of fact unless it is satisfied that they have gone wrong in point of law or that they have misunderstood or misjudged on material points the evidence before them.

Per Swinfen Eady L.J.: The question whether the ratepayer has placed before the assessment committee such facts as constitute a prima facie case for a provisional list under s. 47 is to be decided in the first instance by the assessment committee, and the Court will not readily review their decision unless it involves some mistake in law. Sect. 47 does not, however, make their decision on the question of fact absolutely conclusive, so that it cannot be questioned or overruled. REX *v.* ISLINGTON ASSESSMENT COMMITTEE, *Ex parte* LONDON COUNTY COUNCIL - - - - - C. A. 481

—— Port rates—Exemption—Port of London Acts—Goods exported "coastwise"—
See DOCKS. 1201

—— Railway—Carriage of goods.
See under RAILWAY.

RATIFICATION — Cheque — Crossed cheque — Bank in good faith receiving payment for customer—Negligence - 356
See BILL OF EXCHANGE.

RECOGNIZANCES — Apprehended breach of peace — Recognizances to be of good behaviour—Jurisdiction of justices to order—Conditions of jurisdiction 229
See JUSTICES. 1.

RECORD — Motor car—Manufacturer—General identification mark—Unauthorized user of motor cycle — Failure to keep a record—Offence - - - 165
See MOTOR CAR.

REDEMPTION — Workmen's compensation — Weekly payment—Where the incapacity is permanent—Stability—Basis of computation—Infant - - - 1047
See EMPLOYER AND WORKMAN. 20.

REDISTRIBUTION OF SEATS ACT, 1885, s. 12, sub-s. 4. - - - - - - 62
See PARLIAMENT.

REFEREE — Revenue — Land values — Provisional valuation—Appeal from referee—Order as to costs—Rule of Court 192
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REGISTRAR—Dentist—Discretion of Registrar of Companies to refuse registration—Unlawful object - - - - 1161
See DENTIST.

—— Railway and Canal Commission—Power of registrar to award costs in interlocutory proceedings - - - - - 1195
See RAILWAY. 3.

REGISTRAR—*continued.*
—— Workmen's compensation — Agreement to redeem weekly payments — County court—Duty of registrar to record—Genuineness of agreement—Adequacy of amount - - - - - 266
See EMPLOYER AND WORKMAN. 6.

—— Workman's compensation—Examination of witness before registrar—Delegation of authority—Practice—Evidence. - 989
See EMPLOYER AND WORKMAN. 16.

REGISTRATION—Dentist—Unregistered person — Company proposing to carry on business of dentistry by unregistered persons—Unlawful object - 1161
See DENTIST.

—— Patent agent—Description by unregistered person—Offence—"Patent agency"
See PATENT. 400

—— Voters.
See under PARLIAMENT.

—— Workmen's compensation—Agreement to pay weekly sum—Refusal of registration—Jurisdiction - - - 1001
See EMPLOYER AND WORKMAN. 5.

—— Workmen's compensation—Seaman—Ship registered in United Kingdom"—Registry cancelled - - - 699
See EMPLOYER AND WORKMAN. 17.

RELIEVING OFFICER—Superannuation allowance—"Grave misconduct" - 959
See POOR LAW.

REMUNERATION—Remuneration by share in gross earnings—Employer and workman — Compensation — Fisherman — Workman — Seaman—Fishing vessel—Share of stocker money — Running agreement - - - - - 1039
See EMPLOYER AND WORKMAN. 13.

RENEWAL—Licence—Licensing Acts.
See under LICENSING ACTS.

REPAIR—Bridge—Canal made across highway—Highway carried by bridge over canal—Statutory duty to keep bridge "in sufficient repair"—Standard of repair
See BRIDGE. 1

REPRESENTATION OF THE PEOPLE ACT, 1867, ss. 19, 47; Sched. B - - 62
See PARLIAMENT.

RESTAURANT — Kitchen of restaurant — Kitchenmaid—Shop assistant - 325
See SHOPS. 2.

RESTRAINT OF PRINCES—Shipping—Charter-party - - - - - - - 45
See SHIPPING. 3.

RESTRAINT ON ANTICIPATION — Husband and wife—Separate property—Date of contract—"Separate property which at that time or thereafter she is restrained from anticipating" - 73
See HUSBAND AND WIFE.

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See under COVENANT.

RETROSPECTIVE OPERATION — Workmen's compensation—Review of weekly payment - - - - - - - **974**
See EMPLOYER AND WORKMAN. 18.

RETROSPECTIVE OPERATION OF ACT—Deeds of Arrangement Act, 1913 - **1095**
See BANKRUPTCY. 3.

REVENUE—*Income Tax—Company resident in England—Trade carried on Abroad—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, 1st Case, 5th Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2; *Sched. D.*

A company incorporated in the United Kingdom carried on from there an hotel business in Egypt till 1908. In that year they altered their articles of association by resolutions which provided that all the company's affairs and business in Egypt should be carried on and managed by a local board to the exclusion of any board of directors other than the local board. The local board were to meet only in Egypt, were to be affected by resolutions of general meetings held in Egypt only, and were to exercise all the powers of the company requisite for the Egyptian business. They were to retain the profits in Egypt and remit to England what might be necessary to pay dividends to shareholders resident here, and for expenses incurred by the London board. The London board were to keep accounts, recommend dividends, and control the capital. The only business carried on by the company was the Egyptian hotel business. The resolutions were strictly acted upon from the date of their confirmation, and the company appealed from an assessment to income tax for the year ending April 6, 1909 :—

Held (reversing the decision of Horridge J.), that the powers still exercised by the London board were only powers to deal with profits after they were made, and did not refer to the trade of the company; that no part of the trade was now carried on in the United Kingdom, and that the company was not assessable to income tax since the date of the resolutions, except in respect of profits remitted to this country. EGYPTIAN HOTELS, LIMITED *v.* JAMES MITCHELL
C. A. 118

2. —— *Income Tax—Foreign Possessions—Trade carried on in City of London—Place of Assessment—Jurisdiction to assess at Place of Residence—Prohibition—Grounds of granting Rule—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 106.

Rule nisi to the Kensington Income Tax Commissioners to shew cause why a writ of prohibition should not issue to prohibit them from proceeding on an assessment to income tax under Sched. D whereby A. was assessed in respect of profits of foreign property. A. carried on business in the city of London although he resided in Kensington; and he contended that under s. 106 of the Income Tax, 1842, he was liable to assessment in the city of London only :—

Held, reversing the decision of Bray, Avory, and Lush JJ. [1913] 3 K. B. 870, that the grounds of the rule ought to be amended by stating s. 106 of the Income Tax Act, 1842, as a further ground; that under that section A. was assessable in the city of London only; and that prohibition would lie. REX *v.* KENSINGTON INCOME TAX COMMISSIONERS - - **C. A. 429**

3. —— *Income Tax—Humber Conservancy—Statutory Payments to, whether taxable—Profits of "inland navigation"—"Annual profits and gains"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. A, No. III., r.* 3; *s.* 100, *Sched. D, 6th Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D—Humber Conservancy Act*, 1907 (7 *Edw.* 7, *c. xcvii.*).

The Humber Conservancy Board were the lessees of certain foreshores and the bed of the river Humber, but they possessed no docks or wharves. They exercised under their statute the ordinary conservancy duties, their receipts consisting of shipping and registration dues and certain statutory contributions amounting in the aggregate to 4300*l.* per annum payable to them by four railway companies and a canal company. The Board admitted that all their income other than the contributions from those five bodies fell to be included in the income tax computation of their profits :—

Held, that the contributions in question were also liable to income tax as being either profits from "an inland navigation," within s. 60, Sched. A, No. III., r. 3, of the Income Tax Act, 1842, or as being "annual profits and gains" within s. 2, Sched. D, of the Income Act, 1853. HUMBER CONSERVANCY BOARD *v.* BATER
Scrutton J. 449

4. —— *Income Tax—Income of Married Woman living with her Husband—Charge of Income Tax—Deduction of Tax at Source—Claim for Repayment—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 45.

A married woman living with her husband was the registered proprietor of shares in an English company and the holder of foreign bonds. Income tax was deducted by the company from the dividends on the shares, under s. 54 of the Income Tax Act, 1842, and by the bankers who paid the interest on the bonds, under s. 2 of the Income Tax (Foreign Dividends) Act, 1842, and was paid by the company and the bankers to the proper officer for the receipt of taxes.

The first proviso to s. 45 of the Income Tax Act, 1842, provides that "the profits of any married woman living with her husband shall be deemed the profits of the husband and the same shall be charged in the name of the husband and not in her name" :—

Held, that the tax was not charged upon the married woman contrary to the provisions of s. 45, but was charged upon the company and the bankers, and that therefore the amount of the tax was properly retained by the Crown and could not be recovered by her. PURDIE *v.* REX
Rowlatt J. 112

5. —— *Income Tax—Sched. D—Trade Profits—Deductions—Money exclusively expended for Purposes of Trade—Voluntary Gratuity to*

REVENUE—*continued.*

retiring Law Reporter — Finding of Fact — Evidence.

The respondents, the Incorporated Council of Law Reporting for England and Wales, were a limited company incorporated under s. 23 of the Companies Act, 1867, with no power to pay any portion of their earnings to their members by way of profits. In 1911 the respondents gave a gratuity of 1500*l.* to one of their reporting staff on his retirement after long service. The payment was not made under any contract between the respondents and the reporter, but it was within the powers conferred by the respondents' memorandum and articles of association, and it was the habit of the respondents, to give gratuities to reporters on retirement after long service. The 1500*l.* was included in the respondents' trading accounts for 1911 as an item of expenditure, and an additional assessment to income tax under Sched. D was in consequence made on the respondents of 500*l.*, i.e., one-third of 1500*l.*, in respect of their profits for that year. On appeal by the respondents to the Commissioners, they held that the 1500*l.* was allowable to the respondents as a business expense in calculating the profits of the year for income tax purposes.

On a case stated by the Commissioners :—

Held, that the question whether the 1500*l.* could be deducted from the respondents' profits as being "money wholly and exclusively laid out or expended for the purposes" of the respondents' business, within the meaning of r. 1 applying to first and second cases in Sched. D, was a question of fact for the Commissioners, and that, as there was evidence to support their finding of fact, their decision was final.

Dictum of Evans P. in *Usher's Wiltshire Brewery* v. *Bruce* [1914] 2 K. B. 891 considered. SMITH *v.* INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES
Scrutton J. 674

6. —— *Increment Value Duty—Sale of Fee Simple—Gross Value—Sale in "Open Market" by willing Seller—Special Adaptability to Needs of particular Purchaser—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

Sect. 25, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realize."

The fee simple of a house to persons desirous of using it as a private residence was worth not more than 750*l.* and the provisional valuation fixed the gross value at that sum. The house, however, adjoined a nurses' home the trustees of which desired to extend their premises, it was advantageous to them to pay at least 1000*l.* for the house in question, and they in fact actually purchased it for that amount.

On the occasion of the sale the valuation gave 1000*l.* as the gross value of the house for

REVENUE—*continued.*

the purposes of the above sub-section. The referee and Scrutton J. held that on both valuations the gross value ought to be 1000*l.* and site value 200*l.* :—

Held (affirming the decision of Scrutton J. [1914] 1 K. B. 339), that on a sale in an "open market" it must be assumed that intending purchasers were aware of the fact that the nurses' home were prepared to give a high price for the house, and that its value would thereby be increased ; that it could not be assumed that the nursing home would only have to make one bid beyond the 750*l.* ; and that, whether the vendor were in fact a "willing seller" or not, the existence of a willing seller must be assumed for the purposes of the sub-section. INLAND REVENUE COMMISSIONERS *v.* CLAY. INLAND REVENUE COMMISSIONERS *v.* BUCHANAN
C. A. 466

7. —— *Land Values—Duties on—Valuation—Assessable Value—Divestment—Buildings—Structures — Embankment — Improvement of Value of Land as Building Land or for Purposes other than Agriculture—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25, *sub-ss.* 1, 2, 4 (*a*), (*b*), (*e*).

Land was protected from the sea by two embankments or sea walls, the one dating from the time of the Romans, the other constructed by the owners of the land in question and adjoining lands under private Acts of Parliament early in the nineteenth century. If the embankment had not been there the land would have been flooded at every spring tide, and of little or no value :—

Held, that the embankments were not buildings or structures used in connection with such buildings within the meaning of s. 25, sub-s. 2, and that the owner was not entitled to have the land valued for the purposes of duties as if divested of the embankments ; nor was he entitled to any deductions in respect of the embankments as being works executed for the purpose of improving the value of the land as building land or for purposes other than agriculture, or as works executed for improving the value of the land for agriculture which had actually improved its value as building land or for other purposes under sub-s. 4.

Meaning of the expression "building land" discussed.

Decision of Scrutton J. affirmed. WAITE'S EXECUTORS *v.* INLAND REVENUE COMMISSIONERS - - - - - - **C. A. 196**

8. —— *Land Values, Duties on—Valuation of Land—Agricultural Land—"Gross Value"—"Total Value"—"Full Site Value"—"Assessable Site Value" — Deductions — Unexhausted Manure and Tillages—Growing Grass—"Structure" — Road — Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 25.

In the valuation of land under the Finance (1909-10) Act, 1910, for the purposes of duties on land values the "gross value of land" as defined by s. 25, sub-s. 1, of the Act, and the "total value" as defined by s. 25, sub-s. 3, include any sum attributable to the value of

REVENUE—*continued.*

unexhausted manure or tillages performed, and this sum cannot be deducted under s. 25, sub-s. 4 (*d*), in arriving at the "assessable site value" of the land. The "gross value" also includes the value of all unsevered vegetable growths, whether natural or artificial, transitory or permanent, but the value of these vegetable growths must be deducted from the "gross value" in order to arrive at the "full site value" of the land as being "other things growing thereon" within the meaning of s. 25, sub-s. 2.

A road may be a "structure" within the meaning of s. 25, sub-s. 2.

The value of land laid down from arable in grass by the tenant cannot be deducted from the "total value" in arriving at the "assessable site value" as it is not "a matter personal to the occupier" within s. 25, sub-s. 4 (*d*). INLAND REVENUE COMMISSIONERS *v.* SMYTH

Scrutton J. 406

9. —— *Land Values, Duties on—Valuation of Land for Purposes of the Act—Agricultural Land—Value for Agricultural Purposes—Value of Land for Sporting Purposes—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 26, *sub-s.* 1.

In ascertaining the value of agricultural land, under s. 26, sub-s. 1, of the Finance (1909-10) Act, 1910, the value of the land for sporting purposes is not to be included in the "value of the land for agricultural purposes." INLAND REVENUE COMMISSIONERS *v.* HUNTER

Scrutton J. 423

10. —— *Land Values—Provisional Valuation—Appeal from Referee—Order to pay Costs—Rule of Court—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 3.

By s. 33, sub-s. 1, of the Finance (1909-10) Act, 1910, any person aggrieved may appeal against a determination by the Commissioners of Inland Revenue of the total value or site value of any land. By sub-s. 2 the appeal is to be referred to a referee. By sub-s. 3 the referee is to determine any matter referred to him in consultation with the Commissioners and the appellant, and may order that any expenses incurred by the Commissioners be paid by the appellant; and "any order of a referee as to expenses may be made a rule of Court."

On the hearing of an appeal under this enactment the referee made an order "that the costs of the appellant incidental to this appeal be borne by the Commissioners."

On a motion to make this order a rule of Court:—

Held, that the order was good and could be made a rule of Court.

Simpson v. *Inland Revenue Commissioners* [1914] 2 K. B. 842 distinguished. MATTHEWS *v.* INLAND REVENUE COMMISSIONERS

Scrutton J. 192

11. —— *Licensed Premises — Increase of Duty—Lease—Sub-lease—Liability of Lessor to pay Proportion of Increase—"Held under a lease"—Licence-holder—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 46—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that "where the licensed premises are held under a lease" which does not contain any covenant by the lessee to obtain intoxicating liquor from the lessor, the lessee shall be entitled to recover from the lessor a proportion of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held by Kennedy L.J. and Bray J., Lord Sumner dissenting, that this provision does not apply to the case of a lessee of licensed premises who has sub-let the premises and who is not himself the holder of the licence.

Judgment of the Divisional Court [1913] 3 K. B. 427 affirmed. WATNEY, COMBE, REID & CO., LIMITED *v.* BERNERS - - **C. A. 288**

12. —— *Reversion Duty—Determination of Lease—Agreement to grant a Lease on Performance of Conditions—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13.

A tenant of premises under a lease being desirous of surrendering it and obtaining a new lease, it was on April 5, 1910, agreed between the tenant and the lessor that the lessor should upon the performance of certain conditions by the tenant grant to him such lease for the proposed term, which was to commence as from Lady Day, 1910. The agreed conditions were not in fact performed until after April 29, 1910, the date of the coming into force of the Finance (1909-10) Act, 1910. In June, 1910, the lessor granted to the tenant the new lease in pursuance of the agreement. The Crown thereupon claimed from the lessor reversion duty on the benefit accruing to him by the determination of the old lease after the coming into force of the Act:—

Held, that as the tenant had not performed the conditions before April 29, 1910, he was not entitled at that date to specific performance of the agreement to grant the lease, and could not then be treated, under the doctrine of *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9, as being in the same position as if the lease had been granted; that the agreement for the lease, not being under the circumstances equivalent to a lease, did not operate as a surrender by operation of law of the old lease; that the old lease was not determined until the grant of the new one; and that the lessor was consequently liable to reversion duty. INLAND REVENUE COMMISSIONERS *v.* EARL OF DERBY - - **Horridge J. 1186**

13. —— *Stamp—Conveyance on Sale—Agreement for Purchase of Property—Sub-sales of Part—Conveyances direct by Vendor to Sub-purchasers—Conveyance of Remaining Portion to Purchaser—Ad valorem Duty—Stamp Act*, 1891 (54 *& 55 Vict. c.* 39), *ss.* 54, 58, 59.

The appellant agreed to purchase certain property from F., the consideration being (1.) a payment of 45,000*l.*, and (2.) the assumption by the appellant of certain charges of which the agreed amount was 997*l.* 5*s.* 9*d.* The appellant, not having obtained a conveyance, contracted to sell portions of the property to sub-purchasers, and, in consequence, F. by divers conveyances conveyed those portions to the various sub-purchasers, each of the conveyances being stamped with ad valorem conveyance duty on the purchase-money paid by each sub-purchaser,

REVENUE—*continued.*

the total consideration stated in these various conveyances amounting to 45,000*l.* and upwards. The appellant then took a conveyance to himself from F. of the remaining portion of the property. By that conveyance, which recited the agreement for sale between F. and the appellant and that the 45,000*l.* had already been paid to F. by or under the direction of the appellant on the execution of the conveyances to the sub-purchasers, the appellant covenanted to assume liability for the charges of 997*l.* 5*s.* 9*d.* :—

Held, that the conveyance to the appellant was liable to stamp duty on so much of the original purchase-money (45,997*l.* 5*s.* 9*d.*) as, having regard to the relative values of the property sub-sold and not sub-sold, was apportionable to that part of the property conveyed to the appellant. MAPLES *v.* INLAND REVENUE COMMISSIONERS - - - **Scrutton J. 303**

14. —— *Stamp—Bond, Covenant, or Instrument—Money payable on Contingency—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By a deed executed by them the appellants agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Company would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at 4 per cent. on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Company were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Company made no profits in any year, the appellants would be liable to pay 120,000*l.* in that year, being 4 per cent. on 3,000,000*l.* stock :—

Held, (1.) that the deed was chargeable with ad valorem stamp duty under the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods . . . . for . . . . [an] indefinite period," on the maximum sum which might become payable under the deed; and (2.) that the amount on which the duty was chargeable was the yearly sum that might be payable, namely, 120,000*l.*, notwithstanding that it was payable at half-yearly periods. UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED AND GLYN, MILLS, CURRIE & CO. *v.* INLAND REVENUE COMMISSIONERS- - **Scrutton J. 210**

15. —— *Stamp Act — Agreement — Debts owing by Persons resident Abroad—"Property locally situate out of the United Kingdom"—Ad valorem Duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

An agreement was made and executed in England for the sale of a business, carried on at Buenos Aires in Argentina, and its assets, which included certain book debts owing by persons resident in Argentina to the vendor of the business :—

Held, that the book debts were not property 'locally situate out of the United Kingdom"

REVENUE—*continued.*

within the meaning of the exception in s. 59, sub-s. 1, of the Stamp Act, 1891 ; and that ad valorem duty was, therefore, payable on the apportioned consideration for the sale of the book debts.

Decision of Scrutton J. [1914] 2 K. B. 404 affirmed.

The decision of the Court of Appeal in *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245 has not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217. VELAZQUEZ, LIMITED *v.* INLAND REVENUE COMMISSIONERS - - - - **C. A. 458**

16. —— *Super-tax—Trade Profits—Actual Amount or Average—Evidence—Sched. D Assessment—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 2—*Trade—Discontinuance—Sale of Business—Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 24, *sub-s.* 3.

For the purpose of assessment to super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the amount of the profits derived by the taxpayer from his business during the year preceding the year of assessment to super-tax is not to be ascertained by taking the actual amount of the profits made in that year, but by taking the average of the profits for the three years preceding; and if, on the hearing of an appeal against an assessment to super-tax, it is admitted by the taxpayer that the amount of the profits for the year in question, ascertained in that way, is correctly stated in an assessment to income tax made on the taxpayer under Sched. D, the Special Commissioners are entitled, without taking evidence, to adopt that assessment for the purposes of the super-tax assessment.

If the owner of a business sells it to a company, the business is not "discontinued" within the meaning of s. 24, sub-s. 3, of the Finance Act, 1907. BARTLETT *v.* INLAND REVENUE COMMISSIONERS - - - **Scrutton J. 686**

REVERSION DUTY—Determination of lease—Agreement to grant a lease on performance of conditions - - - **1186**
See REVENUE. 12.

REVISING BARRISTER - - - - **62**
See PARLIAMENT.

ROAD—"Structure"—Revenue—Duties on land values—Valuation of land—Agricultural land—"Gross value"—"Total value"—"Full site value" - - **406**
See REVENUE. 8.

RULES OF THE SUPREME COURT, Order XIV. (Leave to sign judgment and defend where writ specially indorsed), r. 1
See PRACTICE. **1253**

—— **Order LXV. (Costs), r. 1** - - - **1245**
See COSTS. 2.

—— —— **rr. 1, 2** - - - - - **28**
See COSTS. 1.

—— —— **r. 27 (29a)** - - - - **841**
See SOLICITOR.

RUNNING AGREEMENT—Employer and workman — Compensation — Fisherman — Seaman — Fishing vessel — Share of stocker money — Remuneration by share in gross earnings - - - - **1039**
See EMPLOYER AND WORKMAN. 13.

SALE—Conveyance on sale—Revenue—Stamp—Agreement for purchase of property — Sub-sales of part — Conveyances direct by vendor to sub-purchasers—Conveyance of remaining portion to purchaser—Ad valorem duty - **303**
See REVENUE. 13.

SALE OF FOOD AND DRUGS—Adulteration.
See under ADULTERATION.

SALE OF GOODS—*Delivery Order—Document of Title—Delivery Order created and issued by Owner of Goods — Whether a "transfer"—Delivery Order not for Specific Goods—Factors Act*, 1899 (52 & 53 *Vict. c.* 45), *ss.* 1, 2, 10—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 25, 47, 62.

A delivery order was given by the defendants to F. for 2640 bags of mowra seed, which formed part of a consignment of 6400 bags. F. gave the defendants a cheque therefor and indorsed the delivery order to the plaintiffs, who took it in good faith and for valuable consideration. F.'s cheque having been dishonoured, the defendants refused to give delivery of the seed to the plaintiffs :—

Held, (1.) that the delivery order was a document of title to the goods which had been "transferred" by the defendants to F. within the meaning of s. 10 of the Factors Act, 1889, and s. 47 of the Sale of Goods Act, 1893, and having been transferred by F. to the plaintiffs, who took it in good faith and for valuable consideration, the defendants' right of lien as unpaid vendors was defeated ; and (2.) that the delivery order was valid notwithstanding that it related to goods which were not specific.

Capital and Counties Bank v. *Warriner* (1896) 1 Com. Cas. 314 followed. ANT. JURGENS MARGARINEFABRIEKEN *v.* LOUIS DREYFUS & Co. - - - - - - **Pickford J. 40**

—— Broker receiving del credere commission—Non-performance of contract by buyer — Solvency of buyer — Liability of broker - - - - - **1272**
See PRINCIPAL AND AGENT. 2.

—— Note given for goods supplied to makers—Oral agreement by surety — Admissibility of evidence - - - **907**
See PROMISSORY NOTE.

SALMON FISHERY—Weir—Apron of a weir—Trap or device for taking fish—Device for catching salmon - - - **594**
See FISHERY.

SANITARY INSPECTOR—Evidence of appointment and authority to prosecute — Unsound meat - - - - - **160**
See JUSTICES. 3.

SCHEME—Workmen's compensation—Contracting-out scheme — Compensation for injury — Injury by "accident" — Miners' nystagmus — Date of disablement - - - - - - - **1068**
See EMPLOYER AND WORKMAN. 9.

SCHEME OF ARRANGEMENT—Bankruptcy.
See under BANKRUPTCY.

SEAMAN.
See under SHIPPING.

—— Workmen's compensation—Ship registered in United Kingdom—Registry cancelled **690**
See EMPLOYER AND WORKMAN. 17.

SERVICE — Justices—Case stated—Notice of appeal—Service on solicitor for respondent—Acceptance of service by solicitor—"Giving notice in writing of such appeal to the other party" - - **803**
See JUSTICES. 2.

SETTLEMENT — Voluntary settlement—Bankruptcy—Alienation of gift—"Settlement of property" - - **1086**
See BANKRUPTCY. 5.

SHAREHOLDER — Principal shareholder — Limited company—Managing director—Adulteration—Sale to prejudice of purchaser—Person selling - **252**
See ADULTERATION. 2.

SHIPPING — *Charterparty — Demurrage — Period of Demurrage not specified—Detention of Ship beyond reasonable Time—Damages.*

The appeal in this case [1913] 3 K. B. 366 was allowed. WESTERN STEAMSHIP COMPANY, LIMITED *v.* AMARAL SUTHERLAND & Co., LIMITED - - - - - - **C. A. 55**

2. —— *Charterparty — Hire for Fixed Period — Provision for Cessation of Payment of Hire—"Loss of time through damage preventing efficient working of vessel for more than forty-eight running hours"—Loss of Time exceeding forty-eight Hours—Cessation of Payment for first forty-eight Hours.*

A charterparty of a steamer for three years, under which the hire was payable monthly in advance, provided that "in the event of loss of time through deficiency of men or stores, repairs . . . . or damage preventing the efficient working of the vessel for more than forty-eight running hours the payment of hire shall cease until she be again in an efficient state to resume her service" :—

Held, that, in the event of loss of time for a period exceeding forty-eight running hours through any of the specified causes, payment of hire ceased for the whole period, including the first forty-eight hours. MEADE-KING, ROBINSON & Co. *v.* JACOBS & Co. **Bailhache J. 156**

3. —— *Charterparty — Justification of Charterer's Refusal to perform—Restraint of Princes—Inability of Shipowner to carry Cargo to Destination—Frustation of Adventure.*

By a charterparty made between the plaintiffs, the owners of a Greek ship, and the defen-

SHIPPING—*continued.*

dants as charterers, the plaintiffs' ship was to proceed to the Sea of Azoff, there load a cargo of grain, and carry it to a port in the United Kingdom. The charterparty contained an exception of restraint of princes. The ship arrived at the loading port on October 1, 1912, just before the war between Greece and Turkey broke out. She commenced to load, and on the following day, after she had loaded a small portion of the cargo, the defendants stopped further loading owing to the fact that the Turkish authorities were then seizing and detaining Greek ships arriving at the Dardanelles. War was declared on October 18. The lay days under the charterparty expired on October 22. On October 21 the defendants purported to cancel the charterparty upon the ground that the war had brought the adventure to an end, but the plaintiffs refused to accept such cancellation. The ship was unable to leave the Black Sea till September, 1913, when the war ended. In an action to recover damages for breach of the charterparty :—

Held, that the probability of the capture of the ship, if she attempted to pass through the Dardanelles, and the consequent inability of the plaintiffs to perform their duty under the contract of carrying the cargo to its destination, justified the defendants in treating the adventure as frustrated and throwing up the charterparty ; and that the defendants were none the less so justified because at the time of the alleged breach the contract was in part executed by reason of a portion of the cargo having been already loaded. EMBIRICOS *v.* SYDNEY REID & Co. - - - - - - **Scrutton J. 45**

4. —— *Charterparty — Timber Cargo — Freight payable per Cubic Fathom—Measurement — Alternative Methods — Wrong Method adopted—Remeasurement, Cost of—Liability of Charterer.*

A charterparty provided that the ship should load from the agents of the charterers a cargo of pit props and that freight should be payable at a specified rate "per intaken piled fathom of 216 cubic feet." Pit props are measured either by lengths and tops, or by lengths alone. The former method gives more timber to the fathom than the latter. The language of the charterparty indicated that the cargo was to be measured on the basis of the latter method, but the method in fact adopted at the port of loading by the shippers was on the basis of lengths and tops, which gave 683 cubic fathoms, and a bill of lading for that number was tendered to the master and signed by him under protest. In accordance with a term of the charterparty, the bill of lading contained the words "measure unknown." On the arrival of the ship at the port of discharge the shipowners, alleging that the bill of lading measurement was inaccurate, caused the cargo to be remeasured by lengths only, on which basis the cargo was found to consist of 784 cubic fathoms. The shipowners sued the charterers to recover the expense incurred in remeasuring the cargo :—

Held, that under the charterparty there was a contractual obligation on the charterers to procure the measurement of the cargo at the port of loading according to the method indicated by the charterparty, and that, as this had not been done, the charterers were liable to pay to the owners the expense incurred by them in having the cargo measured at the port of discharge. JOS. MERRYWEATHER & Co., LIMITED *v.* WM. PEARSON & Co. - - **Bailhache J. 587**

5. —— *Pilotage — Compulsory Pilotage — Ship navigating in Compulsory Pilotage District for the Purpose of "making use" of any Port—Waiting outside Port for Orders—Pilotage Act*, 1913 (2 *&* 3 *Geo.* 5, *c.* 31), s. 11.

By s. 11, sub-s. 1, of the Pilotage Act, 1913, "every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district" is bound to have a pilot on board.

The steamship *Anglo-Colombian*, laden with a cargo shipped at Antofagasta, was directed by the charterers, in accordance with power given them in that behalf in the charterparty, to proceed to Dover to wait for orders as to her ultimate port of destination. When the *Anglo-Colombian* arrived off Dover she stopped about a quarter of a mile outside the Admiralty Pier extension and signalled for orders. A motor boat, sent out by the charterers, then arrived alongside the *Anglo-Colombian* with a letter containing orders for her to proceed to Hamburg to discharge her cargo, and thereupon she proceeded to Hamburg :—

Held, that the *Anglo-Colombian* had made use of the port of Dover within s. 11, sub-s. 1, of the Pilotage Act, 1913, and, not being an excepted ship, was bound to have a pilot on board. CANNELL AND TRINITY HOUSE CORPORATION, LONDON *v.* LAWTHER, LATTA & Co. **Bailhache J. 1135**

6. —— *Steerage Passenger—Contract Ticket —Form of—"Form approved by the Board of Trade"—Exception of Negligence on Back of Ticket—Exception not approved by Board of Trade—Validity—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 320.

By s. 320, sub-s. 1, of the Merchant Shipping Act, 1894, a person receiving money from any person for a passage as a steerage passenger in any ship proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea shall give to the person paying the same a contract ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters. By sub-s. 2, "the contract ticket shall be in a form approved by the Board of Trade and published in the London Gazette, and any directions contained in that form of contract ticket not being inconsistent with this Act shall be obeyed as if set forth in this section."

The form approved by the Board of Trade contained a "direction" that "a contract ticket shall not contain on the face thereof any condition, stipulation, or exception not contained in this form." The contract ticket issued by the defendants for a passage for a steerage passenger

SHIPPING—*continued.*

in their steamship from the United Kingdom to New York contained all that was in the approved form, but in addition it contained on the front thereof the words "See back," and on the back thereof there were a number of conditions which had not been approved by the Board of Trade, one of which exempted the defendants from loss, damage, or delay to the passenger or his luggage arising from (inter alia) the negligence of the shipowners' servants. During the voyage the steamship, owing to the negligence of the defendants' servants, collided with an iceberg and sank, and the passenger was drowned. In an action under the Fatal Accidents Act, 1846, to recover damages for his death, the defendants contended that the above condition relieved them from liability:—

Held by Vaughan Williams and Kennedy L.JJ., Buckley L.J. dissenting, affirming the decision of Bailhache J., that the above condition, not having been approved by the Board of Trade, was invalid, and that therefore the defendants were not entitled by reason of s. 320, sub-s. 2, of the Merchant Shipping Act, 1894, to rely upon it to protect themselves from liability. RYAN *v.* OCEANIC STEAM NAVIGATION COMPANY, LIMITED. O'CONNELL *v.* SAME. SCANLON *v.* SAME. O'BRIEN *v.* SAME - - **C. A. 731**

—— Docks.
See under DOCKS.

—— Insurance (Marine).
See under INSURANCE (MARINE).

—— Seaman—Ship registered in United Kingdom—Registry cancelled - - **699**
See EMPLOYER AND WORKMAN. 17.

—— Workmen's compensation — Ship — Fall from ship's gangway—Accident arising out of and in course of employment—Intoxicated sailor—Shore leave—Returning to duty - - - **978**
See EMPLOYER AND WORKMAN. 4.

—— Workmen's compensation—Ship—Intoxicated sailor - - - - - **978**
See EMPLOYER AND WORKMAN. 4.

SHOP ASSISTANT—Kitchenmaid—Kitchen of restaurant - - - - - **325**
See SHOPS. 2.

SHOPS—*Company—Duty of Occupier of Shop to close for Weekly Half-Holiday—Whether a Company can be occupier—Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 4—*Liability of Company to Conviction in Penalty—Summary Jurisdiction Act*, 1848 (11 *&* 12 *Vict. c.* 43).

There is nothing in the provisions of the Shops Act, 1912, to exclude an incorporated company which occupies a shop from the obligation imposed by s. 4 of that Act upon occupiers of shops to close their shops on the afternoon of one day in the week.

The provisions of the Summary Jurisdiction Acts as to summoning offenders before a Court of summary jurisdiction to answer an information for a penalty apply to corporations as well as to natural persons. EVANS & CO., LIMITED *v.* LONDON COUNTY COUNCIL - **Div. Ct. 315**

SHOPS—*continued.*

2. —— *Kitchen of Restaurant—Shop Assistant—Kitchenmaid—Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 19.

By s. 1 of the Shops Act, 1912, "On at least one day in each week a shop assistant shall not be employed about the business of the shop after half-past one o'clock in the afternoon."

By s. 19, "The expression 'shop assistant' means any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods":—

Held, that a kitchenmaid employed in the kitchen of a restaurant, whose duties do not take her into the room where the customers are served, is nevertheless a person "employed in a shop in connection with the serving of customers," and consequently her employer is bound to give her the statutory week y half-holiday. MELLUISH *v.* LONDON COUNTY COUNCIL
Div. Ct. 325

3. —— *Weekly Half-Holiday—Sale elsewhere than in Shop on Half-Holiday—Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 4, 9.

Sect. 4 of the Shops Act, 1912, provides for the closing of shops not later than 1 o'clock on the afternoon of one weekday in every week, and it enables the local authority, by order, to fix the day on which a shop is to be closed, but where the day fixed is a day other than Saturday, the order is to provide for enabling Saturday to be substituted for such other day as respects any shop in which notice to that effect is affixed by the occupier. A person contravening the section is guilty of an offence.

Sect. 9: "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act."

In Liverpool the local authority fixed Wednesday as the weekly half-holiday, but the order provided that if the occupier of a shop elected to close his shop on Saturday instead of on Wednesday he might close from 1 o'clock P.M. on that day. The respondent carried on retail trade in her private house in Liverpool on a Wednesday afternoon. No notice under the Shops Act was affixed in her house:—

Held, that it was no answer to a charge under s. 9 of the Act for the respondent to say that as any shopkeeper in the locality might, by affixing a notice, have substituted Saturday afternoon for Wednesday afternoon as the weekly half-holiday, it was not unlawful to carry on retail trade on Wednesday after 1 o'clock P.M. COWDEN *v.* MCEVOY - - - - - **Div. Ct. 108**

SHORTHAND NOTES—Inspection of documents—Privilege — Transcript of shorthand notes of proceedings in previous actions
See DISCOVERY. 2. **86**

SOLICITOR—*Bill of Costs—Solicitor and Client—Disbursements—Unpaid Items—No Statement in Bill that unpaid—"Set out a separate heading in the bill"—Statement in accompanying Letter—Payment "before commencement of taxation"—Disallowance on Taxation—Rules of the Supreme Court, Order LXV., r.* 27 (29a).

A solicitor delivered to his client a bill of costs containing among the other items generally many items of disbursements which had not then been paid, and he sent with it a letter stating that, of the payments therein, 27*l.* for counsel's fees and 36*l.* for printer's charges had not been paid.

The client obtained an order for taxation and a day was appointed to proceed with the taxation; on that day the taxing Master, before dealing with any item in the bill by way of taxation, granted an adjournment to enable the solicitor to pay the unpaid items; they were all paid before the adjourned appointment, and the Master allowed them on taxation:—

Held, that the payment of the items in question had been made by the solicitor "before the commencement of the taxation," within the meaning of r. 27 (29a) of Order LXV., but that the bill, even if read with the letter, did not "set out such unpaid items of disbursements under a separate heading in the bill" as required by the rule, and that therefore those items could not be allowed on taxation. *In re* HILDESHEIM **C. A. 841**

—— Justices—Case stated—Notice of appeal—Service on solicitor for respondent—Acceptance of service by solicitor **803**
See JUSTICES. 2.

SPORTING PURPOSES—Value of land for—Revenue—Land values, Duties on **423**
See REVENUE. 9.

STABILITY—Employer and workman—Compensation—Weekly payment—Redemption—Where the incapacity is permanent—Basis of computation—Infant - - - - - - **1047**
See EMPLOYER AND WORKMAN. 20.

STAMP—Inland Revenue.
See under REVENUE.

STATUTE—Construction of—Two Acts to be construed together as one Act - **772**
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STATUTES:—

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34 Edw. 3, c. 1—*Justices of the Peace* - **229**
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1791.

31 Geo. 3, c. 59, s. 61—*Worcester and Birmingham Canal* - - - - - **1**
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1831.

1 & 2 Will 4, c. 37—*Truck Act* - - **543**
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1832.

2 & 3 Will. 4, c. 71, s. 1—*Prescription* - **911**
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1842.

5 & 6 Vict. c. 35, s. 45—*Income Tax* - **112**
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—— —— s. 60, Sched. A, No. III., r. 3; s. 100, Sched. D, sixth case - **449**
See REVENUE. 3.

—— —— s. 100, Sched. D, first case, fifth case - - - - - - - **118**
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—— —— s. 106 - - - - - - **429**
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8 & 9 Vict. c. 18, ss. 18, 49, 108—114—*Lands Clauses* - - - - - - **259**
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1846.

9 & 10 Vict. c. 93—*Fatal Accidents* - **1020, 1055**
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1847.

10 & 11 Vict. c. 15, s. 10—*Gasworks Clauses*
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10 & 11 Vict. c. 89, s. 21—*Town Police Clauses*
See STREETS. 2. **395**

1848.

11 & 12 Vict. c. 43—*Summary Jurisdiction*
See SHOPS. 1. **315**

1853.

16 & 17 Vict. c. 34, s. 2, Sched. D—*Income Tax*
See REVENUE 1, 3. **118, 449**

1854.

17 & 18 Vict. c. 31, s. 7—*Railway and Canal Traffic* - - - - - - **554**
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1855.

18 & 19 Vict. c. 120, s. 114—*Metropolis Management* - - - - **1181**
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20 & 21 Vict. c. 43, s. 2—*Summary Jurisdiction* - - - - - - - **803**
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1861.

24 & 25 Vict. c. 70, s. 12—*Locomotive* - **818**
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24 & 25 Vict. c. 96, s. 45—*Larceny* - **339**
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—— —— s. 85—*Larceny* - - - **848**
See CRIMINAL LAW. 5.

24 & 25 Vict. c. 98, s. 24—*Forgery* - **356**
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1863.

26 & 27 Vict. c. ccxxv., s. 5—*Great Eastern Railway (Steamboats)* - - - **554**
See RAILWAY. 2.

1865.

28 & 29 Vict. c. 121, s. 36—*Salmon Fishery* **594**
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1867.

30 & 31 Vict. c. 102, ss. 19, 47; Sched. B—*Representation of the People* - **62**
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1869.

32 & 33 Vict. c. 67, s. 47—*Valuation (Metropolis)*
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1872.

35 & 36 Vict. c. 65, s. 3—*Bastardy Laws Amendment* - - - - - **1237**
See BASTARDY. 1.

—— —— s. 4 - - - - - - **1226**
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1873.

36 & 37 Vict. c. 71, s. 15—*Salmon Fishery* **594**
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1874.

37 & 38 Vict. c. 62, s. 1—*Infants' Relief* **607**
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1875.

38 & 39 Vict. c. 55, s. 157—*Public Health* **796**
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A by-law provided that "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building" shall comply with certain requirements as to the width of the carriageway and footways :—

Held, that when once the construction of a new street has been completed no offence is committed against such a by-law by a subsequent diminution of the width of the carriageway or footways below the required minimum.

Semble, that s. 157 of the Public Health Act, 1875, which authorizes the making by urban authorities of by-laws "with respect to the level, width, and construction of new streets," does not authorize the making of a by-law which would render such a reduction of the original width of the street an offence. TARRANT *v.* WOKING URBAN DISTRICT COUNCIL
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2. —— *Obstruction, Regulations for preventing—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 21.

Under s. 21 of the Town Police Clauses Act, 1847, which provides that "The commissioners may from time to time make orders . . . . for preventing obstruction of the streets within the limits of the special Act in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed," the powers of the commissioners are not confined to making orders dealing with extraordinary occasions of obstruction. Where particular streets are normally thronged so that their liability to obstruction is chronic they may make orders for the prevention of obstruction in such streets applicable to every day of the week. TEALE *v.* WILLIAMS
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